



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 310 OF 2019**

**SIMON KIROBI KARIRI.....CLAIMANT**

**-VERSUS-**

**UNITED NATIONS SACCO SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 15th November, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 14.05.2019 through M/S Kamotho Njomo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination from the respondent's employment was un-procedural, unfair and unlawful and unconstitutional.
- b) A permanent injunction do issue restraining and stopping the respondent from headhunting, advertising, recruiting a new Procurement Officer to replace the claimant based on the reasons contained in the letter dated 17.04.2019.
- c) An order does issue reinstating the claimant as the respondent's Procurement Officer and Management Member forthwith without loss of salary and benefits thereof.
- d) In the alternative to (b) and (c) above, the claimant prays for remedies for wrongful dismissal and unfair termination as follows:
  - i. Damages for breach of contract and unfair termination of employment Kshs.11, 644, 380.00.
  - ii. Underpayment in respect of allowances Kshs.116, 350.00 plus the reversed Kshs. 8, 750.00
  - iii. Exemplary damages.
  - iv. Compensation for constitutional rights violation to be assessed.
  - v. Certificate of service.
  - vi. A fine of Kshs.100, 000.00 against the respondent for failure to comply with mandatory provisions of section 51(3) of the Employment Act, 2007.
  - vii. Interest on (ii), (iii) and (iv).
- e) Costs of the suit.
- f) Any other relief that the Court may deem appropriate to grant.

The respondent filed the memorandum of reply on 05.07.2019 through Ombonya & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

By consent order given on 24.07.2019 it was ordered that the suit be determined on the basis of pleadings, affidavits, exhibits and documents filed for the parties.

To answer the **1st issue** for determination there is no dispute that the respondent employed the claimant by the letter dated 19.10.2018. The claimant was employed in the position of Procurement Officer for a fixed term of 5 years running from 01.12.2018 to 01.12.2023. The claimant reported to Deputy CEO/ Head of Finance and Administration. The appointment was subject to successful completion of 6 months' probation which was lapsing on or about 01.06.2019. Confirmation was contingent upon satisfactory job performance and either party could terminate by giving one month notice or one month pay in lieu of notice.

To answer the **2nd issue** for determination the Court returns that there is no dispute that the contract of service was terminated by the letter dated 17.04.2019. The letter details several matters of unsatisfactory performance and states that the probationary appointment was being terminated under clause 3 appointment letter dated 19.10.2019 with payment of one month notice in lieu of the contractual one month notice. The performance concerns stated in the letter include exorbitant pricing which drastically reduced after the Heads of Departments complained; submission of invoices for payment beyond LPO amounts; failure to give proper advice to the CEO; return of supplied goods due to receipting of the goods that were inconsistent with the specifications in the LPO such as for computers; misleading guidance to evaluation committee; flaws in evaluation so that only a single supplier ends up qualifying; prequalifying on supplier even in instances not of specialised services; addressing the Board of directors directly in breach of protocol; declining to obey lawful orders to prepare LPO; bypassing his line manager to present documents directly to the CEO.

To answer the **3rd issue** for determination the Court returns that the termination of the probationary appointment was not unfair or unlawful because it was in accordance with the contractual clause on termination of the contract.

The claimant alleges that the termination was unfair because on the date he was terminated from employment he was due to attend the meeting of the Audit Committee to resolve the claimant's grievances about the irregularities and difficulties he was experiencing in his work as a Procurement Officer.

The validity of the grievances had not been resolved by the respondent's internal mechanisms. In absence of calling of witnesses in the case, the Court may not make a finding one way or the other in that regard. However the Court finds that both parties are in agreement that as at termination, they had grievances against each other revolving around the claimant's performance. In the Court's opinion, the termination of the probationary service clearly accrued and the respondent was at liberty to invoke the termination clause.

The Court finds that the respondent invoked the termination clause and section 41 of the Employment Act, 2007 did not apply to the case. In any event the claimant confirmed he had seriously constrained work relationship with the respondent's managers and the termination of the probationary appointment appears to have been the best action for both parties' convenience and practicality in the obtaining circumstances. Further, as submitted for the respondent, section 42(1) of the Act provides that section 41 of the Act (on notice of poor performance or ill health or misconduct) shall not apply where a termination of employment terminates a probationary appointment.

Thus, the Court finds that the claimant is not entitled to the remedies as prayed for except the statutory certificate of service under section 51 of the Act. In view of the aborted internal grievance process and the certificate of service to be delivered, the Court considers that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit with orders that each party to bear own costs of the suit; and the respondent to deliver a certificate of service in 7 days.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 15th November, 2019**.

**BYRAM ONGAYA**

**JUDGE**