



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 1597 OF 2014

MARY KEMUNTO OYUGI.....CLAIMANT

VERSUS

CANTON BUILDING & CONSTRUCTION LIMITED....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 22nd September 2014 seeking to recover for the dismissal on 27th February 2014. She averred that the Respondent had employed her in August 2013 as an office secretary earning Kshs. 18,000/- a month. She averred that the termination was effected maliciously without any regard to her welfare and her rights under the Employment Act. She averred that no notice of the intended termination was given, the Respondent failed to give her a hearing and terminated her services without any basis or justification for doing so. The Claimant averred that she was exposed to mental anguish, torture, inconvenience and compromised her station of life. She sought payment of the salary for February 2014 less the advanced sum of Kshs. 5,000/-, payment in lieu of notice, pro rata leave for 7 months, compensation for unlawful termination and costs of the suit, general damages and interest on the sums at court rates. The Respondent filed a statement of response on 15th October 2014 and averred that the Claimant was employed at a monthly salary of Kshs. 18,000/- and was earning Kshs. 15,000/- in accordance with her written probation letter dated 5th August 2013. The Respondent averred that the Claimant was paid through petty cash voucher and the voucher produced by the Claimant for Kshs. 18,000/- was therefore doctored. The Respondent averred that the Claimant's performance was not satisfactory during her probation period despite several verbal notifications to improve her performance. The Respondent averred that the Claimant was notified on 27th February 2014 that her employment would be terminated on the next day on account of her non-performance and the Claimant left her employment and never returned. The Respondent averred that the Claimant was deemed to have deserted her employment. The Respondent averred that the intention to terminate the Claimant's services was not actuated by malice. The Respondent averred that the Claimant was therefore not entitled to any damages or any of the claims in her memorandum of claim. The Respondent averred that the Claimant failed to collect her salary for the month of February and that when she returned after absconding her employment she demanded Kshs. 60,000/- without offering any basis. The Respondent denied that the Claimant had suffered any damage to her career and was put to strict proof of this contention. The Respondent thus urged that the suit be dismissed with costs.

2. The Claimant testified on 6th November 2017 and stated that she worked for 3 months on probation after her employment on 1st August 2013. She testified that she was paid Kshs. 15,000/- a month and in January 2014 it was raised to 18,000/-. She stated that she had taken a salary advance of Kshs. 5,000/- in January and at the end of the month was paid 13,000/-. She testified that on 27th February 2014 she was told not to come to work and that on 28th February 2014 she was not allowed in. she stated that she was not paid for the month of February. The Claimant testified that she worked diligently and even used to clean utensils and make the 10.00am tea. She stated that she was never given any warning about her performance and there was no disciplinary action taken against her. She sought Kshs. 13,000/- for the month of February, notice pay for one month, leave for the 7 months and a certificate of service.

3. In cross examination she stated that her probation was 3 months and that she had previously worked as a secretary. She testified that her salary amounting to Kshs. 15,000/- was deposited into her account. She stated that Sammy who worked in accounts would give the salary vouchers. She testified that it was her boss who told her not to come to work on 27th February 2014.

4. The Respondent called Sammy Mwendwa Katiku who testified that he was the HR manager of the Respondent since 2010. He stated that he knew the Claimant who was a typist employed on 5th August 2013 and issued with a probation letter. He stated that the Claimant was on probation for 6 months and that she was given her duties orally by him. He testified that the Claimant earned Kshs. 15,000/- during the probationary period and was paid in cash as only permanent employees were paid through the bank. He stated that he was the one who would sign the payment vouchers. He testified that there was a difference in the vouchers he prepared and the one provided by the Claimant. He stated that the Claimant was warned verbally and that on 27th February 2014 after a verbal warning in the morning failed to return to work. He stated that her probation was to end on 28th February 2014. He testified that the Claimant had gone on leave on 15th December 2013 and that he did not dismiss the Claimant from her employ. He stated that the Respondent had offered to pay the Claimant Kshs. 20,250/- through their letter of 4th April 2014.

5. In cross-examination he testified that the Claimant was given the probation letter and that she was employed as a typist/secretary. He stated the probation was to end in February 2014. He testified that the Claimant was to collect 20,250/- which was pro rata leave, balance of salary for February and leave in lieu of notice. He stated that the Respondent had no problem with paying her the rightful dues. He denied preparing the voucher the Claimant had produced in court. He stated that the Claimant was not given any written warnings and that the Claimant was not registered for NHIF or NSSF. He testified that there was no record for the Claimant.

6. In re-exam, he testified that the Claimant did not meet standards and that she did not complete her probationary period. That marked the close of oral testimony.

7. The Claimant filed submissions on 8th December 2017 while the Respondent filed submissions on 14th December 2017. In her submissions, the Claimant submitted that the Respondent had offered to pay her salary being pro rata leave, salary in lieu of notice and balance of February 2014 salary. The Claimant submitted that the Respondent did not comply with the law and that her probationary period ended on 5th February 2014. The Claimant submitted that the Respondent did not comply with Section 42 and therefore the dismissal was unlawful and unfair. The Claimant submitted her salary was 18,000/- a month and not 15,000/- a month and that the dismissal was without notice or any payment in lieu of notice. The Claimant thus urged the award of the reliefs she had sought in her claim.

8. The Respondent submitted that there was no evidence or proof that the Claimant was summarily dismissed from her employment and without due regard to her rights and welfare. The Respondent submitted that the policy of the Respondent was to have employees on 6 months probation and not three and therefore the voucher indicating her payment had risen to 18,000/- was fraudulent. The Respondent submitted that the advance the Claimant sought was in February not January 2014. It was submitted that the Claimant absconded from her employment one day to the end of her probation. The Respondent relied on the case of **Ann Njoroge v Topez Petroleum Limited [2013] eKLR** for the proposition that the Claimant had absented herself from her place of work. The Respondent also relied on the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** for the proposition that Section 41 does not apply to probationary contracts. The Respondent prayed that the suit be dismissed with costs.

9. The Claimant was not entirely candid in her testimony. She produced a suspect payment voucher whose sole intention was to mislead the court in regard to her remuneration. She asserts that she was on probation for 3 months and not 6 months. She came across as a deceitful person who did not comprehend the sanctity of an oath to tell the truth. In the case of **Danish Jalang'o v Amicabre (supra)** my brother Rika J. eloquently disagreed with the holding in **Samuel G. Momanyi v The Attorney General & Another [2012] eKLR** on probationary contracts. In his view, employers retain the discretion whether to confirm or not confirm an employee serving under probation. The Claimant was not entitled to the process under Section 41 of the Employment Act as she was under the cloud of probation which is a period when the employer and employee are undergoing a fitting process. The Claimant could leave without ramifications during probation and in the same vein a dismissal could be effected without the strictures of Section 41 being engaged. The Claimant however was entitled to receive payment for days worked. She worked in February and was entitled to her dues computed by the Respondent. The Claimant though dishonest is to receive her February salary which was Kshs. 10,000/-, her pro rata leave of Kshs. 6,750/- and Kshs. 15,000/- as notice for the dismissal. The balance of her claim fails and she will not recover any compensation or general damages. General damages are not available under a contract of service. Each party will bear their own costs of the suit.

It is so ordered.

Dated at Nairobi this 20th day of December 2017

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 17th day of January 2018

Radido Stephen

JUDGE