



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 1401 OF 2013

ROBERT ODONGO ASENAH.....CLAIMANT

VERSUS

SUPER FOAM LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that between March 2013 2013 and June 2013 he was employed by the respondent as a credit controller at a gross salary of Kshs 70,000/=. The claimant averred that during the period of employment, he carried out his duties with dedication, devotion and o the satisfaction of the respondent.
2. On 1st July, 2013 the respondent wrongfully and summarily dismissed him from employment on grounds that his individual performance was below the company's expectation and standards. According to the claimant, the termination was unlawful, malicious and that no hearing whatsoever was afforded to him nor had he previously been cautioned or any complaint made against hm. The claimant further averred that upon termination, the respondent never paid his terminal dues.
3. The respondent on its part pleaded that the claimant was its employee from 1st March, 2013 and was on probation for three months. During probation the claimant's performance was to be put under scrutiny and that the period could be extended for further assessment of the claimant's performance.
4. On 1st July, 2013 the claimant's services were lawfully terminated on account of his incompetencies, poor performance and failure to meet the respondent's expectations and standards expectations and standards even after being verbally informed by the Human Resource manager. According to the respondent, the claimant was paid Kshs 44,360 in full settlement of his terminal dues. According to the respondent therefore, the claimant's services were properly terminated.
5. In his oral testimony, the claimant stated that on 1st July, 2013 he was called by the HR manager for a meeting with him and the GM. The GM asked him if he had a problem with Himat. He was also asked if he had a problem with Kesturi. According to him Kesturi used to pay less certain percentage which was not approved by the respondent. Mr Setya then left him with Reuben and he asked Reuben what was going on. He told him Satya wanted him terminated. He was then issued with a termination letter stating his performance was not satisfactory.
6. According to him, he was never given a hearing before termination which he felt was unfair. He further stated that he once withheld Kesturi's order and reported that they used to pay less amount than

required. He later learnt Kesturi was related to Himat.

7. In cross-examination he stated that his contract had a probation period for 3 months and that probation period could be extended. It was further his evidence that he was never issued with a confirmation letter and that no meeting was held on way forward after probation. In re-examination he said that there was no formal assessment during the time he marked.

8. The respondent's witness Mr Reuben Nyaberi stated that he was the respondent's HRM from 2006. According to him the claimant was not unlawfully terminated. He was retained for three month's to work as a credit controller and that his performance was wanting. The claimant's probation was therefore extended for a month but at the end of it there was still no improvement. A meeting was held where the issue was discussed and a decision reached to terminate the claimant's services and upon termination, the claimant was paid his dues. Concerning overtime claim, Mr Nyaberi stated that the claimant was in Senior Management and could not claim overtime.

9. In cross-examination he stated that the assessment was based on reports the claimant was submitting and that the communication over performance was verbal and further that the extension of the probationary period was verbal.

10. It was not in dispute that the claimant's contract provided for three months' probation. He was terminated one month after the expiry of the probationary period. The respondent claimed that the probationary period was verbally extended by a month and still there was no improvement hence a decision was taken to terminate his services. The probation period is intended to put to test the skills of an employee to perform the job for which he or she is recruited. It is the period when the skills of an employee as presented in the curriculum vitae and representations during the job interview is put to practical test. Performance therefore becomes the centre of focus during probation. The respondent has claimed that the claimant's performance was wanting but did not provide any evidence of appraisals or minutes where the claimant's performance was discussed.

11. Where termination is on account of performance there should be sufficient evidence preferably in writing where an employee is notified of areas where his or her performance is wanting and recommendation for improvement. Better still such an employee would require to be put on performance improvement program after which he could be dismissed on that ground if there is still no improvement.

12. Further, section 42(2) allows for extension of probationary period for up to six months but with the consent of the employee. The termination of the claimant's services only a month after expiry of the probationary period and without any evidence of performance appraisals was unfair to the claimant and the court so finds and holds.

13. The court therefore awards the claimant three months' salary as compensation for unfair termination of services. The claimant shall further have costs of the suit.

14. It is so ordered.

Dated at Nairobi this 9th day of February, 2018

Abuodha J. N.

Judge

Delivered this 9th day of February, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent