



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 136 OF 2015

BETWEEN

FEDELIX MWENDWA MULI.....CLAIMANT

VERSUS

BAMBURI CEMENT LIMITED.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Stephen Oddiaga & Company Advocates for the Claimant*

*Njeru & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 18<sup>th</sup> March 2015. He states he applied for a job with the Respondent. He was offered employment as a Field Patroller at Mombasa Plant, in a letter from the Respondent dated 14<sup>th</sup> October 2014. The date of appointment was given to be 1<sup>st</sup> November 2014. The Claimant was to earn a consolidated annual salary of Kshs. 973,735. He accepted offer, and signed Acceptance of Offer, on 22<sup>nd</sup> October 2014. However, the Respondent wrote to the Claimant on 31<sup>st</sup> October 2014, revoking offer. The Respondent explained that one of the reference checks on the Claimant was unsatisfactory. It was a condition in the letter of offer, that the Respondent had to receive satisfactory reference from Claimant's referees. The Claimant feels withdrawal of the offer was illegal, unfair labour practice and contrary to law. He had already resigned from a previous job where he was earning a salary of Kshs. 30,000, on the understanding that he had secured a new job with the Respondent. He prays the Court to make the following orders against the Respondent: -

- a) Compel the Respondent to immediately reinstate the offer of employment.
- b) Compensation for unfair termination and unfair labour practices.
- c) General damages for breach of contract.
- d) Exemplary damages for loss of income.
- e) Costs.
- f) Interest.
- g) Any other relief.

2. The Respondent filed a Statement of Response on 30<sup>th</sup> April 2015 and an Amended version on 23<sup>rd</sup> July 2015. Its position is that employment of the Claimant by the Respondent was subject to certain conditions communicated in the letter of offer. Among these was that:

“... Information supplied by you prior to offer of employment being correct.”

All conditions set in the Offer of Employment had to be met by the Claimant, for an Employer-Employee relationship to be created. The Claimant's contract with his previous Employer expired on 31<sup>st</sup> October 2014. It would not have been renewed, because the Claimant had already been blacklisted by his former Employer, for sabotaging equipment at the workplace. Termination of offer cannot amount to unfair termination in any event, as the Respondent was at liberty to terminate the contract during the period of 6-month probation. The Claimant's work ethic, character and desirability were irredeemably impeached by his former Employer's reference. The Respondent could not ignore that reference. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. Parties agreed in Court on 7<sup>th</sup> November 2017 that the dispute is considered entirely based on the Pleadings, Documents and Submissions on record. They confirmed the filing of Submissions at the last mention on 5<sup>th</sup> February 2018.

4. The Claimant submits withdrawal of offer was made by the Respondent unfairly, without any explanation, and the Claimant lost an opportunity which he had already accepted. He was never given a hearing before withdrawal. Withdrawal amounted to unfair labour practice under Article 41 of the Constitution. The Claimant relied on the offer to resign from his previous employment. The offer and its acceptance by the Claimant constituted a binding contract between the Parties. There was a valid employment contract within the meaning of Sections 2, 9 and 10 of the Employment Act 2007, once the Claimant accepted the offer. The Respondent was bound to observe fair termination law under Section 45 of the Employment Act, and issue notice of termination, or pay 1 month salary in lieu of notice, under Section 36 of the Employment Act.

5. The Respondent submits and reiterates that employment of the Claimant by the Respondent required he fulfils certain conditions. He was, to report to the Respondent on 1<sup>st</sup> November 2014, to begin working on probation for 6 months. The Respondent received information from the Claimant's previous Employer that the Claimant had sabotaged his previous Employer's machine. This information reached the Respondent even before the Claimant reported. The Claimant had been blacklisted by his former Employer, and advised his contract would not be renewed. The Claimant wrote to his former Employer on 23<sup>rd</sup> October 2014 indicating he did not wish to have his contract renewed. The Respondent submits that in any case, the Respondent would have been at liberty to terminate Claimant's contract during probation, without assigning reason, as concluded by the Court in **Danish Jalang'o & Another v. Amicabre Travel Services Limited [2014] e-KLR** and **Dixon Amdama V. Amani Tiwi Beach Resort [2015] e-KLR**. Section 42 of the Employment Act does not entitle the Claimant to receive compensation for unfair termination.

#### **The Court Finds:-**

6. The facts and documents in this dispute are largely not contested.

7. The Claimant applied for a job with the Respondent, and was offered a job, to work as a Field Patroller. The letter of offer is dated 14<sup>th</sup> October 2014. The appointment, it was indicated, would take effect, on 1<sup>st</sup> November 2014. The Claimant accepted the offer in writing, on 22<sup>nd</sup> October 2014. The Respondent withdrew the offer, on 31<sup>st</sup> October 2014, a day before appointment was said to take effect. Withdrawal was on the ground that Claimant's previous Employer had written to the Respondent, revealing that the Claimant was a troublesome Employee while working for the previous Employer, who had sabotaged production lines. It was not clear however, if the Claimant gave any incorrect information to the Respondent, prior to the offer of employment. The Respondent did not say what incorrect information was given by the Claimant; it merely stated there was unsavory information about the Claimant, from his former Employer. The letter of offer required that information supplied by the Claimant prior to 14<sup>th</sup> October 2014, was correct information. Which incorrect information did the Claimant supply to the Respondent, prior to the offer of employment?

8. The fundamental question in this dispute is whether there was an Employer-Employee relationship created through the letter of offer from the Respondent to the Claimant, and acceptance of offer by the Claimant. Secondly, what is the effect of breach, if such a relationship is found to have been created?

9. Section 9[2] of the Employment Act 2007 requires an Employer who is a Party to a written contract, to cause the contract to be drawn up, stating particulars of employment, and indicating that the Employee has consented to the terms and conditions of employment offered by the Employer.

10. Consent of the Employee is signified under Section 9[3] by the Employee signing his name thereof, or by the Employee imprinting thereon an impression of his thumb or one of his fingers in the presence of a Person other than his Employer. Where the Employee is illiterate, the Employer has an obligation to have the contract explained to the Employee, in a language understood by the Employee.

11. The Respondent fulfilled the requirement of Section 9[2] of the Employment Act, through its offer of employment dated 14<sup>th</sup> October 2014. All the particulars required to be given under the law, were given. The Claimant fulfilled his obligation under Section 9[3] by signing acceptance on 22<sup>nd</sup> October 2014. Acceptance was witnessed by a Mister Matano, System Engineer, who does not indicate to have been acting for the Respondent. An Employer-Employee relationship was created once the Employee and his Witness, signed the Acceptance Form.

12. The Respondent could not withdraw from the contract, without regard to the terms of that contract, and the law governing that contract.

13. In effect, the Court is of the view that the Claimant would be deemed under a probationary contract, once he accepted the offer made by the Respondent.

14. The revelation that the Claimant had sabotaged his previous Employer's production lines, should have to be dealt with under the terms of the probationary contract, which as seen above, was a valid contract created under Section 9[2] and [3] of the Employment Act 2007. The probation clause allowed the Respondent to monitor Claimant's suitability to continue in employment.

15. The date of appointment given as 1<sup>st</sup> November 2014, is not the date Employer-Employee relationship, under the law, was created. Creation was on 22<sup>nd</sup> October 2014, when the Employee signified consent, in the presence of his Witness. A binding employment contract was created on 22<sup>nd</sup> October 2014. All particulars of employment, required to be given under the law, were given. There was no other contract intended to be executed by the Parties, different from the one concluded on 22<sup>nd</sup> October 2014. The letter of offer was signed by Plant Manager and Human Resources Manager. It did not mention any other contract intended to be executed after 22<sup>nd</sup> October 2014. It stated the offer, and acceptance thereof, constituted a binding contract between the Claimant and the Respondent. The offer ceased to be an offer, and became a binding employment contract under the law, once the Employee signed his consent on 22<sup>nd</sup> October 2014. The contract so created must be viewed as a probationary contract, and treated as would have been the case, on the proposed date of appointment.

16. The Respondent ought to have proceeded under clause 2 of the offer of employment, in dealing with the adverse reference made by the Claimant's previous Employer. There was a contract of employment already concluded by the Parties, which enabled the Employer to assess the suitability of the Employee, to continue working under the terms and conditions given in the contract.

17. The Respondent was not obliged under Section 42 of the Employment Act, to give reasons for ending its relationship with the Claimant. The claim for compensation for unfair termination cannot hold, and is rejected, as termination was not done pursuant to Section 41, 43 and 45 of the Employment Act.

18. The Respondent however was obliged to notify the Claimant that his contract, concluded on 22<sup>nd</sup> October 2014, had been terminated. Section 42 [4] allows Parties to a probationary contract, to terminate the contract by giving not less than 7 days' notice of termination, or payment of 7 days' wages by the Employer to the Employee in lieu of notice.

19. Clause 2.1 of the contract gave a notice period of 28 days or pay in lieu of notice, presumably 1 month salary in lieu of notice. The Respondent, rather than attempt to withdraw from obligations already created by law, should have terminated the contract under Clause 2.1. Notice pay under this clause was an improvement on the minimum given under Section 42 of the Employment Act.

20. The Court is not convinced that the Claimant suffered breach of contract of such nature, as to warrant grant of general damages. He has not established a case for exemplary damages, or shown he was subjected to unfair labour practices. The Respondent was entitled to seek information from Claimant's former Employers, and assess Claimant's suitability, without seeking Claimant's views. His contract with the previous Employer was set to expire on 31<sup>st</sup> October 2014. He terminated that contract himself before maturation. In the case of **Danish Jalang'o** cited by the Respondent, the Court observed that Section 42 of the Employment Act is a reasonable limitation on constitutional rights flowing from Article 41 of the Constitution, as well as those rights and protections given under other provisions of the Employment Act. The Respondent acted within the law, but should have treated the Claimant as a probationary Employee, not a total stranger, with no contractual rights and obligations. The Claimant has adequate remedy under his probationary contract, in the name of notice pay.

22. The Claimant has not shown he merits immediate reinstatement of the offer of employment. It was a prerogative of the Respondent to continue employing the Claimant, or terminate the relationship, under the terms of the contract. The prayers for general damages, and exemplary damages, have no foundation. It has not been shown that the Claimant was subjected to unfair termination or unfair labour practices. Under any other suitable relief, **the Court grants to the Claimant one month salary in lieu of notice, at Kshs. 81,144.**

23. **No order on the costs.**

24. **Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED:-

**a) The Respondent shall pay to the Claimant notice pay at Kshs. 81,144.**

**b) No order on the costs.**

**c) Interest granted at the rate of 14% per annum, from the date of Judgment till payment is made in full.**

Dated and delivered at Mombasa this 9th day of March 2018.

James Rika

Judge