



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 151 OF 2011**

**PATRICK SIMIYU KONZOLO.....CLAIMANT**

**VS**

**CATHAY HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is an old matter, having been partly heard by the former Industrial Court of Kenya (Mukunya J) in May 2012. The matter was thereafter caught up in the transition from the former Court to the current Employment and Labour Relations Court. This explains the delay in its conclusion.
2. The claim is documented by a Memorandum of Claim dated 7<sup>th</sup> February 2011 and filed in court on 9<sup>th</sup> February 2011. The Respondent's defence is contained in a Reply dated 4<sup>th</sup> August 2011 and filed in court on 5<sup>th</sup> August 2011.
3. At the trial the Claimant testified on his own behalf and the Respondent called Sally Tum and Leonard Langat.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Security Officer from 20<sup>th</sup> March 2008. By the time he left employment, the Claimant earned a monthly salary of Kshs. 17,000.
5. The Claimant avers that his employment was unlawfully and unfairly terminated on 15<sup>th</sup> July 2008. He therefore claims the following:

- a) Compensation for loss of earnings.....Kshs. 204,000
- b) Salary for 32 months (breach of contract).....544,000

**The Respondent's Case**

6. In its Reply dated 4<sup>th</sup> August 2011 and filed in court on 5<sup>th</sup> August 2011, the Respondent states that the Claimant's employment was lawfully terminated on the ground of incompetence. The Respondent further states that prior to the termination, the Claimant had been issued with a warning which he ignored. Additionally, he was duly notified of the reasons for the termination.
7. The Respondent avers that it reserved the right to extend the Claimant's probation and adds that at the time of termination, the Claimant was still on probation. The termination was therefore within the terms of Section 42 of the Employment Act and the Claimant was paid all his dues.

**Findings and Determination**

8. This cause raises three (3) issues for determination:
  - a) Whether at the time of termination, the Claimant was on probation;
  - b) Whether the termination of the Claimant's employment was lawful and fair;

c) Whether the Claimant is entitled to the remedies sought.

### **Probation**

9. The Respondent maintains that at the time the Claimant's employment was terminated, he was still on probation. The relevant clause in the Claimant's letter of appointment states as follows:

***You will be required to serve a probationary period of two months during which the service could be terminated by either party giving the other 30 days' notice or same period's salary in lieu of notice. Upon successful completion of probationary period, you will be confirmed and termination of service will therefore be in accordance with Section 2.7 of Hotel Cathay Staff Regulations.***

10. In the final submissions filed on behalf of the Respondent on 14<sup>th</sup> November 2017, it was suggested that the Claimant's probation had been extended. However, no documentary evidence was provided to support this suggestion. Section 2 of the Employment Act requires probationary contracts to be in writing and in the absence of any document to evidence extension of the Claimant's probation, the inescapable conclusion is that at the time of termination, the Claimant was no longer on probation.

### **The Termination**

11. The Claimant's termination was effected by letter dated 15<sup>th</sup> July 2008 stating as follows:

*"Dear Patrick,*

**RE: TERMINATION OF SERVICES**

*You have not performed your duties diligently for the betterment of the employer and that the right of the employer to determine continuity of employment is hereby terminated with Hotel Cathay Ltd forthwith (sic).*

*Attached herewith please find cheque No. 156681 for Kshs. 15,650/= being your salary for the month of July and cheque No 156682 for Kshs. 15,650/= for the month of August salary in lieu of notice less all statutory deductions. Relevant pay slips attached for ease of reference.*

*You are reminded to hand over all Hotel properties in your position (sic) to the satisfaction of the General Manager and be given clearance certificate and required to vacate Hotel premises immediately (sic).*

*Wishing you the best in your future endeavors.*

*Yours faithfully,*

*(Signed)*

**G.K. Toroitich EBS**

***For and on Behalf of***

***Directors, Hotel Cathay Ltd"***

12. This letter reveals that the Claimant's employment was terminated on account of poor performance. While this is a valid ground for termination under Sections 43 and 45 of the Employment Act, it must be established through due process. The correct procedure in such cases is as stated in ***Kenya Science Research International Technical and Allied Workers Union (KSRIWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*** to the effect that an employee accused of poor performance must be duly notified and allowed an opportunity to improve.

13. In the instant case, there was no proof of any performance appraisal nor was there any notice to the Claimant that termination of employment on the ground of poor performance was being considered.

### **Remedies**

14. In light of the foregoing, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and therefore awards him three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

15. No basis was laid for the claim for salary for 32 months which therefore fails and is dismissed.

16. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 51,000 being 3 months' salary in compensation for unfair termination of employment.

17. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

18. The Claimant will have the costs of the case.

19. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 5<sup>TH</sup> DAY OF MARCH 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH 2018**

**ONESMUS MAKAU**

**JUDGE**

Appearance:

Mrs. Gakoi for the Claimants

Mr. Musila for the Respondent