



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 538 OF 2016

MATHEW WANDERA AKWIRI.....CLAIMANT

VS

HABO GROUP OF COMPANIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 6th July 2016 and filed in court on 8th July 2016, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Response on 23rd January 2017.

2. The matter proceeded before my brother, **Makau J** on 4th May 2017 when the Claimant's testimony was taken. Following transfer of Judges of the Court, the matter came before me on 24th January 2018 when the Respondent closed its case without calling any witness. Both parties filed written statements.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Project Manager from 18th November 2014. His salary rose from Kshs. 60,000 to Kshs. 110,000 as at April 2015.

4. The Claimant's employment was terminated on 4th May 2015, on the ground of poor performance. The Claimant states that at the time of termination, he had already completed his probation period, having served the Respondent for a period of seven (7) months.

5. It is the Claimant's case that the termination of his employment was unjustifiable and unfair. He avers that he was not afforded an opportunity to be heard, prior to the termination.

6. The Claimant's claim is as follows:

- a) Notice pay.....Kshs. 110,000
- b) Leave on prorata basis.....47,142
- c) 12 months' salary in compensation.....1,320,000
- d) Sacco deductions.....1,500

- e) In house/pension for 5 months.....3,000
- f) Unlawful NSSF deductions for 5 months.....144,000
- g) NHIF for 5 months.....1,600
- h) Costs
- i) Certificate of service

The Respondent's Case

7. In its Memorandum of Response dated 20th January 2017 and filed in court on 23rd January 2017, the Respondent admits having employed the Claimant as a Project Manager from 21st November 2014 until 4th May 2015, when his contract of employment was terminated.

8. The Respondent states that the Claimant was not confirmed in his appointment due to his incompetence which caused the Respondent serious financial losses.

9. The Respondent avers that it was a term of the employment contract that the Claimant was to be on probation for a period of three (3) months during which his performance would be assessed. The Respondent adds that if the Claimant's performance was found unsatisfactory, the probation period could be extended for a further 3 months and if there was no improvement, then the Claimant's employment could be terminated.

10. It is the Respondent's case that the Claimant's termination was proper, the Claimant having been notified in advance and meetings held to give him an opportunity to show cause why his contract should not be terminated for non- performance. Upon termination, the Claimant was paid all his dues which he accepted as full and final payment.

11. The Respondent denies that the Claimant worked for more than seven (7) months.

Findings and Determination

12. This cause raises two (2) issues for determination:

- a) Whether at the time of termination of his employment 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

13. The Respondent maintains that at the time the Claimant's employment was terminated, he was still on probation. Clause 7 of the Claimant's employment contract provided as follows:

You will be on probation for a period of Three (3) months during which your performance will be assessed. During this period, either party may terminate the contract by giving fifteen days notice or paying fifteen days salary in lieu of notice. After the probation the employment will be confirmed in writing and the termination notice will be 30 days. If the employee does not get any written confirmation then he/she should consider the probation to have been extended but the same will not be extended for more than six months.

14. By the time of termination of his employment, the Claimant had served the Respondent for five (5)

months. The Respondent therefore contends that since he had not exhausted the six (6) months' probation ceiling and had not been confirmed in writing, then he was still on probation. The initial probation period was for three (3) months and from the evidence placed before the Court, there was no written extension of probation. The question then is whether, in light of Clause 7 of the Claimant's employment contract, which I have reproduced above, the probation period was extended by default.

15. Whatever the Claimant's employment contract provided, I do not think extension of probation by default is tenable. I say so for two reasons; one, Section 2 of the Employment Act requires a probationary contract to be in writing and two, extension of probation, being an adverse managerial action can only be legitimately taken after a prior participatory performance appraisal.

16. In *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* this Court nullified an extension of probation that was not preceded by a participatory performance appraisal. In the instant case, the Court did not find evidence of any such performance appraisal and any extension of probation would therefore have been a unilateral decision by the Respondent, which has no basis in law.

17. Furthermore the Respondent seems to have been well aware of the Claimant's employment status because in the termination letter issued to the Claimant, one month's notice pay is admitted. If the Claimant had been on probation, he would have been entitled to a shorter notice period. In sum, the Court finds that by the time the Claimant's employment was terminated, he was no longer on probation.

18. A related question which was raised by the Respondent in final submissions is whether the Claimant, who had served for less than 13 months, is barred from bringing a claim for unfair termination on account of Section 45(3) of the Employment Act. The only thing I will say on this point is that I am persuaded by the decision by **Lenaola J** (as he then was) in *Samuel G.Momanyi v Attorney General & another [2012] eKLR* in which the said provision was declared unconstitutional. The Claimant's claim is therefore properly before the Court and I will now proceed to consider it on merit.

The Termination

19. The Claimant's employment was terminated by letter dated 4th May 2015, stating the following:

"Dear Mathew

RE: TERMINATION OF EMPLOYMENT

We refer to the above subject. We have evaluated your performance as the Operations Manager-Pili management Consultants Ltd and we find your performance below expectation. A decision has therefore been made to terminate your services with effect from 04th May 2015.

Subject to recovery of any money owed to the company your final dues will be paid as follows:-

- 1. 30 days pay in lieu of notice*
- 2. In-house savings saving (sic) during your tenure*
- 3. Leave earned but not taken*
- 4. Salary for days worked in the month of May 2015.*

Please note that your April salary will be paid to your bank account.

Attached is the clearance form which is required to have been signed by all the relevant offices and present (sic) to our finance office before we can start preparing your final dues. Your final dues will be ready within seven days from the date of receipt of the same.

Yours faithfully,

HABO GROUP OF COMPANIES LIMITED

Mr. Hezron Awiti

CHIEF EXECUTIVE OFFICER

20. Reading from this letter and further evidence adduced before the Court, the termination of the Claimant's employment was occasioned by poor performance. This is one of the grounds allowed by law, but like all other grounds, it must be established through due process. The correct procedure in handling cases of poor performance as stated in **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)** is that once poor performance by an employee is noted, it must be brought to their attention, upon which they are given an opportunity to improve.

21. The Claimant told the Court that he was appraised in December 2014 after which his salary was increased to Kshs. 110,000, effective 1st January 2015. On its part, the Respondent did not provide any evidence of a negative appraisal report on the Claimant.

22. Further, even assuming that the Claimant was indeed a poor performer, it is evident that he was not taken through a capability hearing as contemplated under Section 41 of the Employment Act (see **Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR**).

Remedies

23. For the foregoing reasons, 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.

24. The claims for notice pay, in-house savings and prorata leave are admitted and are therefore payable.

25. No basis was laid for the claims for Sacco, NSSF and NHIF deductions which therefore fail and are dismissed.

26. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation.....Kshs. 330,000
- b) 1 month's salary in lieu of notice.....110,000
- c) In-house savings.....3,000
- d) Prorata leave for 5 months (110,000/30x1.75x5).....32,083
- Total.....475,083**

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

28. The Claimant is also entitled to a certificate of service and costs of the case.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH 2018

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JUDGE

Appearance:

Mr. Anaya for the Claimant

Mr. Bosire for the Respondent