



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1916 OF 2013

(Before Hon. Justice Mathews N. Nduma)

DOLPHINA ABONDO.....CLAIMANT

VERSUS

AIRKENYA EXPRESS LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant worked for the Respondent for a period of 15 months as customer care officer. She was however transferred to reservations office. Her employment was terminated on allegations of failure to meet the company's performance standards inspite several appraisal. She was kept on probation for that period and the company did not deem it fit to confirm her contract of employment.

2. The Claimant was not communicated to in writing in the matter, except the failure by the Respondent to confirm her upon completing six (6) months' probation. The only written communication she got was the letter of termination.

3. At the time of termination she earned Kshs.53,400 per month.

4. The Claimant has sued the Respondent seeking compensation for unlawful termination of employment, payment in lieu of leave and special damages for the unserved 22 months of the contract.

5. The Claimant also claims interest of the suit and costs.

6. The Claimant testified in support of her case and relied on the statement of claim and the annexures thereto.

7. In its response to the memorandum of claim filed on 10th February, 2014 and oral testimony by RW1 Joan Githinji, Human Resource Officer, the Respondent insists that, the Claimant was still under probation when her employment was terminated after 15 months. That the Claimant was made aware after two appraisal sessions that her performance was wanting. That she was transferred from customer care department to ticketing department to give her opportunity to improve her performance in vain. The Respondent

had no alternative but not to confirm her position although she had exceeded the statutory maximum period of probation.

8. RW1 conceded that there was no formal communication to the Claimant about her performance. That the Respondent dismissed the matter orally with her during appraisal and she was aware that she was not confirmed to her position due to poor performance.

9. The Respondent prays the suit be dismissed with costs.

Determination

(i) Was it lawful to keep the Claimant on probation for 15 months?

(ii) Was the termination of the fixed term contract of employment lawful?

(iii) Is the Claimant entitled to the relief's sought?

Issue (i) & (ii)

10. The court will deal with issue (i) and (ii) together. Section 42(2) provides –

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with agreement of the employee.”

11. Sub-section 3 reads –

“No employer shall employ an employee under a probationary contract for more than the aggregate period provided under sub-section (2)”

12. It is without a doubt therefore that keeping the Claimant under probation for an aggregate period of 15 months is contrary to law. The Respondent violated the law therefore in this respect.

13. This being the case, the Claimant was already serving her full contract of 38 months which had commenced on 1st March, 2012 and was due to expire on 3rd May, 2015.

14. The Respondent terminated the said contract by a letter dated 14th August, 2013 in which no reason was given at all for the termination.

15. The termination was in outright violation of sections 41, 43 and 45 of the Employment Act, 2007.

16. The employee shall not terminate employment without giving a notice to show cause; opportunity to explain why the employment should not be terminated and valid reasons for the termination.

17. The belated attempt to justify the termination in court does not work for the Respondent because a valid reason must be given prior to the termination upon giving opportunity to the employee to explain themselves, and in this case on the performance issues raised by the Respondent belatedly as the reason for the termination.

18. This being the case, the termination was in violation of sections 44, 43 & 45 of the Act. It was unlawful and unfair.

19. The Claimant is therefore entitled to compensation in terms of section 49(1) (c) as read with sub-section 49(4) of the Act.

20. In this regard the Claimant was not paid terminal dues upon termination comprising of salary arrears; one month salary in lieu of notice, payment in lieu of 13 days leave not taken and other unpaid allowances in the sum of Kshs.92,260.05 less Kshs.21,609.40 deductions, net Kshs.70,650.65 which the Respondent admits did not pay in its response to the statement of claim.

21. The Claimant had legitimate expectation to at least serve the entire 38 months contract, but the same was unlawfully curtailed after only 15 months service.

22. There were no reasons given and so the court finds that the claimant did not contribute to the unlawful termination.

23. The Claimant suffered loss and damage for this blatant disregard of the law, by keeping her for a period of 15 months under probation and for the unlawful termination of employment.

24. Employers are presumed to know the law and the court shall not countenance blatant disregard of it as happened in this case.

25. Accordingly, the court awards the Claimant the equivalent of ten (10) months' salary in compensation for the wrongful termination of employment and blatant disregard of the law in the sum of Kshs.412,000 (41,200 per month).

26. In the final analysis judgment is entered in favour of the claimant as against the Respondent as follows:-

(i) Kshs.41,200 in lieu of notice.

(ii) Kshs.25,319.05 in lieu of leave.

(iii) Kshs.412,000 being equivalent of ten (10) months salary in compensation for unlawful termination of employment.

Total Award – Kshs.478,519.05.

(iv) The award is payable with interest at court rates from date of filing suit except the award of compensation in (iii) above which is payable with interest at court rates from date of judgment till payment in full.

(v) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 7th day of May, 2018

MATHEWS N. NDUMA

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

MAUREEN ONYANGO

JUDGE

Appearances

Mr. Onyango & Co. Advocates for Claimant

Mr. Manyange for Respondent

Anne Njung'e – Court Clerk