



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 979 OF 2014

NELLY CHELAGAT MALEL.....CLAIMANT

VERSUS

BOARD OF TRUSTEES CAROLINA FOR KIBERA.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that she was on 28th February, 2013 employed by the respondent as a Monitoring and Evaluation and Learning Officer of the respondent on a one year renewable contract at a basic monthly salary of Kshs 105,000/=. Her specific duties and responsibilities included developing and supporting the implementation of a detailed M & E framework, strengthening understanding and capacities within the project and program team on MEL supporting and carrying out regular monitoring of standard indicators.

2. According to the claimant, she embarked on her duties with diligence and dedication until November, 2013 when she received a letter from the respondent terminating her employment immediately. In the said letter, the reasons from termination were alleged to be insubordination and lack of respect for colleagues, and failure to promote teamwork. Before the said termination, the claimant pleaded that she was put on a probationary employee performance evaluation which was conducted on 31st October, 2013 after the lapse of her probation period and she considered this malicious, unlawful, null and void since she was not on probation anymore but a confirmed and full time employee. The claimant further pleaded that even though the evaluation was done after she had completed her probation, she nevertheless scored satisfactory ranking of 61 points and as such should not have been put on performance improvement plan.

3. The respondent on the other hand confirmed the claimant was employed on 18th March, 2013 as pleaded and stated further that it was agreed between the parties that the claimant would serve on probation for 6 months upto 17th September, 2013. This period was extended for a further three months to December, 2013 and the claimant duly informed.

4. The respondent further pleaded that the claimant's performance was reviewed and found to be wanting with regard to compliance with the respondent's code of ethics and the claimant was counselled on 26th July, 2013 and further put on notice on 31st October, 2013. According to the respondent, it became apparent to the respondent that the claimant failed to correct the breaches and therefore terminated her employment on 11th November, 2013.

5. In her oral evidence in court the claimant repeated most of the averments in her memorandum of claim and further stated that she performed her duties as required, she relied on an email dated August 8, 2013 from Hillary the Executive director annexure 6 to her memorandum of claim as such evidence of commendation for her good performance. According to her evaluation was not provided for in her letter of appointment. In any case she expected the performance evaluation during probation but the same was done on 31st October, 2013 some on and a half months after expiry of the probation period. It was her view that being put on PIP meant she was still treated as a probationary employee.

6. It was further her evidence that she proceeded on two days leave but upon her return she was told her services had been terminated. She was not given the reasons for termination immediately but later. She was accused of insubordination and lack of respect for colleagues. According to her, she was never called for any disciplinary hearing prior to dismissal yet the respondent had a disciplinary manual providing for this. It was her testimony that the allegations against her were false and that she had not received any previous warning and further that she was never given an opportunity to defend herself.

7. In cross-examination the claimant stated that her confirmation and issuance of contract was subject to satisfactory completion of the probation. She further stated that for insubordination she would have been reprimanded three times before termination. The respondent's witness Mr Salim Mohammed informed the court that he was the founder of the respondent and that he knew the claimant as one for the respondent's employees and further that he was aware of her termination.

8. In cross-examination he stated that in 2013 he used to go to Kibera monthly. He further stated that he was not involved in staff issues but could access staff. It was his evidence that one Hillary was the executive director when the claimant was terminated was the one who would be involved in the claimant's termination. In his submissions on behalf of the claimant, Mr Obok submitted that the respondent's ranking during performance evaluation was satisfactory 50-75 points; Needs improvement 76-120 points unsatisfactory above 121 points. He therefore submitted that the reasons given by the respondent for terminating the claimants employment were neither valid nor genuine since just a week before the termination the respondent subjected the claimant to an evaluation in which she scored a satisfactory point of 61.

9. Counsel further submitted the respondent did not follow the provisions of its own human resource manual which provided at clause 11.13.6 that for insubordination there had to be at least three breaches and corresponding warnings before termination. Counsel further submitted that his clients termination letter did not indicate whether the purported reasons for termination namely the alleged insubordination and lack of respect for colleagues and failure to promote team work were 1st, 2nd, 3rd or 4th breaches as provided in the respondent's human resource manual. According to counsel, due process required that the respondent followed the provisions of the human resource manual for purposes of fairness and proportionality.

10. Under section 43(1) of the employment Act, in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where an employer fails to do so, the termination shall be deemed to be unfair. On the other hand under section 47(5), for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.

11. The claimant herein was employed on 18th March, 2013. The appointment was for one year subject to a six month probation to run from 18th March, 2013 to 17th September, 2013. According to the claimant her probationary period ended on 17th September, 2013 and no extension of the same was done immediately but purportedly some one and a half months later that is on 31st October, 2013 after a probationary employee performance evaluation which she contended was not provided for in the letter of appointment. The claimant further contended that despite the fact that probationary employee performance evaluation was not provided for in the contract, she still scored 61 points which in the ranking is considered satisfactory hence there was no need to extend the probation period for another six months.

12. The claimant's services were terminated on 11th November, 2013. That is to say some ten days after the purported extension of her probation period. The reasons for termination cited in the letter included;

"1. Insubordination: You have consistently behaved in disrespectful and disruptive manner whenever I try to warn you and offer guidance on your work performance".

"2. Lack of respect for colleagues and failure to promote team work. You have consistently demonstrated general lack of respect and rudeness to colleagues".

13. The performance improvement plan attached as annexure 4 to the claimants memorandum of claim had as points for improvement the same or similar issues raised in the letter of termination. The court has perused the documents filed by both parties and especially the respondent's documents and has not come across any new reported incident or complaint against the claimant concerning insubordination or lack of teamwork. Placing the claimant on performance improvement plan on issues of insubordination and lack of teamwork implied that past incidents would not be used to take disciplinary action against the claimant including termination.

14. Furthermore, clause 11.13.6 of the respondent's Human Resources Manual attached to the respondent's bundle of documents required that cases of insubordination be escalated from official reprimand and suspension for two days, then to official reprimand and four days suspension without pay then to 5 days suspension without pay and final reprimand. If persistent, the employee's service would then be terminated. Although the termination letter complains about the claimant's comments on the PIP issued to her there is no evidence that the claimant was subjected to the procedure set out under clause 11.13.6 of the respondent's manual.

15. To this extent, the respondent failed to prove and justify the reason for termination of the claimant's services as expected under section 43 and 47(5) of the Employment Act. On the issue of extension of the probation period, the claimant's probation period ended on 17th September, 2017. The accusations against her if true, were serious and could have either triggered refusal to appoint her upon expiry of the probationary period or immediate communication of the decision to extend the probationary period. The claimant was nonetheless subjected to probationary employee performance evaluation and in spite of the serious allegations against her still scored 61 points which according to ranking did not warrant the extension of the probation period. The claimant was therefore justified to protest the extension of the probation period.

16. Under Section 42(2) of the Employment Act, 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 the agreement of the employee. Looking at the timing of the extension of the probation period and the fact the claimant did not agree to it for reasons she has ably demonstrated, one cannot help but read malice in the extension more so when the claimant's services are terminated shortly thereafter and for the same old reason which were to be subject of performance improvement plan without any new incident or complaint. In this regard the court therefore finds and holds that the extension of the claimant's probationary period having been done with malice was ineffective hence null and void. The claimant as at the time of termination was therefore not a probationary employee.

17. In conclusion the court finds and holds that there existed no valid and or justifiable reasons for the termination of the claimants service hence the termination was unfair within the meaning of section 45 of the Act and awards the claimant as follows:

- a. One month's salary in lieu of notice 105,000

b. Seven months salary as compensation for

c. unfair termination of service 735,000

840,000

d. Cost of the suit

18. Items (a) and (b) shall be subject to statutory deductions and interest on the decretal sum shall be at court rates from the date of judgement.

19. It is ordered.

Dated at Nairobi this 29th day of June, 2018

ABUODHA J. N.

JUDGE

Delivered at Nairobi this 29th day of June, 2018

ABUODHA J. N.

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent