



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 601 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 28<sup>th</sup> June, 2018)**

**BENNAH NAMAEMBA KILWAKE.....CLAIMANT**

**VERSUS**

**AVIC INTERNATIONAL REAL ESTATE KENYA....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 9<sup>th</sup> April 2014 through the firm of Tobiko, Njoroge & Company Advocates seeking damages for unlawful termination and un-paid dues. She avers that she was appointed by the Respondent to the position of Public Relations Manager vide a contract of employment dated 2<sup>nd</sup> September 2013 which was to continue until lawfully terminated by either party. She was to receive a basic salary of Kshs. 108,750 payable at the end of each month.

2. She further avers that on 29<sup>th</sup> November 2013, she received a letter from the Respondent through an email purporting to terminate her on grounds of non-performance, absenteeism, lack of medical report and reporting to work late which termination was unfair and illegal as it contravened the provisions of the Employment Act as no notice was given.

3. She states that she has served the company diligently and had endeavored to obtain all necessary approvals and consents from the relevant authorities to enable the Respondent to carry on with its projects. She was previously employed in Tanzania with a stable job and had incurred a lot of expenses while relocating to Kenya together with her family to take up the new job she was promised.

4. She further states that despite demand and notice of intention to sue in default given, the Respondent has refused, failed and/or neglected to admit liability for special and general damages arising out of the said accident.

5. The Respondents filed their Memorandum of Response where they admit that the Claimant was their employee earning Kshs. 108,750 per month as basic salary. They however deny the allegations set out by the Claimant and put her to strict proof.

6. They aver that the letter of termination was explicit and in line with the provisions of the Employment Act and a sufficient notice was given to the Claimant and state that at all material times when the Claimant was under their employment she was in breach of the terms of employment.

7. They further aver that they were entitled to terminate the services of the Claimant who was still under probation at all material times hence her termination was lawful and provided for by the contract of Employment. They submit that the Claimant's claim has no basis under the Employment Act and the same should be dismissed with costs to them.

8. The Claimant filed an answer to Respondent's Memorandum of Response where she denies each and every allegation contained in the Memorandum and state that no notice was given. She avers that the Respondent can only terminate the contract of employment upon giving valid reasons and sufficient notice which is in accordance with the Employment Act.

**Submissions**

9. The Claimant filed her submissions where she submits that no notice was ever issued to her and neither was she paid her wages in lieu of the notice hence the Respondent breached Section 42 of the Employment Act making the termination unfair and unprocedural. She relied on the case of **David Namu Kariuki Vs Metal Crowns Limited (2013) Eklr.**

10. She avers that she is entitled to reliefs sought as she incurred cost of relocation and changing schools for her children as well as her residence. She states that she is also entitled to damages for the mental anguish she suffered after termination of her employment without notice.

11. The Respondent filed their submissions where they submit that the Claimant was entitled to 7 days' notice as provided by Section 42 of the Employment Act and no more and as an employee who is terminated while under probation she can only be paid 1 month's salary in lieu of notice. This means that she was terminated lawfully within the probation period.

12. They aver that as an employee who is terminated while under probation, she can only be paid 1 month's salary in lieu of notice hence no other damages are payable under Section 42 of the Employment Act as no legal basis was laid for the claim of Kshs. 652,500 for 6 month's pay and general damages of Kshs. 500,000. They therefore pray that the same be dismissed. They relied on the case of **James O. Oloo Vs Tana and Athi River Development Authority (2016) eKLR.**

13. I have considered the evidence and submissions of both parties. In determining whether the Claimant was lawfully or unlawfully terminated, I refer to her employment contract which shows that she was employed with effect from 2.9.2013.

14. Under Clause 5 of the contract, the contract was subject to the probationary period of 3 months which period is upto 2.12.2013. Under the same Clause, if the contract was to be terminated during the first month of employment, seven days written notice was required.

15. The Claimant was terminated on 2/12/2013. This was the last day of her probation period and so I can safely say that she was terminated during her probation period.

16. In this case, she was entitled to notice period of more than 1 month as distinguished in the letter of employment which states that if the contract was terminated within the first month then 7 days notice was required.

17. Under Section 42(1) of the Employment Act:-

*“The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract”.*

18. The contention by the Claimant that she was required to be subject to a disciplinary hearing is therefore not true.

19. I do not find any wrong doing on Respondent's part save for the lack of notice which I now award the Claimant being 1 month salary = 108,750/=.

20. The Claimant is also entitled to costs of this suit plus issuance of a Certificate of Service.

**Dated and delivered in open Court this 28<sup>th</sup> day of June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Monirei for Claimant

No appearance for Respondent