



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 965 OF 2013

ZADARACK OYARO ACHOKI.....CLAIMANT

- VERSUS -

KENYA RAILWAYS CORPORATION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 25.06.2013 through Koceyo & Company Advocates. The amended memorandum of claim was filed on 08.07.2013. The claimant prayed for judgment against the respondent for:

- a) An order directing the respondent to re-instate the claimant to his former employment position as Corporation Secretary without loss of any office benefits and privileges attached to the office. In alternative, and without prejudice to this prayer (a),
- b) Special damages Kshs.10, 152, 000.00 being compensation for loss of employment Kshs. 346, 000 x12 =Kshs.4, 152, 000.00; and compensation for discriminatory practice while in employment Kshs.6, 000, 000.00.
- c) Costs of the suit.
- d) Interest on (a) and (b) above at commercial rates of 20% from 26th June 2012.
- e) Any other and further relief that this Court may deem fit and just to grant in the circumstances.

The memorandum of response was filed on 07.08.2012 through Prof. Albert Mumma & Company Advocates. The respondent prayed that claim be dismissed with costs.

The claimant was employed by the respondent by the letter of appointment dated 12.10.2011. The claimant was engaged in the position of Corporation Secretary. Clause 5 of the contract stated thus, **“5. Terms of service: This employment will be on permanent basis. You will however, be placed on probation for a period of 3 months after which you will be confirmed in your appointment subject to satisfactory performance and satisfactory reference from your referees and former employer(s). The Board reserves the right to terminate the probation appointment depending on your performance and responses from your referees.”**

Clause 25 provided, **“25. Termination: This appointment may be terminated by either party giving three (3) month’s prior notice, or on payment of an equivalent of three (3) months’ basic salary in lieu of such notice. During probation, either party will give the other one month notice or equivalent salary.”**

Clause 28 stated that the offer for employment was valid for 3 months from the date of the letter (12.10.2011) within which the claimant was required to report. The claimant signed on 14.10.2011 accepting the offer and stating that he would report on 05.12.2011 and the claimant reported accordingly. Thus the three months probationary period was to end on or around 06.03.2012.

The claimant’s case is that on 27.06.2012 he received a letter dated 26.06.2012 informing him that his services as a Corporation Secretary for the respondent had been terminated by the respondent’s Board. The letter addressed to the claimant stated as follows:

“RE: TERMINATION OF EMPLOYMENT

The Board of Directors and Management has upon evaluation of your performance made a resolution to terminate your employment contract.

The Board has taken the decision on account of the following:

- 1) Failure to perform your duties as expected especially during your probation period.**
- 2) Allowing yourself as a Public Officer to bring your office to disrepute contrary to the provisions of the Public Officer Ethics Act.**
- 3) Failure to take out a practicing certificate for the year 2012 to date which is a mandatory requirement in the discharge of your duties.**

Your dues shall be paid in accordance with the Employment Act and the Corporation's policies and procedures as follows:

- **Three months basic salary in lieu of notice.**
- **Accrued but unutilised leave days.**

You are requested to handover the Corporation's property and documents to Mr. Stanley Gitari, Senior Legal Officer and have the attached Clearance Certificate duly signed by your supervisor. You should also have the final Wealth Declaration form completed. Forward all the above to the undersigned to enable processing and release of your final dues.

Yours faithfully,

Signed

Nduva Muli

MANAGING DIRECTOR

It is the claimant's case that there was no valid reason which would have led to his termination save for his insistence on due process in procurement of legal services, refusal to approve payments of unauthorised sums as legal fees and demand for scrutiny of huge expenditures involving Public Funds.

The claimant's further case was that the respondent had an elaborate performance appraisal process, to which he had not been subjected to by 26th June 2012. In such circumstances the claimant wondered what tool of appraisal had been applied to assess his performance. The claimant's case was that the appraisal for confirmation in appointment entailed his completing a prescribed form and the same being completed by his supervisor, in his case, the respondent's Managing Director but, that was never undertaken.

It was the claimant's further case that the respondent's Board meeting of 26.06.2012 was irregularly constituted for want of a relevant notice convening the meeting issued by the respondent's Corporation Secretary and the decision to terminate his employment was therefore not lawful. Further, the claimant's case is that he later met the Managing Director on 03.07.2012 about the grounds of the termination and the Managing Director informed him that the Board was pre-determined to see the claimant out of the respondent's employment. Further, the Managing Director told the claimant that even if he was given a chance to be heard by the Board, nothing would have changed as he would still be terminated by the Board. The claimant states that he told the Managing Director that the termination had been forcefully executed against him and it was unfair, unreasonable and illegal.

The respondent's case was that as at termination the claimant's contract of service was governed by provisions of section 42 of the Employment Act, 2007 which provides that a party to a contract for a probationary period may terminate the contract by giving not less than seven days notice of the termination of the contract or by payment by the employer to the employee of seven days wages in lieu of notice. The termination complied with the provision and it was not unfair or illegal. Further, the respondent had extended the probationary period by the memo dated 28.03.2012 addressed to the claimant by the respondent's Managing Director. The memo stated that the probationary period was being extended in line with the Human Resource Policy to enable the Managing Director and the Board to assess and confirm the that the claimant's performance is satisfactory. The memo stated that in the initial 3 months of probation, the following areas required improvement:

- a) It had been noted that the claimant had a challenge of IT skills in that he could not prepare documents independently on MS Word and Excel.
- b) There were many basic errors noted in the Board minutes that the claimant had drawn and accuracy of minutes was crucial.
- c) Speed of turnaround of assignments was an issue because it had been noted that the assignments or tasks assigned to the department took inordinately long time to complete.
- d) The claimant had not completed the mandatory induction programme as was required to be done in the 3 months of probation.

The memo concluded thus, **“I look forward to you taking the necessary steps to make improvement in these areas in the coming months and feel free to discuss your performance or any concerns you may have with the undersigned.”**

The respondent’s further case was that upon termination of the claimant’s contract of service he was paid his terminal dues. Further the respondent’s procurement was regulated and audited by relevant agencies such as the Public Procurement Oversight Authority, Inspectorate of State Corporations, the parent Ministry of Transport, The National Treasury, and the Kenya National Audit Office and the agencies having not found fault in the respondent’s procurement systems such as the legal services and other projects, the claimant’s allegations were diversionary from the real issues surrounding his termination. Thus the suit should be dismissed with costs.

The Court has considered the pleadings, evidence and submissions filed for the parties.

The **1st issue** for determination is whether the termination amounted to termination of a probationary service or not. The Court has already found that the 3 months contractual period was ending on or around 06.03.2012. The termination was by the letter dated 26.06.2012 and delivered to the claimant on 27.06.2012. The probationary clause was clear thus, **“5.Terms of service: This employment will be on permanent basis. You will however, be placed on probation for a period of 3 months after which you will be confirmed in your appointment subject to satisfactory performance and satisfactory reference from your referees and former employer(s). The Board reserves the right to terminate the probation appointment depending on your performance and responses from your referees.”**

The Court finds that the parties did not agree on the extension of the probationary period. The parties elected to proceed on better terms of probationary service than was provided in section 42 of the Employment Act, 2007 and which the Court finds did not apply but the terms of the clause strictly applied. Thus once the probationary term of three months lapsed the claimant became due for confirmation in appointment subject to satisfactory performance and satisfactory reference from his referees. Thus after 06.03.2012, the Court returns that the claimant could only be confirmed in appointment or be terminated on account of adverse reference or unsatisfactory performance. Even if section 42(2) of the Act allowed extension of probationary appointment, the same required agreement of the parties but it was not shown that in the present case the claimant agreed to the extension. The Court finds that the parties never agreed to extension of the probationary service of 3 months and they are bound accordingly. Thus, as at the time of termination by the letter dated 26.06.2012 and delivered to the claimant on 27.06.2012, the probationary period had lapsed on 06.03.2012. Clause 24 of the letter of appointment incorporated the Employment Act, 2007 and the respondent’s Staff Rules and Regulations. The Staff Rules and Regulations were not exhibited or referred to as justifying the extension of the agreed probationary term of 3 months. Thus there is no established reasonable basis and justification of the purported indefinite extension and the same was null and void as it was outside the parties’ own contractual provision. The Court further returns that the numerous cases cited for parties on termination of probationary service including application of section 42 of the Act are therefore found inapplicable to the present case. For avoidance of doubt, in terminating the contract the respondent appears to have invoked clause 25 of the letter of appointment thereby confirming that the termination was known to the respondent to be outside the probationary period and clause.

The **2nd issue** for determination is whether the termination of the claimant’s employment was unfair. The parties expressly incorporated the provisions of the Employment Act, 2007 in the contract of service. Under section 45 of the Act a termination is fair only if the reasons are valid and the procedure is fair. The Court has considered the alleged grounds in the letter of termination. It is clear that the claimant was not given a notice and a hearing prior to the termination letter being issued. The Court has found that instead of confirming the claimant in appointment or terminating the appointment after the probationary service based on levels of performance and references as was agreed, the respondent took a completely invented path of purporting to extend the probationary appointment and then terminating on account of the stated grounds. The Court finds that such actions were unfair as they offended the parties’ agreed flow of things and procedure. Thus the procedure leading to the termination was unfair and the Court finds that the termination was unfair. The parties spent considerable time giving evidence and submissions on the merits of the reasons in the letter of termination but the Court returns that there having been no due process leading to the termination, the Court will readily find that as at the time of termination, it cannot be said that the reasons for termination were valid as envisaged in section 43 of the Act, 2007. The probationary period having ended and the respondent being desirous of terminating the contract of service on account of misconduct or poor performance as was alleged, it is the opinion that the respondent was bound to comply with section 41 of the Act on notice and a hearing. That was not done and it amounted to unfair procedure.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes the findings as follows:

- a) The claimant prays for an order directing the respondent to re-instate the claimant to his former employment position as Corporation Secretary without loss of any office benefits and privileges attached to the office. The prayer was surrendered.
- b) The prayer for compensation for discriminatory practice while in employment Kshs.6, 000,000.00 was based on the submission that the claimant was required to have a current practising certificate as an advocate whereas the other lawyers engaged in the respondent’s service were not required to hold such certificates. The Court finds that the claim was not established because the allegation that the other lawyers in the service were not required to have practising certificates was not established. The Court further returns that it is sufficient that the Court has found that without a proper hearing leading to the grounds of termination as was alleged in the letter of termination, justice is effectively served upon the finding that the termination was unfair on that account. Thus, the prayer will fail.
- c) The claimant prayed for special damages Kshs.10, 152, 000.00 being compensation for loss of employment Kshs. 346, 000 x12 =Kshs.4, 152, 000.00. The Court has considered that the claimant had served for a short period of time of about 6 months, he had not been confirmed in appointment as per the terms of the letter of appoint, he condoned the extension of the probationary period contrary to the contractual terms, and he had accepted the pay of 3 months after the termination he has subsequently questioned in the current suit. In consideration of those factors, the Court returns that one month pay of **Kshs.346, 000.00** under section 49 of the Employment Act, 2007 in compensation for the unfair termination will meet ends of justice. In any event, the claimant condoned the purported extension of probationary service and in absence of anything else either party could terminate by paying one month in lieu of notice during the probationary period per the agreement. The Court considers that to be the fairest measure of the compensation in the circumstances of this case and the claimant is awarded accordingly.

The Court finds that in view of parties' respective margins of success, the respondent will pay the claimant's partial costs of the suit fixed at **Kshs. 100,000.00** only.

In conclusion, judgment is hereby entered for the claimant against the respondent for payment of **Kshs.446, 000.00** by 01.09.2018 failing interest to run thereon at Court rates from the date of this judgment till full payment.

Signed, dated and delivered in court at Nairobi this Friday 20th July, 2018.

BYRAM ONGAYA

JUDGE