



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT MERU
CASE NO. 64 OF 2018
(Formerly Nyeri ELRC Case No. 248 of 2017)

PHILIP MUTUA ONYANCHA.....CLAIMANT

VERSUS

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....RESPONDENT

JUDGMENT

1. The claim herein relates to the employ of the Claimant as an area secretary of the Respondent. He was appointed on 7th May 2015 to serve in the Timau-Meru area based at the Timau branch office earning a salary of Kshs. 20,000/-. He was on probation for 6 months and he did not receive a letter extending the probation. He worked up to 6th February 2016 when his contract was terminated without notice. He averred that prior to the appointment to the Respondent's Timau Meru Branch, he had worked in Kericho as a secretary for 2 months. He averred that the branch executive was not consulted and they did not give a recommendation for the termination of the Claimant contrary to Rule (y) of the Respondent's constitution. The Claimant averred that he handled many disputes in 2015 and 2016 and his expenses were not reimbursed. He thus sought Kshs. 86,000/- being personal expenses incurred and refundable for work done on behalf of the Union; unpaid salary for the month of March 2016 – Kshs. 20,000/-; 12 months salary Kshs. 240,000/-; a certificate of service; an order for immediate reinstatement to employment forthwith; and lastly, costs of the suit.

2. In its defence, the Respondent averred that the Claimant was employed, placed on 6 months probation which was extended on 14th November 2015 for a further period of two months as the Claimant's performance was wanting. It was averred that the Claimant was issued with a letter to that effect on 14th November 2015 and was invited for a meeting on 9th February 2016 where he was informed that his stay was no longer tenable thus relieved of his duties. The Respondent averred that he never made it as its employee and as such the case against it was full of malafides and an abuse of the court process. The Respondent thus sought the dismissal of the claim.

3. The Claimant gave oral testimony and stated that he currently was a casual labourer. He testified that in regard to his service in Kericho he did not have a letter of appointment as it was unsigned. He stated that he worked for 2 months before transfer to Nanyuki branch. He was given a letter dated 7th May 2015 at Nanyuki and an introduction letter on 15th July 2015. He stated that he worked for 10 months and the total service was 13 months. He did not receive the letter of extension of probation and he received the termination letter on 9th February 2016. He testified that he did not receive a letter concerning his

performance nor was there a disciplinary hearing. He stated that the union did not follow the procedure in its constitution as there was a branch committee that was required to sit in terms of clause 15(h)(i) and (j) (i) and review the performance and it did not sit. He testified that the termination was by a fellow employee an administrator at the head office who did not have the authority to sign for the Secretary General of the Respondent who has 2 deputies who can sign the letters. He stated that he went to the head office to ask how the decision was arrived at and was advised that his services had been terminated. He said that he later received a call from the Secretary General who advised him to ignore the letter and continue working. He later received a letter confirming his termination and continued working till March 2016. He testified that the executive committee of the branch wrote a letter which he produced. The officials were not aware as to how the Claimant was terminated. He said that the branch secretary was assigned his duties and that Brian Weme Indachi was his replacement. He stated that the letter of introduction is issued to an employee who is a permanent employee and he would not have received it if he was on probation.

4. In cross-examination the Claimant testified that there was no letter of transfer given to him from Kericho to Timau. He stated that he received the letter dated May 2015 and he did not protest that it was headed appointment letter and he was not satisfied but had no option but to go on working. He stated that the Secretary General told him to continue working and no letter was done to this effect. He was referred to the letter of extension of probation and he stated that his performance was not wanting. He stated that it was a practice of the Union to issue the letter of introduction to employers to those who are employed and that the letter confirmed he had been confirmed. He said he had read the letter and the letter did not state that he had been confirmed. He testified that he did not have the payslip for 2015. In re-examination he testified that the probation period was not extended. He did not meet the union officials for that exercise. That marked the end of the Claimant's oral testimony.

5. The Respondent called Joseph Aluoch the union administrator and he stated that the Claimant was employed on 7th May 2015 and he was the area secretary. He said that the Claimant was on probation for 6 months and he was not aware of the Claimant's commencement at Kericho. He stated that he should have been aware. The Claimant did not complete probation successfully and the Respondent extended the period for a further 2 months to allow for improvement. He said that the Claimant was dismissed on 9th February 2016 and the letter of 20th February 2016 was written after the Respondent realized that the Claimant had continued working yet his services had been terminated. He testified that as administrative secretary he was in charge of all staff of the Union as it was the equivalent of human resources officer. He has the power to hire, discipline and terminate the services of union staff. He stated that he had every right to terminate the services of the Claimant and he was not aware if the claim for the sum of Kshs. 86,000/- as there was no agreement for the reimbursement.

6. In cross-examination he testified that he was based in Nakuru and that he was conversant with happenings at the branch. He said there was no evidence of the Claimant's service at Kericho and if the Claimant had worked at Kericho he would have known. He was not aware of the payment of Kshs. 35,000/- as he is the person in charge of the payroll.

He was aware of the Claimant's claim on his termination. He stated that that Claimant came asking for employment in May and that is why the Claimant was employed and he was on probation till October 2015. He testified that the probation period under the contract was extended for a further 2 months through the letter of 14th November 2015. The probation was to last till February 2016. He stated that the letter of 14th November 2015 was given to the Claimant. He said the Claimant came to the office and talked to the Secretary General. He testified that the termination was because the Claimant failed to perform. He stated that the employees who sought for the return of the Claimant were of the category of elected union officials and the Claimant was an employee of the Union and the branch committee could not seek reinstatement as it could only seek the reinstatement of elected branch officials. He stated that he knew Mr. Were who was from a different tribe from his and that they were not related. He stated that the allegation which the Claimant made was misleading the court. He testified that the Respondent realized the Claimant was illegally in office and the Claimant was not paid as he was not supposed to be still in the office. In re-examination he stated that the executive committee of the branch are not employees of the Claimant. That marked the end of the Claimant's contract of employment.

7. The Claimant submitted that the issues for determination were whether the Claimant was on probation prior to his termination, whether the termination was procedural and lawful, and whether the Claimant is entitled to the reliefs sought. He submitted that the provisions of Section 42 of the Employment Act made provision on the extension of the probationary period and that it was not extended. He stated that the period could not be extended to February 2016 when he worked as the extension for 2 months from November 2015 would expire in January 2016. He submitted that Section 41 of the Employment Act provided that before termination on grounds of misconduct or poor performance, an employee was to receive an explanation in a language he understands, the reason for which the employer is considering the termination. He submitted that the employee was entitled to have an employee of his choice present during the explanation. He submitted that as per Section 43 of the Employment Act, the dismissal was unfair within the meaning of Section 45. He submitted that he was dismissed contrary to the provisions of the law and the rules of the union. He submitted that he had proved he expended the sum of 86,000/- as personal expenses. He thus sought the reliefs in his claim before court which included unpaid salary and compensation for unfair dismissal, reinstatement as well as costs of the suit.

8. The Respondent submitted that it was under no obligation to treat the Claimant as an employee as he was under probation as provided for under Section 42(1) of the Employment Act. The case of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** where Rika J. held that there was no obligation under Section 43 and 45 for employers to give valid and fair reasons for termination of probationary contracts or to hear such employees at all. It was submitted that the employee was terminated in accordance with the employment contract and the termination was not actuated by any unfairness. It was submitted that the Claimant was disqualified from the protection of the law under Sections 41, 43 and 45 of the Employment Act. It was submitted that he was given a termination notice on 9th February 2016 and that the Claimant was paid his dues and therefore not entitled to any other sum.

9. The Claimant was an employee of the Respondent a union that is in the agricultural sector. He alleges he worked in Kericho and was paid some 35,000/- for the two months before he moved to Nanyuki. He exhibited the letter of employment which indicated that it was an appointment. It seems odd that he was appointed to a position in Nanyuki while he was allegedly an employee in Kericho. An employee would be transferred not appointed. The fact that there is no correspondence is itself telling. He never raised the issue of appointment versus the transfer he would be entitled to as an employee. It is therefore clear the issue of employment at Kericho was pure fiction. As regards the sums he allegedly expended on account of the service at Timau Meru branch of the Respondent, he did not give even a single letter demanding the sums. He did not point out to the court when the particular sums were expended and how they accumulated to the sum of Kshs. 86,000/- which is slightly more than the salary equivalent of 4 months service. He seemed to have made up the issue as well. He did not prove the sum was due and owed to him by the Respondent. As regards the probation period, his contract dated 7th May 2015 stated clearly that he was on probation for 6 months. This period was to expire in November 2015. The Respondent has not exhibited a letter extending the probationary period. The Claimant sought refuge under the provisions of the constitution of the union. Sadly that constitution applies in respect of elected officials and regulates the conduct of members of the union not employees. The dismissal of the Claimant was allegedly for poor performance. He was dismissed in February 2016 after the probationary period had expired. He was entitled to the safeguards under Section 41 of the Employment Act as Section 42(1) did not apply as he was not serving probation. The case of **Danish Jalang'o v Amicabre Travels** though sound reasoning is not applicable. This was not a contract under probation. As the Claimant was not granted the protection under the Employment Act, his dismissal was unfair within the meaning of Section 45. He is entitled to compensation. He worked for 9 months. He claims the full 12 months as compensation. He worked for a relatively short period of time and the infarction in not according him a hearing was on account of the Respondent failing to apply the principles of fairness in Section 41 of the Employment Act. Compensation of 3 months would suffice for this infarction. He therefore is entitled to the following:-

- a. Pay for 9 days worked in February 2016 Kshs. 6,000/-
- b. One month notice Kshs. 20,000/-
- c. Compensation for 3 months Kshs. 60,000/-

d. Costs of the suit

e. A certificate of service

f. The sums in a), b) and c) will be subject to statutory deductions.

It is so ordered.

Dated and delivered at Meru this 3rd day of October 2018

Nzioki wa Makau

JUDGE