



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1578 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

ELIZABETH MWIKALI MWENDWA.....CLAIMANT

VERSUS

KENYA INVESTMENT AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant, Elizabeth Mwikali Mwendwa, filed a Memorandum of Claim dated 15/09/2011 against the Respondent, Kenya Investment Authority and after the Court allowed her to amend her pleadings on 10/10/2011, she filed an Amended Memorandum of Claim on 21/10/2011. She later on again filed an Amended Memorandum of Claim on 14/02/2017.

2. She avers that she was employed as an Executive Administrative Assistant (Grade 7) on 06/08/2010 after applying for the said job, attending an interview on 21/06/2010 and passing the said interview and that she faithfully served the Respondent until her unfair downgrade to an Administrative Assistant (Grade 5) on 25/08/2011.

3. She further avers that she presented valid certified copies of her university transcripts, original result slips and a letter from Kenyatta University confirming she had completed her studies and on 26/07/2011, she sought an extension of time to January 2012 to avail her degree certificate with the university having explained the delay.

4. She also avers that she received a letter from the Respondent on 02/09/2011 relieving her of her duties with the reason that the Respondent could not confirm her employment status. She contends that the decision to downgrade her, deduct her salary and further seek a refund of salary paid to her is malicious, callous and unjust.

5. She prays that judgment is entered against the Respondent for:

- 1. Compensation for unfair and unlawful downgrade of the Claimant's salary scale and office of appointment.***
- 2. Damages for unfair and unjustified demotion of the Claimant.***
- 3. Compensation for all monies unfairly attached and withheld and/or garnished from her salary while she was on grade 7 pay scale with the Respondent.***
- 4. Costs of the suit.***
- 5. General damages.***
- 6. Any other or further relief that this Honourable Court may deem just and fit to grant.***

Respondent's Case

6. The Respondent filed its Amended Memorandum of Reply dated 16/08/2017 on 28/08/2017 contending that it shall be applying to Court and/or seeking to have the Amended Memorandum of Claim struck out for not disclosing any reasonable cause of action against it and that notice was thereby given. It confirmed that it interviewed the Claimant after she applied for employment on 28/04/2010 and consequently employed her on probationary terms of six months with a possibility of extending her probation depending on the performance of her duties.

7. The Respondent further avers that the Claimant completed her probation period in February 2011, she had failed, neglected and/or refused to meet the Respondent's prerequisite requirements by failing to bring and/or produce her Original Degree Certificate after being verbally requested various times by officers of the Respondent between the months of March 2011 to April 2011 to complete the prerequisite matters which were also conditions in her offer of appointment.

8. It avers that it held a meeting on 05/07/2011 and 19/07/2011 and passed a resolution that the Claimant be issued with a 7 days' notice to produce her original degree certificate and when its Disciplinary Committee met on 26/07/2011 to resolve the matter, it was informed that the Claimant did not attend because she was unwell and the committee postponed the matter to the following week. That on the same day before the committee had closed its proceedings, it received an envelope from the Claimant which they did not open but which later on established that she was seeking an extension of time to produce the said certificate, which extension was unacceptable to the committee because 12 months had lapsed since she had accepted the position with the Respondent.

9. The Respondent further avers that the Claimant misrepresented herself as having the qualifications in her respective field and that the onus of proving whether she actually possessed or owned a Degree Certificate lay with her and which she did not prove to the Respondent as at the date of her dismissal. That it could not confirm her employment, which information they communicated to her in a letter dated 02/09/2011 and that it is clear its actions were above board and the Claimant has not made any case against it. Further, that since the Claimant was aware of the terms and conditions of employment, she cannot now accuse the Respondent of acting unlawfully and negligently and that her actions are malicious and intended to unjustly enrich herself at its expense.

Evidence

10. The Claimant testified that the Respondent was fully aware that she did not have her Degree Certificate at the time of offering her employment and in cross-examination she stated that her degree certificate was finally issued in December 2011. On the other hand, RW1 the current Human Resource Manager of the Respondent testified that probation was 6 months and could be extended for another 6 months at the discretion of the Respondent's Managing Director and that the Claimant was given a letter dated 08/08/2011 downgrading her to scale 5.

11. In cross-examination she confirmed that the Respondent did not call the Claimant to a meeting to explain herself after receiving her letter requesting for an extension of time.

Claimant's Submissions

12. The Claimant submits that the issues for determination are whether she was unfairly downgraded and unlawfully terminated from employment by the Respondent and whether she is entitled to damages for wrongful dismissal.

13. She submits that the Respondent failed to confirm her employment or extend her probation period as provided in **Section 42 of the Employment Act 2007** and cites the case of **Hesbon Ngaruiya Waiga -v- Equatorial Commercial Bank Limited [2013] eKLR** where the Court faced with similar circumstances Held:-

"Section 42 of the Employment Act relate to the termination of probationary contracts. From the evidence of the respondent I take it that the claimant was still held to be on probation even after serving them forever 16 months. The termination was therefore on the basis of a probationary contract that exceeded six months. This is a misapplication of the provisions of the contract as between the claimant and the respondent as the clause on probation provided for 6 months, which could not be extended for more than the legal period of one year and could be terminated within seven days. However, the respondent decided to rely on this clause for the termination of the claimant as well as not affording him other benefits due to other employees similar placed as him. He could not access loan facilities due to the status of his contract, being on probation, he could be terminated with a 7 days' notice under the law or as under his contract for one month. He was never considered as a permanent employee who could earn long term benefits like a loan that would take time to repay. This was an unfair labour practice under the meaning of section 45 of the Employment Act."

14. That there is no sufficient evidence to prove that the Respondent indeed asked her verbally to produce her certificate and further, that there is a clear statutory procedure to be followed before an employee can be terminated as indicated in **Section 41 of the Employment Act**. That the Respondent's decision to downgrade her and later terminate her employment one year after employment after she had decided to initiate legal proceedings was unprocedural, unlawful and unfair. That its claim of summary dismissal as a rightful action should fail because it has not shown its grounds as listed in **Section 44 of the Employment Act** nor complained of her inability to perform her duties.

15. Further, that she was not called to any disciplinary meeting and was not aware of the meetings held by the Respondent on the 5th and 19th July 2011. That the decision of the disciplinary meeting was made contrary to statute and she cites the case of **Mwendwa Maluli vs The Kenya Power and Lighting Company Limited [2014] eKLR** where the court held that:-

"The Employment Act 2007 under Section 41 [1] and 41 [2] do not envisage disciplinary hearing on paper; disciplinary hearing entails the physical hearing of the affected Employee, in the presence of his Co-employee or shop floor Trade Union Representative. This is physical participation, not paper representations. It is not possible that there is a hearing, in which the Employee and his Representative participate, without appearing at the disciplinary forum in their physical bodies. The physical presence of the Employee and his Representative are part of the minimum statutory disciplinary procedure, and anything short of a physical appearance would be in violation of minimum employment standards."

16. It is submitted by the Claimant that she is therefore entitled to damages for unlawful and wrongful termination and that the Court should also be guided by the statutory remedies in **Section 49 of the Employment Act**. She denies that she is seeking to be reinstated to her previous position as she is already employed and contends that the Respondent cannot claim that it was non-confirmation of employment because from its conduct it was implied that her employment had been confirmed since it was a year after the probation period. She prays

that she be awarded costs of the suit with interest at Court rates.

Respondent's Submissions

17. The Respondent submits that the main issue for determination is whether it unfairly and unlawfully downgraded the Claimant's salary scale and office/appointment. It contends that the letter from the university indicated that the Claimant had completed her coursework and not that she had completed her degree and it even stated that they were investigating her missing results.

18. It submits that **Section 41 of the Employment Act** does not apply to contracts under probation as stipulated in **Section 42(1) of the Act** and that therefore issues of due process or issuance of reasons before termination could not apply and cites the case of **Nairobi Cause No. 1552 of 2011, Victor Owuor Okeyo Vs African Banking Corporation Limited eKLR.**

19. Further, that there is also no obligation under **Sections 43 and 45** for employers to give valid and fair reasons for termination of probationary contracts or to hear such employees at all and that termination of such contract is strictly regulated by the terms of the contract. It avers that the employer retains the discretion whether to confirm or not confirm an employee serving under probation and that the law to unfair termination does not apply in probationary contracts.

20. The Respondent finally submits that the Court finds on the balance of the evidence on record that the Claimant has failed to discharge the burden of proof imposed on her by statute and that its evidence in this matter was unshaken. It urges the Court to find that the claim herein has no merit and should be dismissed with costs to the Respondent.

21. I have examined all the evidence and submissions of both parties. The issues for determination are as follows:-

1. Whether the Claimant was serving on probation at the time of termination.

2. Whether the termination of the Claimant was lawful.

3. Whether Claimant was entitled to remedies sought.

22. The Claimant was indeed employed by Respondent vide a letter dated 6.8.2010. The letter indicated that she was to be on 6 months' probation period which could be extended at the discretion of the Managing Director, depending on the performance of her duties.

23. The Claimant was not confirmed in employment at the end of the 6 months period which was February 2010 but in May 2010 she submitted her original results slips and explained the delay in getting her degree certificate despite finishing her degree course in 2006/2007 academic year.

24. It appears that the Respondent had demanded she produces proof of her graduation as a prerequisite to her being confirmed in employment. Infact she was served with a letter to produce the said degree certificate vide a letter dated 19.7.2011. The degree certificate was never submitted and this prompted the Respondent to terminate her employment on 2.9.2011. The indication by the Respondent was that the Claimant could not be confirmed in employment unless the degree certificate had been submitted. There is no express communication about this deferment of confirmation but the letter exhibited before Court where Respondent kept demanding for the degree certificate are an indication that the Claimant was still on probation until she submitted her degree certificate.

25. Under Section 42(2) of 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".

26. The understanding is that probation period can be 6 months but could be extended to a total of 12 months. The Claimant having been employed on 6/8/2011, the maximum probation period could go upto 8.8.2011. By 8/8/2011 the Claimant had not been terminated and had not been informed that the probation employment had been terminated. She was finally terminated on 2.9.2011. This was after the 12 months maximum period allowable for probation.

27. Under Section 42 (2) the probation period of 12 months may only be extended for a further period of not more than 6 months. After the 6 months extension, an employee cannot be deemed to be on probation.

28. It is for this reason that I find that the Claimant was not on probation when she was terminated on 8/8/2011.

29. Under Section 41 of Employment Act, an employee who is not on probation cannot be terminated without following the due process envisaged herein where the employee must be given opportunity to be heard and make her own representation.

30. There is no indication that the Claimant was invited for any disciplinary hearing and informed on reasons for which the Respondent was considering terminating her services. Under Section 45 of Employment states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..”.

31. In view of this provision of law, it is my finding that the Claimant's termination was unfair and unjustified. I therefore find for the Claimant and I award her as follows:-

1. 1 months' salary in lieu of notice = 137,040/=.

2. 6 months' salary as compensation for unlawful termination = 6 x 137,040 = 822,240/=

Total = 959,280/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Muya for Claimant – Present

Respondent – Absent