



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 2276 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st March, 2017)

THOMAS AUSTIN OBULUTSA.....CLAIMANT

VERSUS

NACADA.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his claim on 19.12.2014 through the firm of Ms Ojienda & Company Advocates. The Claimant's case is that on 30th October 2013, he was employed by the Respondent as Manager, Medical/Rehabilitation (NAC 8) with effect from 4th December 2013 on permanent and pensionable terms at a salary of 118,400/=. The salary was reviewed on January 2014 backdated to November 1st 2013 to gross of 218,400/=.
2. The Claimant avers that it was a term of his contract that he would serve 6 months probationary contract from 4th December 2013 to 4th June 2014 which period he completed. After completion of the probation period, there was no communication from the Respondent on the status of his employment and he presumed that his employment had been confirmed.
3. However, on 27th June 2014, the Respondents decided to extend his probation period for a further two months backdated from 4th June 2014 to 4th August 2014 which period he underwent without complaint to its conclusion.
4. After conclusion of this extended period, the Respondent also never made any communication to him on his status and he presumed he had now been confirmed on permanent and pensionable terms. He continued discharging his services as per the terms of his contract. On 4th August 2014 till 3rd December 2014 when the Respondent terminated his contract on the grounds that the Board of the Respondent had refused to confirm his employment.
5. The Claimant avers that the Respondent took unreasonable delay to notify him of their opinion or decision concerning the probation since the letter of offer required them to communicate the same at the end of the probationary period. He also contends that they also never offered to pay him his terminal dues totalling to 3,068,400/=.
6. He contends that his termination is unlawful, illegal and unjustified and has caused him great

economical and financial loss, mental strain and is prejudicial to his career.

7. He avers that the provision of the law i.e. Section 35, 37, 42(2), 45 and 49(1) (c) etc of the Employment Act 2007 and the Constitution were flouted and he seeks payment of his dues as prayed all totalling to 3,068,400/=.

8. The Claimant gave oral evidence in Court and was cross examined and in cross examination stated that he worked for 12 months to time of termination and his probation period was extended for 2 months because he had to be appraised.

9. He stated that final say on appointments is supposed to come from the board as per page 35, Clause 3.4.3. He stated that the termination letter also referred to wrong details about him and the letter was never corrected.

10. He states that he was not given any reason as to why he was terminated. That an Appraisal was done on 1.7.2014 (page 11 to 20) and results was a recommendation that he be confirmed.

11. He stated that as per page 38 of the Respondent's Manual if probation was to be extended, he was to be informed and to be told areas of weakness to improve upon.

12. The Respondent opted not to call any evidence. They however filed their response on 2/3/2015 through the firm of Rachier & Amollo Advocates.

13. They admitted that they had employed Claimant as Manager, Medical/Rehabilitation. However, they aver that the engagement was subject to a probationary period which period was extended in accordance with the law.

14. Confirmation was subject to the satisfactory performance of the Claimant.

15. That the Claimant made an erroneous presumption that he had been confirmed and he was notified of all decisions in good time.

16. They aver that they are ready to pay the Claimant 1 week salary in lieu of notice, leave days and days worked in December 2014 and only after he clears with the Respondent.

17. They contend that the termination was lawful and they submit that the demands are unwarranted and unfounded and they want this claim to be dismissed.

18. The Respondent have also Counter claimed for Kshs.171,500/= against the Claimant being illegally held imprest.

19. The parties also filed their submissions and the Claimant submitted that he was not on probation when he was terminated and so the termination was unfair. He cited Learned **JJ Mbaru & Rika in Hesbon Ngaruiya Waigi case No. 60 of 2013 and Industrial Cause No. 1068/2012** respectively in this end.

20. He also submitted that he was discriminated upon and denied his employment benefits. He avers that the Respondent's Code of Conduct did not bind him as he was not presented with one.

21. The Respondents on their part submitted that the Claimant was terminated during his probation period and was only entitled to a 7 day notice period as provided under Section 42 of Employment Act 2007. They cited **Danish Jalang'o & Another vs. Amicabre Travel Services Limited (2014) eKLR.**

22. They therefore submit that the Claimant was not unfairly terminated and he is not entitled to any terminal dues and benefits as prayed except for the just dues being 7 days' notice period. They also state that the Claimant still holds an imprest of 171,500/= which they are counter claiming.

23. Having considered evidence and submissions of both parties, the issues for determination by this Court are as follows:

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

2. Whether the termination of Claimant was unfair and unjustified.

3. Whether the counter claim is proved.

4. What remedies to award in the circumstances.

24. On the 1st issue, the Claimant was employed on 30th October 2013 as per Appendix TAD-1. Under Clause 4 of the letter of appointment:

“Probation

This appointment will be subject to a probationary period of six (6) months. At the end of the probation period, the Authority reserves the right to terminate the appointment depending on your performance”.

25. According to this letter, the probation period was then to end on 30th June 2014. However, the Claimant reported on duty on 4th December 2013 and so the period of probation was to run upto June 4th 2014.

26. At the end of this period, the Respondent did not communicate to the Claimant until 27th June 2014 and this through Appendix TAO.3 extending his probation period for a period of 2 months with effect from 4th June to 4th August 2014.

27. In the letter extending the probation period, the Claimant was informed as follows:

“Due to unavoidable circumstances, it has not been possible to undertake your appraisal as per the terms. Further as a Senior Officer, the Board makes the final decision on the confirmation of staff at this level”.

28. In essence the Respondent through the CEO was explaining why the probation period was extended. This was to be subject to staff appraisal.

29. The Claimant told the Court that the appraisal was finally carried out on 1.7.2014 (page 11 to 20) of his documents and it was recommended by his supervisor including the 2nd supervisor, the CEO that the Board should confirm him in employment.

30. 5 months later, the Respondent received a letter dated 3-12-2014 indicating that the board had reviewed his employment contract and decided not to confirm him to the position of Manager, Treatment and Rehabilitation. The services stood determined from that day.

31. The Claimant had now worked for Respondent for a period of 12 months having reported on 4th December 2013 and being terminated on 3rd December 2014.

32. 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”.

33. The reading of this Section shows that a probation period may be extended for a further 6 months. In case of the Respondents, they extended the probation period for 2 months and they gave reasons for the

extension to allow the appraisal.

34. The appraisal was finally conducted in July 2014 and even when the 2 months extension ending August 2014 came to an end, the Respondent chose to keep quiet until December 4th, 2014, when they terminated the services of the Claimant.

35. What is the effect of silence upon the expiry of a probation period?.

36. In **Industrial Court Case No. 297/2011 (Nairobi) Gichuki Kaburuku vs. Postal Corporation of Kenya**, I alluded to this position and stated that:

“The wordings of Section 42 are couched in mandatory terms implying that the provision must be adhered to.

Having said that, the extension probation period was contrary to law, it implies that the probation period ceased automatically at the end of 12 months and could not be extended even by a single day.....”.

37. In the above case, the Respondent had purported to extend probation period by a further 6 months after the 12 months’ probation period.

38. In the current case, the Respondents extended probation for 2 months and this was within the law. But upon expiry of the extended period, the silence on the part of the Respondent meant confirmation.

39. In **Christopher Kisia Kivango vs Amicabre Travel Services Limited (supra)** Hon. J. Rika found that extension of probationary period without the consent of the employee is unlawful and amounts to breach of terms of probation. In the instant case, there was not only silence but also non consultation or any extensions.

40. In this Court’s view, the moment the extended 2 months’ probation period ended and the Respondent kept mum, the Claimant was confirmed in employment.

41. The letter of December 3rd 2014, came about too late in the circumstances and could not be a basis of non-confirmation in employment.

42. The termination then coming in December 2014, should have conformed to the provisions of Section 41 of Employment Act 2007 which in this case were not followed and therefore in answering issue No. 1 and 2 above, the Claimant was dismissed after his probation period and therefore the termination was unfair and unjustified as he was not given any reason for the termination and due process was not followed.

43. It is my finding that the termination was unfair in terms of Section 45(2) of Employment Act which states that:-

(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.

44. On issue (3), the Respondent have counter claimed against the Claimant for 171,500/= for an imprest held by the Claimant. Other than just claiming for the stated amount, the Respondent didn't have any documents presented in Court upon which to prove their case. The counter claim remains pleaded but not proved and is dismissed accordingly.

45. Having found as above, I find the Claimant is entitled to the prayers sought in his claim and I award him as follows:

1. 1 months salary in lieu of notice = 223,800/=;

2. Leave earned but not taken (1 month) = 223,800/=;

3. 12 months compensation for unlawful and unfair termination= 12 x 223,800 = 2,685,600/=;

4. TOTAL – 3,133,200 less statutory deductions

5. Certificate of Service;

6. Costs of this suit and interest at Court rates with effect from the date of this judgement.

Read in open Court this 1st day of March, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent