



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 22 OF 2017

JOSEPH WACHIRA KIMANI.....CLAIMANT

VERSUS

DATAGUARD DISTRIBUTORS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimant filed the memorandum of claim dated 17.01.2017 through Kihanga & Company Advocate. The claimant prayed for judgment against the respondent for:

- a) A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b) An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits or in alternative payment of Kshs.400,000 x 12 x 25 (60 years age of retirement less 25 years current age of claimant) making Kshs.120,000,000.00.
- c) Special damages of Kshs. 6, 388, 167.00 and the amount as pleaded in paragraph 15(unpaid commissions Kshs.858, 167; unpaid performance pay for February 2016 Kshs.200,000.00; unpaid performance pay for March 2016 Kshs.200,000.00; 21 leave days Kshs.280, 000; and compensation under section 49 of Employment Act, Kshs.4, 800,000.00)
- d) Costs and interest at court rates till full payment.
- e) Any other relief that the honourable court may deem fit to grant in the interest of justice.

The respondent filed the statement of defence on 16.03.2017 through Gachie Mwanza & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent offered the claimant appointment for the position of managing director per letter of offer dated 01.11.2015. The letter set out clear targets attached to the position together with other performance expectations. The letter provided thus, **“Probation: There will be a 6-month probation during which you will be expected to study and understand our products, processes, internal culture and that of external partners. Your confirmation to a full employment will be subject to an evaluation on the performance and clear demonstration growth towards achievement of targets detailed above. The management needs to be convinced that the 6 months have been spent well and you achieved the desired competence level failure to which we will terminate the engagement and a formal contract will not be issued.”** The employment was effective 01.01.2016 so that the 6 months' probationary service

was ending on or about 01.07.2016.

On 24.05.2015 the claimant received a letter of termination signed by the respondent's chief executive one James Kinyua. The letter stated as follows:

“RE: UNSUCCESSFUL PROBATION PERIOD (TERMINATION OF CONTRACT – PROBATION)”

Dataguard Distributors Ltd wishes to let you know that your probationary employment has been unsuccessful. Your performance during the period has been unsatisfactory and despite the various shortcomings being pointed out you have not demonstrated initiative to resolve them.

Kindly prepare handover notes and submit all company assets in your custody to the CEO by 1st June 2015. Any payments due to you will be processed subject to a complete and comprehensive handover and submission of clearance form signed by department heads.

We wish you well in future endeavours.

Yours sincerely,

Signed

James Kinyua

Chief Executive Officer”

The claimant states that he was shocked by the turn of events as the said James Kinyua had been the chairperson of the respondent's board of directors but had suddenly assumed the office of the chief executive officer as per the termination letter the claimant had received. The claimant states that he was not subjected to any disciplinary or other proceedings prior to the termination and after clearing as directed, he was not paid the terminal dues. Thus, he filed the present suit.

The respondent's case is that the claimant was on probationary service for 6 months from 01.01.2016 and due to end on 30.06.2016. Further, the contract was clear that the claimant would be given a formal contract of employment or be confirmed in appointment subject to evaluation by the management and it was not for the claimant to say he had performed satisfactorily. The respondent's case was that the claimant failed to show satisfactory performance during the probationary period and he was given a termination letter on 24.05.2016 (wrongly dated 24.05.2015) taking effect on 01.06.2016 which was a 7 days' notice within section 42 of the Employment Act, 2007. The respondent's further case was that the claimant's unsatisfactory performance was manifested in his decisions which occasioned financial losses to the respondent. Thus, the claimant had not been unfairly terminated. The claimant had been paid all his terminal dues and he was not entitled to the remedies as prayed for.

The **1st issue** for determination is whether the termination of the probationary contract of service was unfair. It is not in dispute that at the time of the termination, the claimant was on a probationary service. Section 42 of the Employment Act, 2007 provides for termination of probationary contracts of service as follows:

- 1) The provisions of section 41 shall not apply where a termination of employment terminates probationary contract.**
- 2) 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.**
- 3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**

4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

The claimant received the termination and notice of termination letter on the midnight of 24.05.2016 by email and to the effect that the contract of service would terminate effective 01.06.2016. The court returns that the termination notice was issued per section 42 (4) of the Act and in absence of better terms of service or agreement providing for a longer period for a termination notice of the probationary service, the court returns that the respondent complied with the minimum statutory provision. Accordingly, the termination was not unfair. As submitted and as held by **Rika J** in **Danish Jalang'o and Another – Versus- Amicabre Travel Services Limited [2014]eKLR** employers have no obligation to hear employees who are serving probation for any reasons stated under section 41 of the Act on account of poor performance, misconduct, or physical incapacity prior to terminating the contract of probationary service. Further, as held by **Rika J** in **Dixon Amdama –Versus Tiwi Beach Resort [2015]eKLR**, it is unreasonable for an employee whose probationary contract of service has been lawfully terminated to demand anticipatory salaries and benefits to the end of such probationary contract as such employee would not have rendered any work for such remaining term of the contract. Accordingly, the court returns that the claimant was not justified to make claims for anticipated salaries and benefits up to the alleged retirement age of 60 years.

The **2nd issue** for determination is whether the claimant is entitled to the prayers for unpaid commissions, unpaid performance dues, and 21 leave days. The court returns that he is not entitled as prayed for. First the court returns that the claimant failed to provide the evidence and justification for the prayers as he stated that he had not filed the relevant documents that would establish the claims. Second, the claimant had not served for 12 consecutive months as envisaged in section 28 (1) (a) of the Employment Act, 2007 and the court returns that no annual leave had accrued as claimed for.

Finally, the court returns that the claimant is entitled to a certificate of service.

In conclusion judgment is hereby entered for the parties for:

- a) The declaration that the termination of the claimant's employment by the respondent was not unfair or unlawful.
- b)The respondent to deliver a certificate of service to the claimant within 7 days from the date of this judgment.
- c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE