



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 8 OF 2015
MERCY MACHIYACLAIMANT
VERSUS
THE AFRICAN POPULATION AND
HEALTH RESEARCH CENTRE (APHRC-K) RESPONDENT

Mr. Lutta for claimant

Mr. Otieno for respondent

JUDGMENT

1. The claimant relies on a statement of claim filed on 8th January 2015 and amended on 12th March 2015.
2. The respondent filed a statement of Defence on 5th March 2015 which was amended on 20th March 2015.
3. The parties filed witness statements and bundles of documents upon which they rely.
4. Claimant testified under oath and the respondent called RW1, Alex Ezeh who testified in support of the respondent's case.

Facts not in dispute

5. The claimant was employed by the respondent in the position of Program Manager for its CARTA Program by a letter dated 22nd July 2013, to commence work on 26th July 2013 earning a gross monthly salary of USD 5,833 per month.
6. In terms of the contract she was placed on 6 months' probation.
7. On 9th April 2014, the claimant was appraised on her performance in which she rated herself at 1.3 while the supervisor rated her at 2.4. The respondent found the claimant's appraisal unsatisfactory and the claimant's probation was extended by a further six (6) months upto 30th November 2014. The extension was to give the claimant time to improve her performance and she was sponsored to undertake a course in South Africa, on writing skills to improve her report writing skills. The claimant was given a

letter dated 26th June 2014, for the said extension of probation.

8. On 28th November 2014, the claimant's performance was appraised again and the claimant rated herself at 2 while the supervisor rated her at 2.4.

9. Following the appraisal, a meeting was held on 9th December 2014 in which the claimant's performance was discussed and she was informed that she would not be confirmed in employment, hence her employment was terminated and she received a letter of termination dated the same day 9th December 2014. The claimant was in the said letter given one month's notice of termination upto 8th January 2015.

10. On 18th December 2014 the claimant sent to the respondent a letter appealing her termination on the basis that as at the time of termination, she had served the respondent for 15^{1/2} months and was therefore no longer under probation.

11. The respondent responded to the appeal by a letter dated 29th December 2014 and reiterated that the claimant's performance had remained consistently poor but extended her termination notice by a further two months upto 8th March 2015, in recognition of the contractual term that applied upon completion of probation.

12. The claimant moved to court on 8th January 2014 seeking the court to restrain the respondent from terminating her contract. Interim orders were granted. The suit proceed on the merits and was closed on 19th December 2016.

13. By a consent order recorded on 23rd October 2015, the defence reached settlement on part of the claim and the pending issues for determination are as follows;

- (i) whether the termination of employment was for a valid reason and in terms of a fair procedure.
- (ii) what remedy if at all is available to the claimant.

Determination

Issue (i)

14. The claimant obtained interim orders from the court which remained in force for 10^{1/2} months until 23rd October 2015 when the parties compromised the interim orders vide a consent order dated 23rd October 2015. The claimant remained in employment pursuant to the interim orders and continued to receive her salary until the orders were lifted by the consent order.

15. However, it is not in dispute that the claimant was not allowed to perform her work during the period and instead respondent opted to pay her salary for no work performed.

16. The claimant's employment remained constructively terminated by fact of the refusal by the respondent to allow her to perform her duties. This tribulation came to an end on 23rd October 2015, upon entry of consent order.

17. According to the respondent's Human Resource manual, appraisal were to be conducted in line with section VIII. The section provides thus;-

“Every staff member will have his/her work performance and contribution towards APHRC's objectives evaluated annually or when considered appropriate.

The first step of the performance management appraisal process is the drafting of an annual work

plan by the staff member and supervisor. The plan will include objective indicators of satisfactory performance that will be the basis for the staff member's subsequent evaluation."

(Emphasis mine).

This was not done in the claimant's case.

18. Furthermore Clause 'G' of the Human Resource Manual provides;

"the Executive Director, after careful consideration and review with appropriate staff members of a staff member's unsatisfactory performance, will give written notification to the staff member of a decision to terminate his/her appointment unless significant improvement can be achieved within a stated period of time." (Emphasis mine)

19. It is not in dispute that no such notice was given. Indeed, the claimant's employment was terminated on the same date she received the letter of termination on 9th December 2014. She was only to serve notice of termination until 8th January 2015. This period was extended upon appeal but not for purposes of reviewing her performance but was a terminal notice.

20. Clearly the respondent did not follow its own procedure prescribed in cases of termination for poor work performance. For this reason the termination violated the contract of employment between the claimant and the respondent and was therefore unlawful.

21. Secondly, the claimant having completed probation period ought to have been subjected to the provisions of sections 41, 43, 44 and 45 of the Employment Act, 2007. In this respect, the claimant ought to have been given a notice to show cause why her employment ought not to be terminated for poor work performance. This was to be followed by a written explanation by the claimant and if the explanation was found wanting, was then to be subjected to a disciplinary hearing in terms of part 'J' of the Human Resource Manual and in conformity with section 41 of the Act.

22. It is apposite to note that the employee should have been notified of her right to be accompanied by a colleague of choice in such an intended hearing, which was clearly not done.

23. Thirdly, it is clear from the documents before court that the rating given to the claimant at 2.4 by the supervisor on both occasions was not agreed upon in terms of section 4 of the performance manual at page 10.

24. In the case of **Kenya Science Research International Technical and Allied Workers Union (KSRIWU) Vs. Stanley Kinyanjui and Magnate Ventures Limited; Industrial Court Cause No. 273 of 2010**, it was held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and to give them opportunity to improve over a reasonable length of time. In the opinion of the court, 2 – 3 months would be reasonable.

25. Further in the case of **Jane Wairimu Macharia Vs. Mugo Waweru and Associates (Industrial Court Cause No. 621 of 2012)**, the court held that a credible performance appraisal process must be evidently participatory.

26. In the present case, the procedure set by the respondent itself for its employees was not followed.

27. The termination of employment for poor work performance was unlawful and unfair for failure to follow its own procedure. The court also finds that the rating given to the claimant of 2.4 was indeed indicative of 'good performance' in terms of its own manual.

Issue ii

28. In terms of the amended statement of claim, the only remedy outstanding, following the consent by

the parties is compensation for unlawful dismissal and payment of three month's in lieu of notice.

Notice pay

29. With regard to the issue of notice, it is not in dispute that the claimant having completed probation was entitled to the notice period of three months provided in the contract of employment. This item was not agreed upon in the consent recorded by the parties on 23rd October 2015. The claimant was allowed to work for three months upon termination and indeed worked for a total of 10^{1/2} months on the basis of the interim orders given by the court. The court finds that the claimant having served the notice period is not entitled to payment in lieu of notice.

Compensation

30. In terms of section 49 (1) (c) of the Employment Act, the claimant is entitled to compensation for unlawful and unfair termination of employment taking into account the relevant consideration under section 49 (4). The claimant was a foreign national from Zimbabwe and had been induced to terminate a good job in Namibia, by the offer made to her by the respondent. The loss and damage caused by the termination after only 15^{1/2} months of service was immense seen in this light.

31. The claimant was yet to serve 20^{1/2} months of her contract at the time of termination.

32. The claimant served 10^{1/2} more months up to the time a consent was entered into. The claimant is entitled to specific performance of her contract, especially because, she had relocated from her home country and had legitimate expectation that she would complete her three year contract and get paid the full salary in respect thereof.

33. The court takes into account that the respondent paid salary for ten months prior to the consent and that it agreed to pay other terminal benefits to allow the claimant to return to her own country. This ameliorated the loss and suffering on her part.

34. The court relies on the Decision in the case of **Pravin Bowry EACC, ELRC [2013] eKLR** to find that the claimant is entitled to damages equivalent to the uncompleted term of her contract equivalent to 10^{1/2} months salary in the sum of USD 61,249.65.

35. In the final analysis Judgment is entered in favour of the claimant as against the respondent for US Dollars 61,249.65 with interest at court rates from date of filing suit till payment in full.

36. Costs to follow the outcome.

Dated and Signed at Nairobi this 18th day of August, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE

Dated, Delivered and Signed at Nairobi this 18th day of August, 2017.

JORAM NELSON ABUODHA

JUDGE

Delivered in the presence of:

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