



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.604 OF 2014

NARRY PHILEMONS ONAYA-ODECK.....CLAIMANT

VERSUS

TECHNICAL UNIVERSITY OF KENYA

[FORMERLY, THE KENYA POLYTECHNIC

UNIVERSITY COLLEGE).....RESPONDENT

JUDGEMENT

1. The claimant was on 14th April, 2011 offered by the respondent employment as the College Registrar and Secretary upon terms contained in his letter of offer and under the Terms and Conditions of Service dated 15th November, 2010.
2. On 16th April, 2011 the claimant accepted the offer of employment and with it were express terms and conditions that it would run for 3 years on a monthly remuneration of Kshs.216,000.00. the claimant was entitled to various allowances for responsibility, leave travel, passage and baggage, subsistence, car, entertainment, medical, housing, utility and furniture. The claimant would be subject to 6 months probations which would be undertaken in terms of the Terms and Conditions of Service.
3. The claimant commenced employment with the respondent on 8th June, 2011 and remained in such employment for 10 months and ending on 18th April, 2012. Upon completing the probation period of 6 months on 8th December, 2011 the claimant was not notified of any extension or termination of his contract of service in terms of clause 11.2 of the Terms and Conditions of Service. Onwards, the contract could only be terminated in accordance with the provisions of clause 12 which required that the claimant be issued with 3 warning after a hearing by the University College Council Disciplinary Committee; be interdicted for good cause; be placed on suspension; and be given a full hearing where his conduct was found wanting.
4. On 18th April, 2012 the respondent wrote to the claimant notifying him to attend as Appointment Review Committee on the 25th day of April, 2012 for considerations or confirmation of his appointment. The claimant complied where 4 issues set out in the letter of notification were discussed.
5. On 30th April, 2011 the respondent wrote to the indicating that his appointment would not be confirmed on the claim of unsatisfactory performance. The letter was to take effect immediately.
6. The claim is that the claimant was wrongfully and unfairly terminated on the grounds that at the time of

such termination of his employment he was past the probation period and he had been effectively confirmed by operation of the law. The inquiry by the review committee and termination was therefore null and void and contrary to the law and the Terms and Conditions of Service. No reasons were given relating to unsatisfactory performance and the procedures adopted contravened the law.

7. The claimant is pleading that reinstatement would not be an appropriate remedy in view of the deteriorating relationship between him and the respondent as manifested in the circumstances surrounding the wrongful and unfair termination of his employment with the respondent. the claimant suffered damage, injury and damage as a result of the actions of the respondent and is seeking the following;

- a. *Salary for the remainder term of his contract at Kshs.5,616.00;*
- b. *Responsibility allowance for 26 months at Kshs.338,000.00;*
- c. *Leave travel allowance kshs.312,000.00;*
- d. *Passage and baggage allowance for 26 months Kshs.468,000.00;*
- e. *Car allowance for 26 months Kshs.468,000.00;*
- f. *Entertainment allowance for 26 months kshs.234,000.00;*
- g. *Housing allowance Kshs.1,690,000.00;*
- h. *Utility allowance Kshs.280,800.00; and*
- i. *Furniture allowance at kshs.52,000.00 Total kshs.9,458, and 800.00*

8. The claimant is also seeking payment of interests due on his claims and costs of the suit.

9. The claimant testified in support of his case. Upon employment, the claimant was issued with written contract of service and terms and conditions and the Terms and Conditions of Service dated 15th November, 2010 applied to him. He completed his probation period, there was no review but 10 months later the respondent sought to undertake a review and proceeded to issue him with a termination letter citing unsatisfactory performance but the details were not set out. The claimant was paid notice pay of 3 months as an indication that his probation period had lapped in terms of his contract of service and the terms of service.

10. The claimant also testified that during his employment he had no warning letter or a disciplinary case against him. In the order of hierarchy, he was placed third in administration and as the college secretary. Based on his appointment and functions, the claimant was a member of the board as secretary and served in the procurement committee.

Defence

11. In defence, the respondent's case is that there was a contract of service with the claimant save that the claimant was not entitled to be given any reasons for the termination of his contract of service as his case relates to the termination of a probationary contract governed under section 41¹ of the Employment Act, 2007. The respondent thus had no duty to give the claimant any reason for the termination of his contract of service.

12. The defence is also that the claimant was not notified any extension of his probationary period or the contract of service terminated after 6 months as the respondent acted pursuant to clause 9.2.2 of the Terms of Service. A committee to review the appointment of the claimant was constituted and had the mandate to take appropriate decision and decision to terminate the claimant from his employment with the respondent. the review committee was not constituted within 6 months when the claimant was to be

confirmed for the reasons that the respondent, then Kenya Polytechnic University College was transitioning into a full university and the principal in his letter of 27th March, 2012 to the chairman of the Council noted that the respondent structures were still evolving and given the special circumstances of transition, there was need to appoint a Special Council Appointment Review Committee. The committee was constituted before the expiry of the 6 months' probation period lapsed.

13. The claimant's contract of service was never deemed to have been confirmed with effect from 9th December, 2011 or from any other date. For public institutions, actions such as confirmation and termination of employment must be properly documented and entries made in the concerned employee's file. There was therefore no obligation to terminate the claimant's contract of service by notice of 6 months as his fell under the purview of probationary terms and never graduated to a confirmed contract.

14. The defence is also that the meeting held with the claimant on 25th April, 2012 was an appointment review meeting to enable the respondent confirm or terminate his employment. The committee listened to several employees who made presentation and with regard to the claimant it was recommended that he had a persuasive presentation but not the reality. A decision was taken to thus terminate the claimant's employment and he did not lodge an appeal. He handed over his duties peacefully and was paid his dues of 3 months' notice pay and leave allowance. The termination thus remains lawful and justified and the claim for damages, injury made should be dismissed with costs.

15. In evidence, the respondent witness Ruth Kirwa testified that she is the Legal Officer formerly the acting director, Corporate Affairs. Upon the employment of the claimant she issued him with the letter of appointment together with the terms and conditions of service dated 14th April, 2011 but he reported on duty from 8th June, 2011. The claimant held a senior position at grade 16 and stipulated his probation period would be 6 months and the contract would be for 3 years as he had just retired from the University of Nairobi and had his retirement age. Other officers were serving for 5 years contract terms. Only a Council committee could review the claimant's employment for confirmation after completing the probation period. As the time of 6 months drew near, there were several factors at play within the respondent entity. There was transition from a college to a university and all systems were not in place.

16. The claimant served the 6 months' probation period. He was not confirmed in his employment. With the changing systems, senior officers were leading the transition and this affected dean's registrar and secretary and thus the claimant was affected. The respondent Council had not formed all the required committees. There was need to have proficient and efficient staff to help the respondent meet its mandate.

17. Several employees were invited to make presentations before the Council committee based on the terms and conditions of service to which the claimant had accepted to be bound. The claimant having just retired from the University of Nairobi, it was expected that he would help the respondent transition into a fully-fledged university as a senior registrar but the committee upon his review made a decision to terminate his employment. The claimant accepted the letter and did his hand over and was paid for his notice period and leave days due.

18. The witness also testified that she took minutes of the review committee that made recommendations on the claimant's employment. She only sat as the secretary but not as a member. A decision was taken on 24th April, 2012 to terminate the claimant from his employment with the respondent.

19. The witness asserted that the claimant was terminated due to his poor performance and due to altercations at the place of work. When the claimant was invited to attend the review committee, the matters were not set out for him to address save for him to state his vision, successes.

20. Both parties filed written submissions.

21. The claimant submits that the employment relationship between the claimant and the respondent was governed by a written contract and the Terms of Service. The claimant probation period was 6 months and under clauses 9.2 of the Terms of Service. the respondent had the discretion to extend the probation

period which was not done and was thus required under the Terms of Service to confirm his appointment in accordance with clauses 11 and 12 of the Terms of Service.

22. The claimant also submits that under section 42 of the Employment Act, 2007 the respondent could not employ the claimant under a probationary contract for more than the aggregate period of 12 months. Once probation period lapse, by operation of the law was confirmed and could only be terminated for a justifiable cause. Effectively, on 9th December, 2011 the claimant's employment was confirmed. On 18th April, 2012 the claimant was invited to appear before the Appointment Review Committee on 25th April, 2012 for them to consider him for confirmation of his appointment and the claimant obliged. On 30th April, 2012 the respondent wrote to the claimant and informed him that his employment would not be confirmed. The claimant was paid kshs.918,425.00 on account of 3 months' salary in lieu of notice and leave ay due.

23. The claimant has relied on several cases in support of submissions in the court addressing the question of probationary contract and wrongful and unfair termination of employment. The cases of **Rose Achieng Mihudhi versus Jos Hansen & Soehne (EA) Limited [2015] eKLR**; **Lucy Wangui Wanyika versus Nam Consult Limited [2016] eKLR**; **Richard Bwogo Birir versus Narok County Government & 2 Others [2014] eKLR**; **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR**; **Caroline Chemutai Rotich versus Chase bank (Kenya) Limited [2015] eKLR**. the remedies sought are therefore due in form of special damages for wrongful and unfair termination of employment and compensation under the provisions of section 49 of the Employment Act, 2007.

24. The respondent submits those articles 27(1), 41(1) and 47 of the constitution, 2010 and section 12 of the Employment Act stipulates some guidelines that govern the employer and employee relationship. Such provisions cannot be looked at alone and must factor the complexities that are encountered in various working environments and therefore must cater for specific and unique work environs but that conforms to the constitution. in **Benjamin Nyambati Ondiba versus Egerton University [2014] eKLR** the court held that an employer puts an employee on probation so as to be able to assess his performances and capability within the workforce and the essence of section 42 of the Employment Act, 2007 is to allow the employer terminate the contract of service less time where the employee's performance should be found wanting. The law therefore gives the employer the right to retain an employee on probation for 12 months and terminate employment on short notice as held in **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited [2013] eKLR**.

25. The claimant was under a contract of service and regulated by the terms of service. As a new employee the respondent as the employer had the right to review his performance and assess his capabilities before confirmation. The review meeting held with the claimant on 25th April, 2012 was justified and lawful and upon this review the claimant's contract of service was terminated within the probationary period.

The question of unfair termination is regulated under section 45 of the Employment Act, 2007. The respondent witness Ms Kirwa that when the claimant was invited to make a presentation before the Review committee, it was not satisfied with the same and thus made a recommendation for his termination of employment on the grounds of poor performance. In **Danish Jalango & Another versus Amicabre Travel Services [2014] eKLR** the court held that an employee whose contract is subject to probation under section 42(2) of the Employment Act, 2007 can be terminated without the application of the requirements of section 43 and 45 of the Employment act with regard to procedural and substantive justification. In **Dede Esi Annie Amanor-Wilks versus Action aid International [2014] eKLR** the court held that where an employee is found incompatible this is a fair ground for termination.

26. The respondent submits that the remedies sought by the claimant are not due as this is not a commercial relationship but a special relationship and must be insulated from greed associated with the profit making motives inherent in commercial contract – **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eKLR**. the amounts claimed herein by the claimant are far beyond fair remuneration that the court can award and should be dismissed. The court cannot award anticipatory claims.

Determination

Several issues arise for determination herein and can be summarised as follows;

Whether the claimant was terminated under probation or not;

Whether there was an implied confirmation of the claimant's employment; and

Whether there are any remedies.

27. Before delving into the issues above, the respondent has relied on the provisions of articles 27(1), 41(1) and 47 of the constitution, 2010 and section 12 of the Employment Act on the grounds that the constitution and the law has set out the principles upon which the employer and employee relationship should be built upon. Article 27(1) of the constitution relates to the rights of equality before the law for everyone; article 41(1) relates to the right to fair labour practices, article 47 relates to the right of everyone having fair administrative action; and section 12 of the Employment Act, 2007 relates to the duty of an employer to have disciplinary rules or policy in place at the place of work. As such, the submissions by the respondent thus recognise that the constitution protects every employee to enjoy the full benefit of the law and enjoy fair labour practices and fair administrative action before any action is taken to negate their rights at work. The requirement under section 12 of the Employment Act, 2007 that every employer should have disciplinary rules and procedures at the work place is thus to ensure that where an employee is faced with any matter that requires a disciplinary action, such should be addressed within the law and ensure fair administrative action in a fair and reasonable manner that recognises that everyone has the right to equality before the law.

28. The sanctity of the employment contract cannot be gainsaid. The parties herein agreed to be bound in the employment relationship by the contract of service and under it the terms and conditions of service. The contract of service carried with it rights and duties, responsibilities and obligations on either party. In this case, the claimant was required to be on probation for a period of six (6) months and upon which he would be reviewed and confirmed into full employment.

29. In this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place as agreed. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship.

30. The rationale in this regard is in the letter of the law under section 42 of the Employment Act, 2007 which provides as follows;

42. Termination of probationary contracts

(1) The provisions of section 41 shall not apply where a termination of employment terminates a 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.

31. The emphasis here is that the employer has the right to terminate the employment of an employee during the probation period on short notice or upon payment in lieu thereof. However, such probation period cannot be for more than 6 months or for a period as agreed by the parties and where the employer finds the need to have the probation period extended beyond the agreed period, this must be done with the agreement of the employee. In this regard, the court in **Peris Nyambura Kimani versus Dalbit Petroleum Ltd, Petition No.63 of 2013** held as follows;

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on 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.

Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee. [underline added].

32. The Failure by the respondent to have systems in place so as to have the claimant's employment reviewed in time and before the probation period lapsed cannot be visited upon the claimant as an employee. Where there existed a written contract of service spelling out the terms and conditions of his employment with the respondent, such cannot be negated by extraneous matters and factors beyond his control, the respondent was under a duty as the employer to observe. At paragraph 6 of the *Reply to Statement of Claim* the respondent well notes that they did not extend the probationary period for the claimant noting the transitional matters which had to be addressed. The right to extend the probation period was therefore available and was never utilised. Noting such, the parties remained bound by the contract of service. Such must be upheld.

33. Noting the above, the probationary terms of the claimant's contract of service lapsed after 6 months. By operation of the law and in accordance with section 42 of the Employment Act, the claimant successfully completed his probation period and thus his employment confirmed. After the lapse of 6 months, the respondent as the employer had no right to review such contract of service retrospectively. Effectively, under the terms of service, once the claimant proceeded to offer his labours to the respondent upon the lapse of 6 months, he could only be terminated from such employment in accordance with section 35, 40, 44 of the Employment Act, 2007 or by mutual agreement of the parties.

34. In this case Ms Kirwa testified that the claimant was invited vide letter dated 27th March, 2012 to a committee to have his employment reviewed. At the committee, the claimant made a presentation but it was found to be unsatisfactory and the claimant's performance was reviewed as not meeting the capability requirements of the respondent for the position of Registrar. Such are serious allegations to be made against the claimant and even where the respondent's intention was to review the claimant for the purpose of confirming his employment, to challenge his performance and capability as poor, due regard must be given to the mandatory provisions of section 41 of the Employment Act, 2007 which address the same as follows;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [underline added].

35. The assertion by the respondent that the claimant was found to be of poor performance is thus a matter addressed in law in terms of the procedural and substantive requirements of the same. The position held or the sector under which the respondent operates is not the issue, rather, it is the procedural safeguards put in law which in essence are to be followed to ensure the employee faced with the possible loss of employment are guaranteed. Notice of matters to be addressed at such a hearing, and the presence of another employee is meant to ensure justice to the employee.

36. In addressing the question of how poor performance at work is to be addressed by the employer, the court in **Agnes Yahuma Digo versus PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011** held that;

a. The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.

b. An employer who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed.

37. The above is reiterated in **Jane Samba Mukala versus Ol Tukai Lodge Limited Industrial cause number 823 of 2010** where the court held that;

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

38. The above put into account, I find the respondent failed the mandatory provisions of the law in addressing the procedural requirements in terminating the employment of the claimant on 18th April, 2012 in a summary manner. There were no substantive reasons to justify such action and the reasons assigned to be probationary provisions are not valid, reasonable and thus contrary to the contract of service and the applicable law. The same does not meet the constitutional threshold outlined under article 41(1) of the constitution. the same amounted to unfair termination of employment to the damage of the claimant.

Remedies

39. The claimant has specifically pleaded the nature of damage suffered in terms of loss of employment under the 3 years contract with the respondent and thus seeks the benefits due under the same. The respondent wet out the findings in **Abraham Gumba case, cited above**. However, the findings put into account, on the conclusions that the claimant was unfairly terminated from his employment by the respondent and that the same failed to meet the procedural and substantive justice, section 49 of the

Employment Act, 2007 grants various remedies, which the court can award to the claimant to address the unfair termination of his employment.

40. Section 49 of the Employment Act, 2007 in part provides that;

*(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to **the employer to pay to the employee any or all** of the following—*

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. [underline and emphasis added].

41. The remedies thus under section 49(1) may be awarded in singular or multiple terms. Each case must be looked at on its own merits and particularly the pleaded orders. In this case, the claimant asserted his rights to benefit from the full benefit of his 3 years contract that was prematurely terminated at no fault of his own.

42. The claimant had a monthly gross wage of kshs.216,100.00. on the 3 years contract of service the claimant only served for 10 months and thus a remainder of 26 months were due. he has not been able to secure new employment noting that he had just retired from his previous employment at the University of Nairobi and based on his age, the respondent gave him a 3 years contract instead of 5 years. For the remainder term of the contract, the claimant is hereby awarded the sum of Kshs.5,618,600.00.

43. The claim with regard to allowances for responsibility, leave, passage and baggage, car, entertainment, housing, utility and furniture, these were part of the position held by the claimant. Both parties agreed to be bound by the terms of service annexed to the contract of service. for the position held by the claimant as Registrar, the terms of service set out the benefit that accrued to him on a monthly basis. Putting these benefits into account would place the claimant not at an advantage but remedy the unfair termination of his employment. In this regard therefore the claimant is awarded the following;

Responsibility allowance was dues at Kshs.13,000.00 per month and awarded at kshs.338,000.00;

Leave travelling allowance was due annually at Kshs.12,000.00 and awarded for 3 years at Kshs.36,000.00;

Passage and baggage was due once at kshs.7,200.00 and Kshs.10,800.00 all being Kshs.18,000.00;

Car allowance was due at Kshs.18,000.00 per month and awarded at kshs.468,000.00;

Entertainment allowance was due at Kshs.9,000.00 monthly and awarded at kshs.234,000.00;

Housing allowance was due monthly at Kshs.65,000.00 and awarded at Kshs.1,690,000.00;

Utility allowance was due monthly at Kshs.10,800.00 and awarded at Kshs.280,800.00;

Furniture allowance is awarded annually at Kshs.52,000.00.

With the award of the full contract term, notice pay is not due. such is declined. Costs shall be awarded on the basis that the claim herein is well founded.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

1) A declaration that the claimant was by operation of the law a full time employee of the respondent at the time of termination of employment;

(a) Remainder of fixed term contract Kshs. .5,618,600.00;

(b) Responsibility allowance Kshs.338,000.00;

(c) Travelling allowance Kshs.36,000.00;

(d) Passage and baggage Kshs.18,000.00;

(e) Car allowance Kshs.468,000.00;

(f) Entertainment allowance Kshs.234,000.00;

(g) Housing allowance Kshs.1,690,000.00;

(h) Utility allowance Kshs.280,000.00;

(i) Furniture allowance Kshs.52,000.00; and

2) Costs of the suit.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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