



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 232 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 7<sup>th</sup> April 2016)**

**CHRISTINA SIGOWA WADULO.....CLAIMANT**

**VERSUS**

**SOLIMPEXS AFRICA LIMITED.....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant filed her Memorandum of Claim on 20.02.2014, through the firm of Obura Mbeche & Company seeking damages for unlawful and unfair termination.
2. It is the Claimant's case that she was employed by the Respondent on a five (5) year contract vide a letter of appointment dated 23<sup>rd</sup> May, 2012, in the capacity of Chief Executive Officer with effect from 1<sup>st</sup> July, 2012. The letter of appointment is annexed to the Memorandum of claim as Appendix 1. The Claimant's employment was to be governed by the said letter of appointment, company regulations and the Respondent's Code of Conduct.
3. The Claimant avers it was a term of the Contract that she was to be on probation during the initial three (3) months which she successfully completed on 30<sup>th</sup> September, 2012. It was also a term of the contract that the Claimant's starting net salary would be 500,000/= per month for the 1<sup>st</sup> quarter which was to be increased to Shs. 750,000/= per month for the second quarter and third quarters and further increased to Shs. 1,000,000 per month from the 4<sup>th</sup> quarter of her employment.
4. She states that she performed her duties diligently and to the satisfaction of the Respondents, undertaking her roles and additional role of Chief Finance Officer as required of her in her contract of employment.
5. She further states that on 30<sup>th</sup> November, 2012, the Claimant was invited for a meeting by the Respondent's chairman during which she was informed that there had been disagreement amongst the board members relating to her terms of employment in that some members of the Board felt that her salary and employment benefits were too generous. She was informed by the chairman that since the terms could not be changed, she would find it difficult to work with a divided Board and it was in her interest that she resigned from her job.
6. The Claimant states that she pondered on the issue and responded to the chairman stating that she would consider resigning if she was paid her full salary for the unexpired period of her contract of five

years.

7. The Chairman assured the Claimant that he would ensure that the Claimant is paid full compensation for the lost years but prevailed upon the Claimant not to put that demand in her resignation letter as it would not go well with the disgruntled Board members. The Claimant states that she was asked by the Chairman to put a demand for three months plus terminal benefits only.

8. She further avers that by a letter dated 30<sup>th</sup> November, 2012, she tendered her resignation bowing to pressure from the chairman. The letter was endorsed by the Chairman as confirmation of the subject matter of the discussion save for the benefits payable. The letter of resignation is annexed to the Memorandum of Claim as Appendix 2.

9. That the chairman requested her to prepare a handing over report which the Claimant did by listing all the outstanding issues in her docket as at the time of termination of her contract.

10. The Claimant states that in total breach of the parties' understanding and or in violation of the Claimant's contract of employment the Respondent has refused and or declined to pay the Claimant terminal benefits as had been undertaken by the Chairman to be paid made up as follows:-

<i>a. Salary balance for the month of October 2012</i>	-	238,175/=
<i>b. Salary for the month of November 2012 including</i>		
<i>Respondent's pension contribution</i>	-	51,029/=
<i>d. Salary for the balance of 55 months of the contract</i>	-	1,767,700/=
<i>d. Electricity &amp; water bills from October to November 2012</i>	-	14,295/=
<i>e. One way air tickets for self and spouse</i>	-	39,600/=
<i>f. Payment in lieu of annual leave 8.75 working days</i>	-	298,295/=
<i>g. Two return air tickets for July/Set and Oct/Dec 2012</i>	-	61,248/=
<i>h. Bonus at the end of 1<sup>st</sup> year as per clause 6.1</i>	-	3,100,000/=
<i>i. Relocation expenses to Kampala</i>	-	195,000/=
<i>j. Refund for rent for December 2012–February 14 2013-</i>		150,000/=
<i>k. Refund of car allowance for Dec 2012 – Feb 14 2013</i>	-	300,000/=
<i>l. Medical refund</i>	-	400/=
<i>m. Electricity and water bills for Dec 2012 – Feb 14 2013</i>	-	18,694/=

11. The Claimant further claims that in the alternative to the particulars set out in (c) and (d) above she claims that she is entitled to three (3) months' salary and provident fund contribution in lieu of notice being Shs. 2,548,575/= and the equivalent of twelve (12) months salary and provident fund contribution as compensation for constructive dismissal and or wrongful termination of her contract of employment, being Shs. 10,194,300/=.

12. The Claimant states that her demands to be paid her terminal benefits is confirmed by the several demand letters written by the Claimant which were produced as a bundle marked Appendix 4.

13. The Claimant further states that by a letter dated 11<sup>th</sup> February, 2013, the Respondent in an attempt to deny the settlement arrangement alleged that the Claimant resigned due to failure to successfully complete her probation period an allegation which is denied by the Claimant.

14. She states that her dismissal was unlawful and unfair and done in breach of contract of employment and that the same dismissal was in violation of the Employment Act 2007 and against the rules of natural justice. She states that the Respondent has also violated the terms of her forced resignation.

15. She prays for:

***a. Compensation as particularized in the Claim***

***b. Costs and interest***

***c. Such further and other relief as the Honourable Court may deem fit.***

16. The Respondent filed a Statement of Response on 25<sup>th</sup> March, 2014, through the firm of Robson Harris & Company admitting that the Claimant was indeed in the employ of the Respondent but denies that she was employed on a five (5) year contract.

17. They state that the contract (*clause 3 thereof*) was subject to a condition precedent for the Claimant to undertake a mandatory probationary period of three (3) months with the option of a further extension of a further three (3) months. They state that the extension was automatic unless the Respondent confirmed the employment in writing.

18. They state that the assertion by the Claimant that she was employed on a five (5) year contract is inapplicable and it is based on a wrong misapprehension of the law. That the Claimant's probationary period was never successfully completed on 30<sup>th</sup> September or at all and that the probationary period automatically extended pursuant to the express provisions of Clause 2.1 of the letter of appointment.

19. The Respondent denies that the Claimant performed her duties diligently and to the satisfaction of the Respondent and particularly her role as chief finance officer was marred with irregularities which exposed the Respondent's business to foreseeable risks to wit;

***i. The Respondent experienced cash flow problems.***

***ii. The Respondent incurred Pay As You Earn (P.A.Y.E) interest and penalties for the months of October and November amounting to Shs. 222,030.60.***

***iii. The November payment included house allowance tax that had not been computed for one employee for the month of July and August respectively together with accrued interest and penalty.***

***iv. The Claimant in the period between July and October 2012, did overpay into her own account the sum of Shs. 80,717.90.***

***v. Payroll administration of other employees.***

***iv. Upon the resignation of the Claimant, the Respondent engaged an accountant who spent long man hours rectifying the discrepancies and inconsistencies left behind by the Claimant, unlawfully subjecting the Respondent to additional unnecessary costs.***

20. The Respondents deny ever requesting the Claimant to resign from her employment and her decision to resign was voluntary. They also state that she is not entitled to November salary for failing to give the Respondent's notice of her intention to terminate her employment.

21. They deny that the Claimant is entitled to a one way air ticket for self and spouse stating that this incentive had not accrued since she had not gone through the first quarter and in the event she had completed her first quarter the contract had no provision for a spousal air ticket. They further state that the Claimant was not entitled to annual leave since she was a probationary employee.
22. The Respondent state that the Claimant has failed to disclose to the Court that they transferred Kshs. 300,000/= to her account as relocation expenses. A document evidencing the transfer is annexed to the Response as R-7. They also aver that the provision for car allowance was discretionary and the Respondent cannot be compelled to provide her with one. The Respondent also avers that the claim of constructive dismissal has not been proved and should not be allowed.
23. In evidence the Claimant reiterated joining the Respondent in year 2012 having been given an appointment letter signed by one Engineer Mbugua Kamau, the board chairman at the time. She admitted that the contract provided that she would be on probation for the 1<sup>st</sup> three months of the contract and that she was never issued with any other letter after this period.
24. She stated that in October 2012 the chairman came to inspect the factory premises and it is at this point that she asked for a letter of confirmation to which the Chairman responded would be done at a later date since at the time they were busy in getting the Company up and running.
25. The Claimant stated that during the probationary period she worked according to the work plan and attended board meetings and never at one time did she hear any complaints about her work and she therefore had no reason to think that her contract would not be confirmed.
26. She further stated that her terms of reference did not include marketing and there was a person in charge of marketing which department was not doing so well. She nevertheless prepared a report annexed to the bundle of document filed in Court highlighting on marketing strategies which report was forwarded to the relevant person to act.
27. As the acting financial controller she states that she was very diligent in her work and she reported to the chairman of the board when she realized that there was a cash flow problem. That on the day she was discussing the finances of the Respondent with the Chairman he informed her that the Board had decided that she was too expensive to keep and it was in her best interest if she resigned since the Board was divided on the issue of her emoluments and it would be impossible for her to work with a divided board. She stated that she continued to write a resignation letter which was not to prejudice the contents of the contract of employment and the Board chairman was agreeable to.
28. She stated that if the Court does not award her compensation for the remainder of her contract she would be agreeable to twelve (12) months compensation and three (3) months' notice pay.
29. In cross examination she admitted that her contract had a term of probation of three (3) months which period was to end in September 2012 and if the period was extended it was to end in December 2012. She stated that in her opinion the probation period ended after the first 3 months since there was no letter to the contrary. She stated that she was entitled to compensation for October to November 2012, since she stayed on in Nairobi awaiting payment of her benefits as stated in her letter of resignation which she never received.
30. The Respondent put up one witness who stated that the Claimant was employed on a five (5) year contract subject to a probation period of three (3) months. He stated that the Claimant did not complete the probation period as she opted to resign. That the 1<sup>st</sup> probation period lapsed on 30.9.2012 and since the employment was not confirmed it automatically extended and it was to lapse on 31.12.2012.
31. That on 30.11.2012, RW1 met with the Claimant to discuss her performance. They went over areas which the Board felt were unsatisfactory and at the end of the meeting the Claimant opted to voluntarily resign. That she was not unduly influenced to resign and her entitlements as stated in the letter of Claim were not going to be affected.

34. He also led evidence to the effect that her salary for October 2012 was paid as per annexure R-6. That she failed to give one month's notice before ending the contract and that all her entitlements were paid and further relied on annexure R-6. RW1 stated that the Claimant is not entitled to salary for the remainder of the contract as it had not accrued.

33. In cross-examination RW1 admitted that they never wrote a letter of dissatisfaction in performance other than for the meeting held on 30.11.12 of which they did not have any minutes for. He claimed that the Claimant was paid all her entitlements stated in the letter of resignation but he did not have any proof of this. They also admitted that they never informed the Claimant of the P.A.Y.E penalties accrued at Kenya Revenue Authority. RW1 stated that he learnt of the accounting discrepancies after the Claimant had left employment.

34. The Claimant filed submissions in which she addresses the issue of probation and state that the probation period was to be for three months unless extended on account of unsatisfactory performance until her meeting with RW1 on 30.11.2012. No incidences were brought to the Claimant's attention and the Respondent did not adduce evidence to prove this assertion. As at 30.9.2012, the Claimant submits that she had legitimate expectation that her employment would be confirmed as there was no evidence that she had not successfully completed her three months probation.

35. As to the presumption of extension of the probation period the Claimant submits that if Clause 2.1. of the employment contract is to be understood within the context of the sentences preceding which imply that it should first be proved that the Claimant has not been performing satisfactorily and if this is the case that is the time when it can be said that the right to extend the probation period overrides the right to confirm employment.

36. The Claimant further submits that the Respondent allowed her to complete the probation period without reservation only to turn around two months after such completion to express dissatisfaction. This according to the Claimant amounts to unfair labour practice and hence unconstitutional. By failing to draw to the Claimant's attention to any form of unsatisfactory performance in her duty and by failing to issue a letter extending the probation period on account of unsatisfactory performance, the Respondent waived its right to presume the probation extended and more so after the Claimant had resigned and was asking to be paid agreed terminal dues.

37. It is the Claimant's submission that the contention by the Respondent to the effect that the Claimant was still on probation as at 30<sup>th</sup> November, 2012, is an afterthought intended to defeat the course of justice. They state that RW1 received the Claimant's resignation letter and initialed all the pages acknowledging the contents thereof and thus affirming the contents thereof he is thus estopped from contending on behalf of the 1<sup>st</sup> Respondent that the Claimant was still on probation.

38. The Claimant further submits that the Respondent ought to have reduced the extension of probation in to writing as Section 10(2) of the Employment Act provides a written contract should contain the form and duration of the contract. Since this was not done as at 30.9.2012, she contends that her employment was confirmed immediately thereafter.

39. On the issue of being coerced to resign, the Claimant submits that she had an illustrious career in senior positions and she came all the way from Uganda to work for the Respondent after promises of handsome remuneration. It was after the discussions of 30.11.2012, that the ensuing letter of resignation and handing over happened. This, according to the Claimant is a clear indication that she did not have any intention of resigning but was compelled to do so based on the prevailing circumstances within the Board and the promise of a golden handshake.

40. The Claimant submits that the defence contains mere denials and should be dismissed for being a sham and that her prayers contained in the Memorandum of Claim should be allowed as prayed.

41. The Respondent in their submissions insists that the Claimant was on probation and her employment had not yet crystalized as envisioned in the contract of employment. They rely on the case of **Benjamin**

**Nyambati Ondiba Vs Egergton University (2014)eKLR** which gives the meaning and terms of a probationary period and in their view the Claimant's situation fulfilled the criteria set out therein. In view of the definition in the aforesaid case, they state that the Claimant had not concluded the probationary period when she opted to resign.

42. The Respondent further submits that Section 41 of the Employment Act, 2007, the provisions thereof shall not apply where a termination of employment terminates a probationary contract.

43. On constructive dismissal, the Respondent submits that the Claimant cannot make such a claim since she was a probationary employee. They state that the Claimant does not meet the criteria set out in the Court of Appeal case of **Coca Cola East & Central Africa Limited Vs Maria Kagailigaga (2015) eKLR** and as such she has not proved that she was constructively or wrongfully dismissed.

44. The Respondent claims that the Claimant is not entitled to the sums claimed since she was not confirmed as an employee and what was due to her was paid accordingly.

45. The Respondent submit that in the unlikely event the Court finds that the Claimant was unfairly/wrongfully dismissed then she should only be awarded 12 months' salary as compensation based on the monthly salary as at the time of dismissal as was stated in the case of **Alphonse Maghanga Mwachanya Vs Operation 680 Limited (2013) eKLR**.

46. They pray that the entire claim be dismissed with costs.

47. Having considered the evidence and submissions of the parties herein, I narrow down issues for determination as follows:

1. ***Whether the Claimant was on probation employment as at 30.11.2012.***
2. ***Whether the Claimant was forced to resign or she voluntarily resigned.***
3. ***What remedies if any the Claimant is entitled to.***

48. On the 1<sup>st</sup> issue, under Appendix 1 dated 23<sup>rd</sup> May 2012, the Claimant was employed by the Respondent as per the letter of offer which puts 1.7.2012 as the commencement date. The letter is signed and accepted by the Claimant on 5<sup>th</sup> June 2012. Under paragraph 2 of the said letter, it was stated as follows:

***“You will serve a probationary period of three (3) months, which you are required to complete satisfactory before your employment with the company is confirmed. This probationary period may be extended by the company in its absolute discretion for a further period not exceeding three (3) months if in its opinion your performance has been unsatisfactory. The probationary period will be extended automatically unless the company confirms your employment in writing before or on completion of the first period”.***

49. The reading of this portion of the contract confirms that with effect from 1.7.2012, the initial three months of probation were to end on 30.9.2012. But since the Respondent did not confirm the employment of the Claimant in writing before this date 30.9.2012 then the probation period was to be extended automatically for another period of three months to end on 31.12.2012. This position is perfectly in tandem with Section 42(2) of Employment Act 2007 which states that:

***“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”.***

50. The Claimant resigned her employment on 30.11.2012 as per her letter Appendix 2. It is therefore this Court's finding on issue No. 1 above that at the time of resignation, the Claimant was still serving her probation period.

51. On the next issue, in this resignation letter, the Claimant states in part as follows:

***“In the meeting held with you today, various discussions were held and an amicable agreement was reached out of which I now tender my resignation effective November 20<sup>th</sup> 2012 and this will in no way compromise my entitlement as stipulated in the said contract as per our discussion and agreement reached .....*”.**

52. In her evidence the Claimant stated that she opted to resign on this day after having discussions with the Respondent’s Board Chairman who asked her to resign. This apparent “discussion” is echoed in the Claimant’s resignation letter in her words above showing that the resignation was a discussion with the Chairman and therefore could not have come out of the Claimant’s own volition.

53. In the **Supreme Court of Canada Potter vs. New Brunswick Legal Aid Services Commission, 2015 SCC 10**, the learned Judges McLachlin, C.J and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ discussed the question of constructive dismissal and states that:

***“The test for constructive dismissal has two branches. The court must first identify an express or implied Contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. However, an employer’s conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. ....(emphasis is mine).***

54. This test viewed in light of a resignation, the employer’s conduct can constitute a constructive resignation as in this case where a resignation had to be discussed between the Claimant and Respondent showing no free will on the part of the Claimant in this case.

55. In light of the above finding this Court is of the view that the Claimant was actually forced to resign even though she was on probation. This is seen from the fact that the Claimant was asking for pay in lieu of notice from the Respondents which is envisaged under Clause 2.2.2 of the contract where a probationary period could be terminated by giving 1 months salary in lieu of 1 months notice period.

56. Having found that the Claimant was terminated while on probation, the Respondent wanted to evade their obligation under the contract for not confirming the Claimant which was their right but they opted to force the Claimant to resign.

57. I therefore find that though the Claimant resigned, this was a forced resignation. I therefore award the Claimant less what she has already been paid by the Respondents as follows:

***1. 1 months salary in lieu of notice = 750,000/=.***

***2. Salary balance for the month of October 2012 = 238,175/=***

***3. Salary for November 750,000/=.***

***4. Electricity and Water bills for October 2012 to November 2012 as per Clause 7 of the contract as pleaded = Kshs.14,295/=.***

***5. One way ticket for self and spouse = 39,600 as per Clause 7 of the contract as the Claimant was entitled to her leave even on prorated basis.***

***6. Leave on prorated basis for 8.75 days = 298,295/=.***

***7. Relocation expenses to Kampala = Kshs.195,500/= as per clause 7 of the contract.***

***8. Issuance of a Certificate of Service.***

9. *6 months salary for unlawful dismissal* = 750,000 x 6 = 4,500,000/= .

**TOTAL DUE = 6,785,865/=**

Less statutory deduction

Plus costs of this suit.

Read in open Court this 7<sup>th</sup> day of April, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Oloo holding brief for Obura for Claimant

Miss Mumbo holding brief for Kitur for Respondents