



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 2152 OF 2012**

**LUCY WANGUI WANYIKA.....CLAIMANT**

**VERSUS**

**NAM CONSULT LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant in her memorandum of claim averred that she was employed by the respondent on 16<sup>th</sup> November, 2011 as a Marketing Manager at a salary of Kshs.80,000/= per month. She contended that upon employment she performed her duties in exemplary manner and that she therefore contributed to the success of the respondent.
2. It was her complaint that on 21<sup>st</sup> March, 2012 the Chief Executive Officer of the respondent unfairly, and wrongfully terminated her services.
3. The respondent on the other hand pleaded that it was true that the respondent was employed as alleged and at the salary stated however the said employment was subject to inter alia probationary period, performance and termination clauses in the agreement.
4. The respondent denied the claimant performed her duties in an exemplary manner and to the contrary the respondent averred the claimant's performance during the probationary period was wanting and was brought to the claimant's attention at the conclusion of the probationary period leading to the discussion to extend the same.
5. The respondent further admitted terminating the claimant's employment as alleged but denied the termination was wrongful and unlawful. According to the respondent, the termination was accordance with Employment Act. It was their contention that in a clause in the contract of employment provided that either party could terminate the contract by giving one month's notice or one month's pay in lieu of notice and during probation, either party could give two weeks' notice or pay in lieu. It was therefore entitled to terminate the claimant's services during probation period after giving two weeks notice.
6. The respondent denied the amounts demanded by the claimant but conceded that she was entitled to Kshs.119,111/= comprising of unpaid salary, two weeks pay in lieu of notice and prorated leave days.
7. In her oral testimony in Court the claimant stated that on 21<sup>st</sup> March, 2013 she was asked to

leave the respondent's premises as her work had ended since she refused to sign a non-disclosure agreement. She denied ever being given a chance for a hearing before dismissal. It was her evidence that she was on probation for three months and later confirmed. She denied ever being issued with a letter extending her probation period.

8. In cross-examination she maintained that she met her targets. She further stated that she was never issued with a confirmation letter but in her understanding she thought she was confirmed.

9. The respondent's witness Ms. Wahuthi Mahogo stated that the claimant was never confirmed since she did not meet expectation. According to her, the claimant continued on after probation. It was her evidence that the claimant lost her mother during probation and the respondent felt she needed more time. It was her testimony that during the time the claimant worked, she did not make any sales. According to her confirmation was to be done after a meeting to negotiate salary and terms of service. The meeting never took place in the case of the claimant.

10. In cross-examination she stated that the issue of non-performance was never communicated in writing nor was the extension of the probation period. She further stated that the claimant never collected her termination letter.

11. From the pleadings and evidence the only issue this Court is required to determine is whether at the time of termination the claimant was on probation or a regular employee of the respondent. The determination of this issue would decide the mode of separation from employment between the claimant and the respondent.

12. The claimant was employed on 16<sup>th</sup> November, 2011 with an initial probation period of three months which could have terminated on or around the 16<sup>th</sup> February, 2012 and she either be confirmed into employment or discontinued. The respondent's witness claimed that the claimant underperformed during the probation period leading to the extension of the same.

13. She however did not say for how long the extension was but said the extension was done verbally. It was further her evidence that the issue of non-performance was discussed but no communication was made in writing regarding the same.

14. It is a conventional practice in contractual relationships that where parties conduct their dealings in writing, the same mode of interaction should as far as possible be retained for avoidance of confusion. The claimant herein was appointed in writing hence it was only reasonable that any issue concerning her contract which had the possible effect of modifying or bringing to close the contractual relationship be done in the same manner. It is curious that whereas the respondent claimed that the extension of the probation period and communication over non-performance of the claimant were verbal, the termination of her services was actually in writing.

15. In the circumstances, the Court finds that it was unreasonable to let the claimant continue working beyond her initial probation period without clear and documented communication over the reasons for extension of the probation period and for how long the extension would be.

16. Section 42(2) of the Employment Act provides that the probation period shall not be more than six months but may be extended for a further period of not more than six months with the agreement of the employee. What this means is that the claimant ought to have been consulted and agreed to the extension of her probationary period. The agreement could only have been signified in writing or by a memorandum in writing between the parties. In absence thereof the Court finds that the claimant became regular employee of the respondent to which the legal requirement for termination of a regular employee applied.

17. Considering the duration of the contractual relationship, the Court will award the claimant as follows:-

Kshs.

- a. One month's salary in lieu of notice.....80,000.00
- b. One month's salary as compensation for  
unfair termination of services.....80,000.00
- c. Unpaid salary.....56,000.00
- d. Pro rated leave.....23,111.00

239,111.00

e. Costs of the suit

18. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of June 2016**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 17<sup>th</sup> day of June 2016**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha Jorum Nelson**

**Judge**