



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1886 OF 2014

EVANS KIAGE ONCHWARI.....CLAIMANT

VS

HOTEL AMBASSADEUR NAIROBI.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 24th October 2014 and filed in Court on even date the Claimant has sued the Respondent for wrongful and unfair termination of employment. The Respondent filed a Memorandum of Reply on 17th February 2015.

2. At the hearing the Claimant testified on his own behalf and the Respondent called Leah Wambugu.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a supervisor at a monthly salary of Kshs. 12,000 effective 1st March 2004. He worked until 1st October 2012 when his employment was unlawfully terminated.

4. He claims the following:

- a) 12 months’ salary in compensation.....Kshs. 144,000
- b) Salary in lieu of notice..... 12,000
- c) Accrued leave for one year.....8,400
- d) Costs plus interest

The Respondent’s Case

5. In its Memorandum of Reply filed on 17th February 2015, the Respondent states that at the time of termination, the Claimant was serving as Food and Beverage Supervisor on probationary contract governed by Section 42 of the Employment Act, 2007. The Claimant could not therefore bring a claim under Section 41 of the Act.

6. Further, the Claimant was duly notified of the reasons for the termination vide a probation report dated

25th September 2012, on whose basis the Claimant's employment was terminated.

7. It is the Respondent's case that it exercised the power granted to an employer to terminate a probationary contract under Section 42(2) of the Employment Act.

Findings and Determination

8. There are three issues for determination in this case:

- a) Whether the Claimant was on probationary contract and whether he has recourse for unfair termination;
- b) Whether the termination of the Claimant's employment was justifiable and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Probationary Contract?

9. The Respondent states that at the time of termination, the Claimant was serving on probationary contract and cannot therefore bring a claim for unfair termination of employment.

10. The Respondent's witness, Leah Wambugu testified that her company, Kenwide Investments Limited was hired by the Respondent in 2012 to manage the Hotel. Wambugu told the Court that under the new arrangement, a decision was made to hire the staff afresh. The employees however remained those of the Respondent. It was under these circumstances that the Claimant was put on probation from April 2012 to September 2012. In Wambugu's words, before then the Claimant was a permanent employee.

11. In the final submissions filed on behalf of the Respondent, it is suggested that because there was change of management at the Respondent Hotel, then the Claimant's employment period was broken. There is no legal basis for such a proposition. The obligations of a body corporate must survive change in management.

12. The question then is whether the Claimant's employment from April 2012 to September 2012 was on a probationary contract as defined in law.

13. Section 2 of the Employment Act, 2007 defines a probationary contract as:

“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period”

14. The Respondent did not produce any written contract to support its averment that the Claimant was on probationary appointment from April 2012 to September 2012.

15. Further, the legality of converting a permanent employment to a probationary one is doubtful. In my view, a permanent employee may only be put on probation for a definite period of time under a performance improvement programme mutually agreed upon by the employer and the employee. It cannot happen as a unilateral decision of the employer. Consequently, the Court rejects the Respondent's assertion that at the time of termination the Claimant was on probationary contract.

16. I would have stopped here on this issue. I however find it necessary to comment on the constitutionality of Section 42(1) of the Employment Act which ousts the procedural fairness requirements under Section 41 as far as probationary contracts are concerned.

17. The Court was referred to the decisions of **Rika J** in **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** and **Dixon Amdama v Amani Tiwi Beach Resort [2015] eKLR** where my brother Judge held that in terminating probationary contracts, the substantive justification and procedural

fairness requirements under Sections 43 and 45 are not obligatory.

18. I hold a different view. Article 41 of the Constitution, 2010 guarantees employment and labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of the Constitution. To limit enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold set in Article 24.

19. To this extent I agree with the holding by **Lenaola J** in **Samuel G. Momanyi v the Attorney General & Another [2012] eKLR** that Section 45(3) of the Employment Act is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected. Parties to an employment contract in whatever form are no longer allowed to walk out at will.

The Termination

20. It is against the foregoing background that I will examine the events leading to the termination of the Claimant's employment. The Respondent produced a document dated 25th September 2012 titled '*End of Probation Report*'. In this report, the Respondent accuses the Claimant of several acts of poor performance. Curiously, the report also served to terminate the Claimant's employment.

21. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee. This would ordinarily be achieved in an internal disciplinary process prior to termination, within the dictates of Section 41 of the Act. There was no evidence of any such process in the Claimant's case and the Court therefore finds the termination unfair within the meaning of Section 45 of the Act.

Remedies

22. In light of the foregoing I award the Claimant eight (8) months' salary in compensation for unfair termination. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I further award the claimant one (1) month's salary in lieu of notice. In the absence of leave records the claim for leave pay must also succeed.

23. Finally I make an award in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 96,000
- b) 1 month's salary in lieu of notice.....12,000
- c) Leave pay for 1 year (12,000/30x21).....8,400
- Total.....116, 400**

24. The award amount will attract interest at court rates from the date of the award until payment in full.

25. The Claimant will have the costs of this case.

26. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2016

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JUDGE

Apperance:

Evans Kiage Onchwari (the Claimant in person)

Mr. Otieno for the Respondent