



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.246 OF 2016

ABDULKADER M. MUSANI.....CLAIMANT

VS

FLORA PRINTERS.....RESPONDENT

JUDGMENT

Introduction

1. On 16.12.2015, the parties herein signed a contract in which the claimant was employed by the respondent as her Chief Accountant at kshs.140,000 per month. The commencement date was pushed to 15.1.2016 to enable the claimant to serve a termination notice to his previous employer, which he did immediately after signing the new contract. On 24.12.2016 the respondent notified the claimant via a WhatsApp message that she had changed her mind and as such she was not going to employ the claimant and that she was going to write a letter to revoke the contract.

2. It is the claimant's case that the revocation letter was never served on him and therefore he reported to work on 15.1.2016 as per the signed contract but he was not let in by the respondent even after pleading with her. Consequently he brought this suit on 23.3.2016 seeking declaration that he was still employee of the respondent and that he should be paid his salary as agreed in the contract of employment. In the alternative he prays for damages for unfair termination amounting to kshs.2,100,000.

4. The respondent has admitted that she entered into the said contract of employment with the claimant and that she terminated it as alleged by the claimant. She however avers that the termination was justified because the contract had been secured through misrepresentation of fact by the claimant. That the claimant failed to make full disclosure of material facts which, had he done so, she would not have entered into the employment contract with him. The concealed facts according to the respondent was that the claimant had been dismissed from work by a previous employer for the reason of financial impropriety. That due to the role he was to play in her office, the respondent could not have given him the job. She denied the claim for damages or salary and averred that the claimant has not done any work for her.

5. The suit was heard on 13.7.2016 when the claimant testified as Cw1 and the respondent called Mr. Molin Shanghavi as Rw1. Thereafter both parties filed written submissions.

Analysis and Determination

5. There is no dispute that the parties herein entered into an employment contract on 16.12.2015 by which

the claimant was employed for a monthly salary of ksh.140,000. There is also no dispute that the respondent terminated the said contract on 16.1.2016 when she denied the claimant from commencing work. The issues for determination are:-

(a) Whether the termination of the employment contract by the respondent was unfair.

(b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

6. Under section 45 of the Employment Act, unfair termination occurs if it was done without any valid and fair reason, and if it is done without following fair procedure. Fair procedure for purposes of terminating on ground of misconduct, physical incapacity and poor performance is provided for under section 41 of the Act. The said section provides for mandatory oral hearing of the employee in presence of a fellow employee or shop floor union official of his choice. I must add that, the law further provides that such proceedings must be in a language of the employees' understanding.

7. The foregoing legal protection is however fettered by section 42 of the said Act in cases where the employee is serving under a probationary contract. The said section provides that:

“(1) The provision, of the section 41 shall not apply where a termination of employment terminates a probationary contract.

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days notice of the termination of the contract, or by payment, by the employer to the employee, of seven days wages in lieu of notice.”

8. Probationary contract has been defined by section 2 of the Employment Act as:

“A contract of employment, which is of not more than 12 months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

9. In this case, the parties agreed on a probationary contract during the first three months of the contract after which the claimant was to be either confirmed or terminated. The parties, however did not expressly agree on the period for termination notice. Clause 5 of the contract of employment stated as follows:

“As with all position under, there is a 3-month probationary period after which the employment will either be confirmed or terminated.”

The dispute herein is therefore governed by the provisions of section 42 of the Employment Act which leaves the court with the discretion of determining the reasonable notice period.

10. The question that arises is what is the rationale for a probationary contract before confirming an employment. In my considered opinion, the said probationary contract is meant to allow both parties to the contract to assess each other's good and bad sides. It is a period for the parties to gauge whether the person they are about to confirm a binding agreement with, is the right one. Consequently section 42 *Supra* has been coined in a manner that provides parties with an easy and cheaper way to terminate the main contract before the probation period expires. The said probationary contract is however not supposed to be abused.

11. After carefully considering the pleadings, evidence and submissions presented before the court by both parties, I find and hold that the employment contract dated 16.12.2015 was terminated before it had matured to the state of gaining the protection and the safeguards erected under section 41,45,46,49 and 50 of the Employment Act. The said provisions are the main legal regime which protect employees from unfair termination by their employers. The claimant cannot therefore be availed the protection and the benefits of Section 41 because it was terminated during the probation period.

12. For the foregoing reason, it is my finding that the termination herein was proper save that the respondent terminated the contract before serving at least 7 days notice or paying the claimant wages in lieu of notice. Therefore I decline to make declaration that the claimant is still employee of the respondent and that he is entitled to his monthly salary of kshs.140,000 per month. I also decline to make an order in terms of prayer (b) because the same is already overtaken by events.

Notice and Compensation

13. I also decline to award the compensation for unfair termination in view of my findings above that the claimant is excluded by section 42 (1) of the Employment Act from that benefit. I will however award the claimant Kshs. 420,000 being wages for 3 months under section 42(4) of the Act. Under clause 5 of the contract the claimant was entitled to serve 3 months probation after which he be confirmed or terminated. There was no termination clause under the probation contract. Section 42 (4) of the Act provides for not less than 7 days. The claimant suffered huge loss after terminating his job on the basis of the new contract. The claimant will therefore have to content with the said sum because it was a risk he took deliberately when he signed the probationary contract on 16.12.2015 and went further to leave his former job.

Disposition

14. Judgment is entered for the claimant in the sum of **Kshs 420,000** plus costs and interest.

Signed, dated and delivered at Mombasa this 25th day of November 2016.

O.N. MAKAU

JUDGE