



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

CAUSE NO 1284 OF 2014

DICKENS ODHIAMBO OUYA.....CLAIMANT

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED..RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 4th August 2014 and filed in Court on 6th August 2014, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Statement of Defence on 8th October 2014.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called its Legal Officer, Jacob Mbae Meeme.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 3rd April 2013 in the position of Legal Officer at an initial monthly salary of Kshs. 50,000 which was later increased to Kshs. 55,000. He was not issued with a pay slip. The Claimant further states that he was placed on probation for a period of three (3) months and that he was confirmed by effluxion of time.

4. Sometime in March 2014, the Claimant was asked to submit his time sheets and he duly complied. Soon thereafter his employment was terminated without notice. He states that no valid reason was offered for the termination and that he was not afforded an opportunity to be heard.

5. The Claimant now claims the following:

a. A declaration that the termination of his employment was unlawful

b. Reinstatement or reengagement without loss of benefits or in the alternative;

i. 3 months' salary in lieu of notice (3x55, 000).....Kshs. 165,000

ii. 21 days' leave pay (21/30x55, 000).....38,500

iii. Service (15/30x 55,000).....27,500

iv. Compensation for unlawful termination (12x55,000).....660,000

v. Certificate of Service

vi. Costs plus interest

The Respondent's Case

6. In its Statement of Defence filed on 8th October 2014, the Respondent admits having employed the Claimant but on probationary basis as communicated by letter dated 3rd January 2013.

7. The Respondent states that the Claimant failed to meet critical deadlines and that his overall performance was poor, an issue that had been raised with him.

8. By an email dated 17th February 2014, the Claimant was asked to submit his time sheets for the purpose of monitoring his performance. The Respondent avers that it became aware of the Claimant's poor performance after perusing the time sheets.

9. It is the Respondent's case that the Claimant was aware of his superior's dissatisfaction with his performance and that he was afforded an opportunity to explain himself during meetings held on 24th July 2013 and 17th December 2013. The Claimant had also been issued with previous warnings.

10. The Respondent goes on to state that even after receiving a salary increment and guidance, the Claimant continued to perform poorly. The termination of his employment was therefore lawful and fair.

Findings and Determination

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

- a. The status of the Claimant's employment at the time of termination;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

Status of the Claimant's Employment

12. The Respondent states that by the time the Claimant's employment was terminated, he was still serving probation and is therefore not entitled to the remedies sought. The Claimant on the other hand maintains that he was confirmed in his appointment by effluxion of time.

13. Upon his employment, the Claimant was issued with letter dated 3rd April 2013 stating as follows:

"Dear Dickens Odhiambo Ouya,

PROBATION LETTER OF APPOINTMENT FOR DICKENS ODHIAMBO OUYA

We refer to the interview conducted in our offices on 23.03.13.

We are please (sic) to inform you that we are offering you for (sic) an employment in our legal department as a legal officer on the following terms:-

1. Your reporting date will be on 10.04.13 and the reporting time is 8.00am,

2. Your starting salary will be a gross of Kshs. 50,000 (all inclusive) which will be subject to

statutory deductions,

3. You (sic) employment will be subject assessment (sic) after serving the three (3) months' probation period starting from 10.04.13,

Kindly confirm your acceptance and note that this is not a letter of employment.

Thank you and we wish you the best.

Yours faithfully:-

SYNERGY INDUSTRIAL CREDIT LIMITED

(Signed)

(Signed)

J.M. MEEME

PARESH PANDYA

LEGAL OFFICER

CHIEF OPERATING OFFICER”

14. 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;”

15. Regarding probationary period Section 42(2) of the Act provides that:

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.

16. According to the letter dated 3rd April 2013, the Claimant's probationary period would have ended on 10th July 2013. The Respondent claims that owing to the Claimant's poor performance, his probation was extended.

There was however no documentary evidence to support this assertion. In ***Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR*** this Court held that extension of probation on account of poor performance can only be effected vide a participatory appraisal process that is well documented.

17. No evidence of such a process was adduced and in light of this, the Court has reached the conclusion that the Respondent's averment that at the time of termination the Claimant was still on probation is unsupported and therefore unbelievable. That said, the Court agrees with the Claimant that upon expiry of the probation period defined in letter dated 3rd April 2013, he was confirmed by effluxion of time.

The Termination

18. I will now examine the termination which was communicated to the Claimant by letter dated 15th March 2014. The letter states as follows:

“Dear Dickens Odhiambo Ouya,

TERMINATION OF EMPLOYMENT DURING PROBATION AGAINST ODHIAMBO OUYA

We refer to above subject matter regarding your employment.

1. You will appreciate that you have been on probation the same which has been extended in (sic) several occasions during our meetings with the management the most recent meeting being on

17.12.13 when you were given the last chance up to 31.03.14 to improve or leave the company.

2. It has been observed that however much time you will be given you have demonstrated that you are not capable to perform (sic) the said duties in the legal department in spite the company having (sic) been so indulgent on you and therefore by copy of this letter you are kindly informed that the company has hereby terminated your services.

3. By copy of this letter you are hereby notified that your services are now terminated as from 31.03.14 and therefore you are required to return any materials, equipment, documents you might be possessing for the company(sic).

4. Please note that you have been on probation but we are paying by **cheque number 005240 dated 31.03.14 of Kes. 44,108** being full and final dues and also being one month's in lieu of notice (sic) paid to you and in your favour purely as an *ex gratia* payment.

Do confirm receipt of this termination letter and enclosures by signing below. Thank you and we wish you the best.

YOURS FAITHFULLY:-

SYNERGY INDUSTRIAL CREDIT LIMITED

(Signed)

J.M. MEEME

LEGAL OFFICER

(Signed)

PARESH PANDYA

CHIEF OPERATING OFFICER

19. I have already reached the conclusion that by the time his employment was terminated, the Claimant had been confirmed by effluxion of time. I will therefore examine the termination as against the procedural and substantive fairness requirements set out in Sections 41 and 43 of the Employment Act.

20. Regarding substantive fairness, Section 43 requires an employer to prove a valid reason for terminating the employment of an employee. Perusal of the termination letter dated 15th March 2014 reveals that the termination of the Claimant's employment was triggered by poor performance. This is one of the grounds that must be established pursuant to the mandatory procedure set out under Section 41 of the Act.

21. It is my view that in determining cases of termination on the ground of poor performance, the Court must concern itself with the procedure adopted by the employer in reaching the decision to terminate employment.

22. In ***Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*** Rika J held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve.

23. I agree with this holding and add that it is not enough for an employer to state that an employee is a poor performer. Even where there may be disagreement between an employee and an employer on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.

24. In ***Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR*** this Court held that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41.

25. In support of its case, the Respondent produced a record of proceedings of meetings held on 24th July 2013 and 17th December 2013, the subject of discussion being the Claimant's performance. The Claimant however denied attending any such meetings and since he did not sign the minutes of these meetings, the Court could not verify whether the meetings indeed took place.

Remedies

26. From the foregoing, I have reached the conclusion that the termination of the Claimant's employment was unjustifiable and unfair and therefore award the claimant three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process.

27. From the evidence on record, the Claimant was paid one (1) month's salary in lieu of notice and the claim for notice pay therefore fails and is dismissed. Regarding the claim for leave pay, the Respondent adduced evidence showing the Claimant's leave balance as 6.5 days. In the absence of proof of

National Social Security Fund (NSSF) contributions on the Claimant's account, the claim for service pay succeeds and is allowed.

28. In the final analysis I enter judgment in favour of the Claimant in the following terms:

- a. 3 months' salary in lieu of notice.....Kshs. 165,000
- b. 6.5 days' leave pay (55,000/30x6.5).....11,917
- c. Service pay for 1 year of service (55,000/30x15).....27,500
- Total.....204, 417**

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

30. The Claimant is also entitled to a certificate of service and the costs of this case.

31. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Ongicho for the Claimant

Mr. Washe for the Respondent