



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.143 OF 2015

(Before D. K. N. Marete)

PATRICK KORIR ROTICH.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of an Ammended Statement Claim ammended on 29th June, 2015. It does not disclose an issue in dispute on its face.

The respondent in an Ammended Memorandum of Response opposes the claim and prays that the same be dismissed with costs.

The claimant's case is that his employment contract was illegally, unlawfully and unfairly terminated in contravention of the Employment Act, 2007 and the respondent's Human Resource Policy. He had been employed as legal counsel – Unilever Tea East Africa Ltd with effect from 18th July, 2011 vide a written contract.

His further case is that he was placed under probation for six months effective from this date of employment. He was entitled to three probation performance reviews in intervals of two months with the first being on 22nd October, 2012. This was a contravention of the original terms period for such review. This contravened clause 7.17 of the respondent's Human Resource Policy and Section 5, Employment Act, 2007.

The claimant's further case is that the second performance review was conducted on 2nd April, 2012, two months after the lapse of the probationary period as agreed thus occasioning an illegality. This conduct of the 2nd and 3rd review long after the stipulated timelines was discriminatory and actuated by extraneous considerations. This was also despite his written protest to the respondent that these reviews were no longer due.

The claimant's other case is that in the last of these reviews, he was not afforded an opportunity to react to the results of the review but was instead served with a letter of termination. This was a violation of his right to a fair hearing per Article 50 of the Constitution and Section 5 (2), Employment Act, 2007. He also avers that he was entitled to a pension scheme on close of probation but this was not accorded to him, or at all. He was accorded a salary increment and bonus on 12th March, 2012 in accordance with the respondent Human Resource Policy on terms for permanent employees. This is as follows;

12. The claimant claims that the termination of service was effected on 31st May, 2012 on the premise of probationary terms in an illegal, unlawful, unfair and irregular termination since the probation period had lapsed by effluxion of time and effectively the claimant constructively confirmed when the respondent failed to appreciate its responsibility and obligation in accordance with the Employment Act 2007 laws of Kenya.

14. The claimant claims that the respondent conducted a job evaluation where the claimant was the subject of the aforesaid evaluation process for the position of Legal Counsel Unilever Tea – East Africa wherein the work level was raise and a commensurate salary increment.

15. The evaluation results were effected in the month of June 2012 after the unlawful termination of the claimant's contract and the claimant was legitimately expecting the pay increment and commensurate benefits in line with the changes.

He claims as follows;

(a) Compensation equal to the claimant's gross monthly salary for 12 months (Kshs.1,644,258/=) as under Section 49 (1) (c) as read with section 50 of the Employment Act.

(b) Compensation equal to the claimant's gross monthly salary for 2 months (274,043/=) in lieu of notice as under Section 49 (1) (a) as read with section 50 of the employment act.

(c) Unpaid leave for one (1) year (Kshs. 137,021.50/=) under section 28(1) of the Employment Act.

(d) Sick leave for one month as follows;

Full pay (7 days x gross monthly salary (Kshs.137,021.50/=)/30 days)

plus (+) Half day (7 days x gross monthly salary (Kshs.137,021.50/=)/30 days) =
Kshs.47,957.52/=

(e) House allowance of Kshs. 456,483/=

(f) Fuel allowance of Kshs. 337,148/=

(g) Pension 150,000/= (3 months after due confirmation)

(h) Annual bonus of Kshs. 103,013.00/=

In the penultimate, he prays as follows;

(a) A declaration of that the termination was illegal, ubnlawful and irregular.

(b) That the respondent be condemned in accordance with Section 49 of the Employment Act 2007 laws of Kenya.

(c) That the claimant be issued with a certificate of service and letter of clearance.

(d) That the claimant be paid termination notice pay in full.

(e) The claimant be issued with a certificate of service and letter of clearance. An order directing the respondent to pay the claimant his terminal dues and benefits of Kshs.3,149,924.02/= as set out in paragraph 16 above.

(f) General damages.

(g) *Punitive damages.*

(h) *Costs of this suit and interest at court rates.*

(i) *Any other relief as the court may deem just and fit.*

The respondent's case is that this suit is bad in law, inept, ambiguous and does not or does not sufficiently disclose proper particulars of the claim on cause of action and should be struck out with costs. She also pleads that the action is time barred and intimates that she would raise a preliminary objection to deter continuance of the suit.

The respondent's further case is that the claimant's six month probationary contract was subject to renewal by operation of the law for a further period of not more than six months per S 42 (2) and (3) of the Employment Act, 2007 and essentially, this was between 25th July, 2011 to 25th July, 2012. She denies all claims of irregularity or delay of probation reviews and puts the claimant to proof thereof. In any event, this is the prerogative of the employer and not the whim and dictate of the claimant. She denies irregularity, illegality on discrimination in this exercise.

The respondent's further case is that the performance evaluation was to assess suitability for the job and therefore filling. Again, the claimant's termination was for under performance and poor service delivery and therefore fair and legal. She therefore denies the claim and prays that the same be dismissed with costs.

The matter came to court variously until the 18th July, 2016 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the claimant was on probation at the time of termination of employment?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. the claimant is entitled to the relief sought?
4. Who bears the costs of this suit.

The 1st issue for determination is whether the claim was on probation at the time of termination. The claimant in his written submission posits that he was not, this having lapsed on the 18th January, 2012 after a period of six months. His termination on 31st May, 2012 vide a letter of 30th instant was outside the probation period. He seeks to rely on the authority of **Hebson Ngaruiya Waigi Vs. Equitorial Commercial Bank Ltd (2013) eKLR** where Mbaru, J observed as follows;

“In this case, the respondent issued the termination letter on the basis that the claimant had become redundant. This was the reason given. However, in their evidence and by the call of Ms June Ambesa, there was no indication as to the steps taken by the respondent in pursuance to the provisions of section 40 of the Employment Act. What was clear was that the claimant was terminated under the terms of probations that the respondent held to be still in existence even after the lapse of the stipulated period of six months.

Section 42 of the Employment Act relate to the termination of probationary contracts. From the evidence of the respondent I take it that the claimant was still held to be on probation even after serving them for over 16 months. The termination was therefore on the basis of a probationary contract that exceeded six months. This is a misapplication of the provisions of the contract as between the claimant and the respondent as the clause on probation provided for six months, which could not be extended for more than the legal period of one year and could be terminated

within seven days.”

Again, the claimant submits that due to the absence of the extension of the probation period by the respondent, the claimant's employment was confirmed by virtue of the doctrine of effluxion of time at the end of the probationary period.

He further seeks to rely on the authority of **David Namu Kariuki v Commission for the Implementation of the Constitution (2015) eKLR** where Justice L. Ndolo observed as follows;

“According to the claimant's letter of appointment dated 30th January 2012, he was to be on probation for a period of three months from the commencement date of his employment being 1st March, 2012. The probationary period would therefore have terminated on 31st May 2012. It follows therefore that by the time the claimant was dismissed on 6th August 2012, his probationary period had come to an end.

17. The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the Employment Act, 2007.

18. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time (see Jane Wairimu Machira vs Mugo Waweru and Associates (cause no.621 of 2012). That said, the court finds that the claimant was confirmed in his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the court.”

On the basis of the claimant's submissions on issue numbers 1 and 2 above, I find that the claimant's termination of employment was had outside the probation period. Again, at this time, his employment had automatically been confirmed by effluxion of time. The confines of probation are guided and guarded by the law and no one would escape from this. This is because probation period is in law a transition period whereby the employer is allowed time and opportunity to test the suitability of new recruit in employment. Strict adherence to the procedure and timelines of probation must be had to avoid hurting the interest of the parties. This was not had in the circumstances of this case. I therefore agree with the submissions of the claimant and find that the termination of employment was outside the probation period. So far for the 1st issue for determination.

With a finding that the termination of employment was irregular and out of the probation period, it would be tenable to further find a case of wrongful, unfair and unlawful termination of employment and I find as such. And this settles the 2nd issue for determination.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. I must admit that the claimant is entitled to relief but not necessarily the one sought in the claim.

I however note that throughout the pleadings the claimant has not in any manner indicated or pleaded his monthly salary or emoluments or at all. He does not plead any periodic salary or pay thereby frustrating this court's ability to award relief in the circumstances.

Indicators of monthly salary or periodic emolument by a claimant in a case of unlawful termination of employment facilitates a computation and calibration of compensation awardable to a successful claimant by the court. In the absence of such data from the parties, and particularly the claimant, the court is left helpless like in the instant case. I am therefore not able to award compensation to the claimant in the circumstances.

This matter was visited by this court in the authority of **Samuel Kipkoech Keter V County Government of Bomet & 3 Others (2016) eKLR** where the court observed as follows;

“The letter of appointment is a critical document in establishing an employment contract and relationship. This is because it clearly illustrates the nature of the actual contract entered into by the parties and therefore eases the work of the court or any other agency in a determination of the terms of employment. Another such essential document is the payslip for the employee. These documents are necessary annexures in any claim relating to terms of employment and particularly unfair termination of employment. These facilitates a determination on the nature of termination and also relief sought in the event of unlawful termination. Their production, where appropriate is essential and non-negotiable in the establishment of a good claim.”

This is the same scenario here.

I am, however, inclined to allow the claim with costs to the claimant.

Delivered, dated and signed this **8th day of December 2016.**

D.K.Njagi Marete

JUDGE

Appearances

Mr. Obosso instructed by Sila Munyao & Company Advocates for the Claimant.

Mr. Karanja instructed by M/s Murimi Ndumia, Mbago & Muchela Advocates for the Respondent.