



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

Industrial Cause No. 1099 of 2012

BENJAMIN NYAMBATI ONDIBACLAIMANT

VERSUS

EGERTON UNIVERSITYRESPONDENT

JUDGEMENT

1. On 21st June 2012, the claimant Benjamin Nyambati Ondiba filed his claim of unfair termination by the respondent, Egerton University. The respondents filed their defence on 31st August 2012 admitting the claimant was their employee and was terminated for misconduct and thus deny the whole claim. At the hearing the claimant gave his sworn evidence in support of his claims while the respondent called Mr Joseph Mungai as witness in support of their case. At the close of the hearing both parties filed their written submissions on 2nd April 2014 and 30th April 2014 for the claimant and respondent respectively.

Claimant's case

2. The claimant was employed by the respondent on 1st July 2010 as the Network Administrator under the ICT Department and earning a gross pay of Kshs.68, 810.00 per month. The claimant took his 6 months' probation period and upon completion, confirmation was deferred to May 2011. The claimant avers that the letter to defer his confirmation was activated by ill-will and bad faith after seeking confirmation from the respondent which had taken inordinately long. The claimant had raised concerns with the respondent in the manner procurement processes were being handled by the responsible person thereby prompting ill-treatment and victimisation. The claimant completed his extended probation which lapsed on 23rd May 2011 and as under the CBA there was an implied term that they had been absorbed and or confirmed as a permanent employee. On 24th October 2011, the claimant was served with a letter of termination contrary to the provisions of the Employment Act and the CBA which was done inhumanely and against the rules of natural justice as the same was done while he was on sick leave. That any claims made against the claimant were never investigated or substantiated or indicated to him as under the law and his termination violated the provisions of section 41 and 45 of the Employment Act and the existing CBA.

3. The claimant also states that the grounds for his termination were actuated by malice and in bad faith and unfair as he was never summoned to defend himself and was in breach of natural justice and this the respondent was biased and no efforts were made to establish the accusations and when he lodged an appeal against his dismissal, no response has ever been received. The claim is for;

a. *The sum of Kshs.1, 586,507.00 being terminal dues payable in damages for unlawful termination;*

- b. *A declaration that the claimant's termination from employment was unlawful and against the rules of natural justice;*
- c. *An order that the employer do issue a certificate of service to the claimant in accordance with the Employment Act*
- d. *Costs of the suit;*
- e. *Interest on (a) and (c)*
- f. *Any other or further relief as this court might deem fit.*

4. In evidence to support his claim, the claimant stated that he is trained as a technologist and worked for the respondent from 1st July 2010 to 24th October 2011 when he was unfairly terminated. He applied for the job of network Administrator and was given the offer in Grade X in ICT Department. The position was subject to confirmation after 6 months upon which he was to become a permanent employee that was pensionable. During the probation period he earned Kshs.67, 478.00 per month. In the offer letter, the terms of service were subject to the Collective Bargaining Agreement (CBA) that was stated as that of the period 2008/06 which had ceased and the one in force was for 2010. The claimant was paid a basic salary of Kshs.31, 168.00 based on the 2010 CBA indicating this was the applicable document and not as stated in the offer letter.

5. The claimant served his probation period of 6 months until 31st December 2012 when he was due for confirmation. He asked the department head at the Human Resource (HR) office and on 24th February 2011 he received a letter from HR indicating that the confirmation had been deferred until May 2011 an additional period of 3 months. This deferment was based on the 2010 CBA that allowed a department head to defer probation for 3 months. On 23rd May 2011 when the time lapsed, there was no communication until 24th October 2011 when the claimant received his letter of termination.

6. According to Clause 4 of the CBA, the claimant upon completion of his probation period was to receive a confirmation letter failure to which, it was to be assumed he had been confirmed and became permanent and pensionable. Instead of a confirmation letter being issued, the claimant received a termination letter on the reasons that he was of unsatisfactory performance. Under the CBA, before such termination should have been subjected to disciplinary procedures.

7. The claimant also stated that he had differences in his department on wireless connections where he was issued with 2 letters of misconduct. There were discussions with the administrators on the matter. The claimant wrote a letter noting defaults in the integrity of the networks as some items purchased were not delivered to the department and hence raised this with the Deputy Vice Chancellor (DVC). The claimant duty was to maintain the university networks and he noted the procurement of materials was not being done properly.

8. The claimant got sick and was admitted for surgery at the Nairobi hospital and while on sick leave, he received his letter of termination. The termination was unfair as he was never given a hearing and the procedures for any disciplinary acts outlined in the CBA were never followed. In the respondent's defence it is noted that a complaint had been raised against the claimant by Mr Mungai the Acting ICT Manager who had done a report to which the claimant stated that when he noted there were problems in his department, he raised his concerns with the DVC and Mr Misaro was asked for an investigation and a report was filed. The report noted that the allegations against the claimant were unfair and unfounded.

9. The claimant is therefore seeking his terminal dues that of 3 months' salary in lieu of notice as under the CBA and damages for unfair termination as he was terminated while undergoing treatment and incurred costs of travel and treatment as he had received an imprest that was not enough and seek to be paid the difference of kshs.46,080.00. He never took his leave days and his medical bills were not paid and the claimant only paid these after the claim was filed. The claim for hospital bills is thus withdrawn. He is also seeking reinstatement.

Respondent's case

10. In defence, the respondent stated that upon being employed, the claimant was put on 6 months' probation pending confirmation. On 21st December 2010 and the Acting IT Manager forwarded a report to the DVC with regard to the claimant's performance noting that the ICT department had been affected by the claimant's actions and despite several meetings with the claimant to discuss the issues, he was persistent on working single handedly with a confrontational attitude towards his work mates which was inappropriate as the position held by the claimant was dependent on team work. On 24th February 2011 the claimant was informed that his confirmation had been deferred due to unsatisfactory performance and poor interpersonal skills and was advised to improve and be conscious in cost utility and improve on his work planning. On 20th July 2011, the IT Manager was asked to prepare a confidential report on the performance of the claimant. On 24th August 2011 the It Manager wrote to the claimant about his misconduct pointing out the various incidents where the claimant had behaved in a manner that was insulting to the IT manager at a meeting held on 23rd August 2011. At the meeting the claimant had displayed conduct that was disrespectful to his colleagues and refused to abide by the resolutions reached. That the claimant remained erratic in responding to situations, arrogant and refused to obey lawful and proper command issued by his superior the IT Manager.

11. The respondent also stated that the claimant instructed one of his subordinates not to conduct surveys in a number of areas that had been agreed at the meeting held on 23rd August 2011 and attempts by IT Manager and HR to assist the claimant in the management of his erratic reactions were met with arrogance. The claimant was forcefully evicted from the meeting of 23rd August 2011 by security personnel.

12. On 26th August 2011 the IT Manager wrote to the claimant regarding his misconduct after unilaterally stopping the installation of a radio mast at the respondent's Faculty of Health Science. He failed to adhere to communication protocol by copying his emails advocating stoppage of work to staff of KENET, Dean Faculty of Health Science, Dean of Agriculture and other personnel without reference to his supervisor.

13. On 5th September 2011 the IT Manager submitted his confidential report on the claimant and noted his performance lacked significant progress, lacked interpersonal skills and failed to consult with others even when this was required of him to do so. The IT manager made a recommendation that the claimant should not be confirmed in his position. On 24th October 2011 the claimant was terminated in accordance with clause 4(d) of the terms of service and clause 42 of the Employment Act. The termination was effective on 1st November 2011. A one months' notice pay was to be paid subject to the claimant returning all of respondent's property in his possession and file a clearance form dully completed before his dues could be paid as he had a lap top valued at Kshs.48, 750.00.

14. That the claimant is not entitled to kshs.206,430.00 as notice pay of 3 months or damages of kshs.825,720.000 or Kshs.311,321.00 for medical bills as these are not owed. Also the claim for baggage allowance of Kshs.29, 370.00 is denied as well as the claim of Kshs.167, 580.00 and 46,080.00 for unpaid leave and refund of expenses outlined by the claimant. These should not be paid. That the claim in hospital bills has already been paid by the respondent and do not arise. The termination was lawful as there were good and valid reasons as under section 45(2) (b) (in) and (ii) and thus the claim should be dismissed.

15. In evidence to support the claim, Joseph Mungai testified that he is a Computer Engineer working with the respondent and conversant with the claim filed by the claimant who worked in his department. When the ICT Manager went on leave, the witness was the acting manager and directly working with the claimant as his supervisor. Initially the claimant's performance was good as IT is a technical area and required team work. However the claimant did not perform well. He got to witness several issues and noted the claimant was not a team player, a lone ranger and being knew he needed to interact with his colleagues for better performance of the department.

16. The witness also stated that when he was the acting IT Manager he was responsible for networks

and needed a team to secure a contract for the respondent. When the claimant was asked to work on it, he failed to do as directed. The claimant also got a third party technician to work on the network servers which interfered with the service. He changed the configurations forcing others in his departments to re-do the work to restore the networks. That the claimant as the Network Administrator should have known the standard procedures in such a situation. He was asked to address the situation but was not cooperative.

17. Further the witness stated that the claimant was a difficult person to work with, he was rude and violent and refused to acknowledge his mistakes. There were two areas that needed to be connected – the Njoro and Town Campuses – the claimant was asked to do a report on a template for the sites and when he handed the report, the same had flaws and the relevant template was not used. The respondent and department staff had done such a process before but the claimant refused to learn from it. The project could therefore not proceed. This was communicated to the claimant through emails, but still failed to do as was required of him. Another incident related to the claimant storming into a meeting following a colleague who had removed some computers from the stores causing problems to everybody else in the entire department. That the claimant lacked protocol in dealing with his colleagues and when this was brought to his attention, he failed to address it and remained arrogant.

18. The witness had worked with the claimant for about 6 months and was able to do a confidential report on him. The claimant was incompetent and insubordinate and not a team player. When given orders by his supervisors and seniors, he failed to attend. After filing the confidential report, the witness was called to the Senate that handles all matters and the issue of internet problems that had been grounded was addressed. He defended the claimant noting that had he disclosed his poor work performance he would have been terminated immediately. He however did not recommend him for confirmation noting that the claimant needed to work on his skills and interpersonal relations. The respondent ICT department was large and expensive valued at over 200 million and the claimant was expected to learn from others but failed to do so.

Submissions

19. The claimant in the written submissions state that upon his employment on 1st July 2010 his terms and conditions of service were governed by his letter of appointment and the applicable CBA operative at the time, 2010. Probation period was 6 months, and was extended by 3 months in a letter dated 24th February 2011. At the end of the probation, there was no communication made to the claimant and according to the CBA, he became a permanent and pensionable employee of the respondent. This scenario is outlined under the CBA Clause 4 and 5. In support, the claimant relied on the case of **Ruth Gathoni Ngotho-Kariuki versus Presbyterian Church of East Africa and Presbyterian Foundation [2012] eKLR** where the court held that the employee was entitled to be informed by the employer the refusal to renew her contract within 3 months before lapsing of expiry. The employer silence was constructively construed to mean renewal.

20. The claimant also submitted that the termination was unfair and not justified contrary to the provisions of the Employment Act. The reasons for termination were indicated in the termination letter but there was no justification as the claimant was not taken through a hearing process or given time to defend himself against any accusations that were levelled against him. The applicable CBA was not followed. The claimant relied on the case of **Robert Brown versus Livingstone Registrars Limited & 2 Others [2012] eKLR** which held that acts such as poor performance, minor errors of judgement or negligence are not typically considered gross misconduct, but rather as poor performance.

21. There was no procedural fairness as outlined in section 45 and 41 of the Employment Act and the CBA. When the claimant's probation period expired, there was no communication on his performance, he continued to serve and while on his sick leave was served with a letter of terminations without having been heard or given a chance to give his defence. In the circumstances of the case the claimant should be paid 3 months in lieu of notice, passage allowance, leave allowance and refund of his expenses together with maximum compensation.

22. The respondent on their part submitted that the claimant after his employment by the respondent

was of poor interpersonal skills which were a constant barrier to the flow of operations in the ICT Department. The reason for being placed on probation is not only to assess an employee's performance but to assess their capability. Competence and good interpersonal skills allow an employee to flourish as an employee does not work in isolation. Section 45 of the Employment Act outline the provisions under which a termination can be undertaken to be valid, fair and justifiable. In this case, at a meeting held on 23rd August 2011, the claimant displayed utter disrespect to all colleagues at the meeting and indicated his unwillingness to abide by the resolutions arrived at in the meeting. That the claimant was advised to work on his conduct that was unbecoming, lacked teamwork, depicted arrogance, disrespectful and acts of insubordination. The claimant unilaterally stopped the installation of a radio mast at the respondent's faculty of Health Science and Agriculture without consultations with his superiors. The claimant was found totally incompatible with the employer and as such, his supervisor advised that he should not be confirmed.

23. The respondent also submitted that under the letter of appointment, the claimant was to be given 1 month termination notice or be paid in lieu of such notice. The claimant was supposed to clear and hand over property belonging to the respondent before his terminal dues were paid. The claimant refused to return the property of the respondent, a lap top. The respondent relied on section 44 of the Employment Act noting that any employee who neglects to perform his duties, is careless and improperly conducts himself is guilty of misconduct. The claimant was negligent which is defined by the law as gross misconduct.

24. In this case, termination was fair and lawful as the same was based on the claimant's poor performance, poor interpersonal skills, incompatibility and insubordination which the claimant failed to improve upon despite numerous advice. The respondent relied on the case of **Carey Francis Mbaraka versus Delta Trading Equipment's Co. Ltd, Cause No. 2073 of 2012** where the court held that the Industrial Court is not a playing field for errant employees and where an employee engages in acts of lawlessness against his employer, the court must take that into account. The claimant was only employed for 1 year and 3 months and his claim should be dismissed.

Findings and determination

25. Both parties agreed during the hearing that the claim with regard to the medical bills amounting to kshs.311, 321.00 have now been paid. This being admitted will be taken as a settled claim.

26. On the other claims the court must determine the following issues;

1. What was the employment status of the claimant at the time of termination?
2. Whether the termination was valid, fair and justified in the circumstances of the case; and
3. Whether there are any remedies.

27. Most employment contract now has provision for a probation period. The purpose of imposing probation as a condition of engagement is to assess the employee's performance and behaviour during the probationary period. Investing time and resources in the assessment of performance during the period of probation of ongoing employees and longer-tem non-ongoing employees can deliver benefits for the employer whether the employee's employment is terminated or not. In determining the length of the probation period, employers are supposed to look at the contract of employment, applicable CBA and the law. It is therefore important for an employer to carefully consider what status of an employee during the probation period; the duration [maximum] of the probation, whether the duration can be extended and in what circumstances; matters to consider while on extension of probation period; and what the probationary performance will be measured against and the mechanisms by which it will be measured. This outline is important to any employer who has placed an employee under probation as the subject employee must be advised, during their probation period on their work responsibilities, the standards of work expected of them and the standards of conduct expected of them. This will entail the employee's immediate duties and any additional requirements in respect of ability to perform other jobs and or to interact appropriately with other employees and third parties in the work environment.

28. A probationary employee is one who has a conditional contract. That is the continuation of the contract is conditional on whether the employees' work performance during the probation period shows that he is able to carry out the work properly. While this defines the purpose of the probationary period, it does not mean the employer has a free hand to fire the subject employee if the employer feels the employee performance is unsatisfactory. The employer is allowed to extend the probation period in order to further assess the employee's performance. This must however be outlined in a measurable tool that can be used to evaluate the employee at the end of the set period. This then means that the employee must be given an opportunity to make presentations with regard to any issue of his non-performance and agree on the conditions set for the extension of the probation period. Therefore, it must be clearly set out as to the reasons for the extension of the probation period, the duration, a set of reasonable performance standards, specific performance standards as expectations, mode of evaluations and monitoring of the employee performance against the set performance standards, how to give feedback to the affected employee, when to issue a warning where the employee fails to meet the set standards and what assistance and training the employee is supposed to get to be able to achieve the set performance standards. In a dynamic work environment, these are reasonable and legitimate expectations of the employee during the probationary period that can apply to any employer and employee.

29. A good example is to be found in the case of **Fraser versus Caxton Publisher [2005, 3 BALR 323]** where an employee was dismissed for falsifying her resume to get a job and once employed found to be incompatible for the job. In **Tharratt versus Volume Injection products (pty) Ltd [2005, 6 BALR 625]** an employee who was dismissed during the probation period for poor performance was found to have been unfairly terminated as the employer failed to investigate the cause of the poor performance.

30. Section 42 of the Employment Act, 2007 is therefore important to also refer here;

42. (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(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.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

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

32. With regard to the application of section 42 of the Act, an employee can be terminated without going through the process of hearing or being subjected to disciplinary procedures applied to other employee who are not on probations. The probation period cannot be extended for more than 6 months without the consent of the affected employee and the period cannot go beyond 12 months in aggregate. Termination of a probationary contract can be effected after 7 days' notice or payment in lieu of such notice.

33. In this case, the claimant was employed on 1st July 2010 and issued with a letter of appointment for the position of Network Administrator. His contract provided for a probation period of 6 months which was to end on 31st December 2010. There was no communication until 23th February 2011 when the claimant was served with a letter deferring his confirmation which noted;

Please refer to our letter of offer of appointment dated 7th June 2010 in which the terms of your appointment were stipulated to include six (6) months' probation period before confirmation of appointment.

It has been brought to our attention that your performance of duty has not been satisfactory. The effective and efficient provision of service, loyalty, commitment and

responsibility to duty requires you to take note of the following:

- a. *Improvement on your interpersonal relations*
- b. *Consciousness in cost utility &*
- c. *Improvement on work planning*

The above shortcoming has been pointed out to you by the ICT Manager. Your confirmation will therefore be deferred for another three (3) months period with effect from 24th February 2011 to 23rd May 2011. It is expected that at the end of that period you will have made substantial improvement and corrected your weak areas to which the University will take necessary course of action.

34. Did this deferment of confirmation of the claimant probationary terms meet the standards set in section 42 of the Employment Act? Did this deferment of confirmation of the claimant meet fair labour practices as outlined above? Section 42 is couched in mandatory terms, before extension of the probation period, an employee must agree to the same and even where such consent is obtained, the period cannot be extended for more than one year in aggregate. From the letter of deferment, the claimant was to be reviewed on 23rd May 2011; this was not done until the date of termination, 3 months later. The respondent does not outline what performance measures were put in place to assist the claimant in achieving his maximum potential.

35. I agree with the respondent in their submission that;

One of the reasons why an employer places an employee on probations is not only to assess the employee's performance but also to assess their capability with the respondent's workforce.[\[1\]](#)

36. The essence of section 42, which majestically stands out alone in the entire of the Employment Act, give an employer immense powers in an employer and employee relationship. An employer;

may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

37. This gives an employer who finds themselves with a newly employed employee and fails to cope with the work demands, is of poor performance or for any other cause is not able to undertake the duties assigned to them. This is a time to enable the employee display his worth from the assigned duties and to give the employer confidence that indeed they are what they stated at the interview and outlined in their application for employment for the allocated job. If there is non-performance or the job fails to meet the employee expectations, either party has 7 days within the probationary period to terminate the relationship.

38. The effect of the respondent's action in deferring the confirmation of the claimant unilaterally and filing to review and confirm his employment was that he became constructively confirmed as of 31st December 2011. The respondent failed the provisions of the law outlined in section 42 of the Employment Act. That failure must be interpreted to the benefit of the employee, the claimant in this case. He effectively became permanent and pensionable as under the applicable CBA, 2010 that remained valid at the time of the claimant's employment.

39. Even where the respondent had good ground to terminate the claimant's contract within the probation period, they choose to defer unilaterally and even after the period of deferment lapsed, did nothing and again unilaterally decided to terminate the claimant. I find no evidence, in the pleadings in defence, in the testimony of Joseph Anthony Mungai for the respondent or in the submissions that before termination, the claimant was given notice or a hearing conducted to address any misconduct as under section 41 of the Employment Act. To terminate the claimant as the respondent did on 30th October 2011

without a hearing was an unfair labour practice.

Remedies

40. The claim for notice pay is based on the CBA, 2010. Once the claimant finished his probation period on 31st December 2010, the CBA that covered him made provision for termination of employment upon notice of 3 months. this is outlined in the CBA. The claimant will be granted pay for 3 months in lieu of notice following his termination.

41. The passage and baggage allowance was to be paid to the claimant following a memo dated 7th July 2010. There was no evidence by the respondent to dispute the payment of this amount. This will be granted. However the claim for imprest expenses, even though no evidence was given by the respondent to contradict this claim, the claims forms are not approved or confirmed as having been incurred in the course of undertaking business for and on behalf of the respondent. This will be declined.

42. The claimant was entitled to annual leave after serving for 6 months. he had 36 days of annual leave for each year calendar year. Based on his monthly salary of Kshs.67, 478.00 the 36 days earned for the calendar one year served is Kshs.80, 971.20. this will be granted.

43. On the finding that the claimant was unfairly terminated, this court notes that he had served for one year and three months but the circumstances under which he was served with his letter of termination was most inhumane. The claimant was on sick leave and was never given notice or an opportunity to defend himself. An award of three (3) months' pay is therefore an adequate compensation in this case. This amounts to kshs. 202,434.00.

44. The respondent gave evidence that the claimant refused to return their property, a lap top and hence the reason for withholding the terminal dues. There was however no counter-claim in this respect or the value of this asset stated and claimed from the claimant. it would be useful for the claimant to surrender any properties of the respondent in his possession and not authorised to keep. Despite there not being a counter-claim, where the court finds it fit and just to make an order that is appropriate, the claimant to comply as directed. In view of the court findings above at paragraph (43), the claimant to return the stated lap top in seven (7) days.

In conclusion, I enter judgement for the claimant against the respondent in the following terms;

- a. **A declaration that the termination of the claimant by the respondent was unfair;**
- b. **The claimant is awarded 3 months gross salary in compensation at Kshs.202, 434.00;**
- c. **Notice pay of 3 months gross salary at Kshs.202, 434.00;**
- d. **Accrued leave pay at Kshs.80, 971.20;**
- e. **The claimant to return the property of the respondent in his possession [the lap top] within 7 days; and**
- f. **50% cost of the suit.**

Delivered in open Court at Nairobi and dated this 27th Day of May 2014

Mbaru

JUDGE

In the presence of

Court Assistant:

.....

.....

[\[1\]](#) See Respondent's written submissions, paragraph 6, and page 2.