



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 297 of 2011

GICHUKI KABUKURU APPLICANT

VS

POSTAL CORPRATION OF KENYA RESPONDENT

JUDGMENT

Issue in dispute

Unfair and unlawful dismissal of Claimant from employment.

The Claimant herein Gichuki Kabukuru filed his statement of claim dated 15th February 2011 on the 14th March, 2011 through the firm of Ngata Kamau and Company Advocates. In his memorandum of claim, the Claimant states that he was employed by the Respondent as an Assistant Manager/Corporate Communication vide a letter dated 5th May 2009 and he commenced employment on 6th May, 2001.

The offer of employment was subject to a probationary period of 12 months. On the 4th June 2010, the Claimant states that the Respondent, illegally purported to extend the probation period for a further period of 6 months which was unlawful. That further on 10th November, 2009, the Claimant states that he was appointed by the Respondent to perform the duties of Manager/Corporate Communication, which appointment was backdated to 29th June, 2009 over and above the duties of Assistant Manager/Corporate Communication he was already performing. On 21st December, 2010, the Respondent terminated the Claimant's employment purporting it to be probationary without giving reasons for the termination and without giving reasons for the termination and without paying any terminal dues.

The Claimant wrote to the Respondent on 13th January, 2010, challenging the termination of employment without any offer to pay his terminal dues under the employment and therefore demanding payment of his terminal dues as a permanent and pensionable employee of the Respondent.

On 1st February, 2011, the Respondent paid the Claimant Ksh.43,959,60/= expressed as one month's salary in lieu of notice but declined to pay any other dues the Claimant says he is entitled to. The Claimant contends that by the Respondent terminating him after serving for 18th months, the probation period had long lapsed as 18 months was long after the probationary period permissible under the law had expired.

The Claimant contents that the probation employment terminated automatically on 5th May 2010 into a permanent and pensionable employment when the Claimant was appointed to perform the duties of full

Manager/Corporate communication which he was not under probation.

The Claimant further contends that he was diligent in the performance of his duties and the Respondent's contention that his employment was terminated because of poor and unsatisfactory performance were malicious. The Claimant contends that the Respondent terminated his employment without paying his terminal dues except Ksh.43,959.60 one month's salary in lieu of notice paid after demand for terminal dues was made by the Claimant. The Claimant also states that he was paid salary for Assistant Manager/Corporate Communications but at termination he had not been paid the difference of salary for the Manager/Corporate Communication amounting to Ksh.70,000/= per month for the entire 18 months. He says that he was entitled to 3 months' notice to terminate employment or 3 months' salary in lieu of notice.

The Claimant therefore seeks judgment as follows:

(a)	Salary arrears 70000 x 18 months	=	Ksh.1,260,000/=
(b)	3 months salary in lieu of notice	=	Ksh.54,000/=
	Total	=	Ksh.1,800,000/=
	Less paid	=	Ksh.43,956.60/=
	Balance	=	Ksh.1,756,040.40

The Claimant submits that as a result of the unlawful termination, he suffered loss for which the Respondent is wholly liable. He prays for;

- (a) A declaration that the termination of the Claimant's employment by the Respondent was unjustified, unlawful, unfair, wrongful, malicious and illegal.
- (b) That the Respondent be ordered to pay the Claimant his terminal dues amounting to Ksh.1,756,040.60.
- (c) He also seeks for costs of this case.

When the Respondent was served with the Claimant's memorandum of claim they filed their Reply dated 28th April 2011, on 29th April, 2011 through the firm of Sichangi and Company Advocates. In this reply the Respondents admit that they employed the Claimant as an Assistant Manager/Corporate Communication while under probation for which he accepted as for the Respondents exhibit PCK 1. They also agree that the Claimant was appointed to perform extra duties of Manager/Corporate Communication but he was still substantively an Assistant Manager/Corporate Communication as exhibit PCK 2. The Claimant understood this and in his letter exhibit PCK 3 sought to be confirmed to the position of Assistant Manager/Corporate. The Respondent avers that the Claimant and his dues were accordingly paid as provided for under the Employment Act. The Respondent further avers that the Claimant was to be on probation for a period of one year after which he could be confirmed but the confirmation was differed for 6 months to enable the Respondent assess the Claimant further. The Respondents avers that the Claimant's performance was not satisfactory and this is why the confirmation was differed by a further 6 months as per PCK 4. The Respondent avers that the Claimant was finally terminated as his work was not satisfactory. The Respondent contends that their periodic review of the Claimant's work showed that he was performing fairly. The report PCK 5 further showed that there was need for greater commitment and motivation from the Claimant. The Respondent further avers that the Claimant's performance deteriorated further and therefore his probation period was terminated as per PCK 6. The Respondent asked this court to dismiss the Claimant's case accordingly.

The parties consented to have the case proceed and a determination made on their pleadings filed herein. They also agreed to file their written submissions upon which this court was to reach a finding.

The Claimant filed his submissions on 11th November 2011 and the Respondent on 1st December 2011. In the Claimant's submissions they asked court to determine;

- (1) Whether the Respondent informed the Claimant in the termination letter of 21st December, 2010, the reasons for termination of his employment.
- (2) Whether under the Employment Act, the Respondent could extend the probationary period for 12 months to 18 months as they did on 4th June, 2010.
- (3) Whether the Claimant's performance of his duties was satisfactory for the entire period he worked for the Respondent.
- (4) Whether the Claimant was entitled to be paid for the post of Manager/Corporate Communication for duties performed from 29th June 2009, together with those of Assistant Manager/Corporate Communication.
- (5) Whether the Claimant is entitled to be paid the costs of this claim by the Respondent.

In answer to question 1, the Claimants submit that the letter under reference terminating the Claimant's services did not give any reasons for the termination and the contention that the performance was not satisfactory is an afterthought. The Claimant submit that mere fact than reason are not given to show that the Respondent was not acting in good faith and their defence should therefore fail.

The Claimant submit that the Respondent were not entitled by law to extend the probation period for 6 months and that that extension has no legal effect. That this probationary period ended on 4th May 2010. The Claimant further submit that the Respondent could not have appointed the Claimant to perform higher duties of Manager if his performance was not satisfactory. The Claimant further submit that the various letters to the Claimant from the Respondent's General Manager and the Permanent Secretary, Information and Communication show he performed well and therefore the Respondent's contention of poor performance is not truthful.

The Claimant therefore submits that he is entitled to all the orders sought.

The Respondent on the other hand submit that the claim must fail. They submit that the issue for determination is whether the Claimant's termination was unlawful. The Respondent submit that indeed the Claimant covered higher duties which required dynamism and innovation but his performance was not satisfactory. They submit that he was paid all his terminal dues.

Having examined the evidence of both parties submitted through their various memoranda and their written submissions, the issues for determination by this court are:

1. Whether the Claimant was unfairly and wrongly terminated.
2. What remedies, if any the Claimant is entitled to.

On the 1st question, it is not in dispute that the Claimant was employed by the Respondent on the 5th May, 2009. The offer was subject to twelve months probation. The probation period was 12 months which the Claimant acceded to. However, the extension of probation period by another six (6) months was contrary to Section 42 of the employment Act which states 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.

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

The wordings of this section are couched in mandatory terms implying that the provision must be adhered to.

Having said that the extension probation period was contrary to law, it implies that the probation period ceased automatically at the end of 12 months and could not be extended even by a single day. At this point, the Claimant was automatically converted into a permanent employee on 5th May, 2010.

In any case, during the same period, the Claimant was asked to perform duties of a higher post as Manager/Corporate Communication. The letter appointing him in this capacity dated 10th November, 2009 states as follows;

“I am pleased to inform you that you have been appointed to higher duties of Manager/Corporate Communication with effect 23rd June 2009. The position that you have been appointed to entitles you to 70% of the difference of your current substantive salary and the entry point of the higher grade in which you have been appointed to cover duties.

I am sure you will be equal to the tasks ahead”.

The Claimant was employed on 5th May, 2009 and asked to act on this higher post on 23rd June, 2009 for over 9 months after his appointment as Assistant Manager. If the Respondent were sure he was equal to the task ahead, what becomes of the Claimant as time goes by that he could not be confirmed in the lower post. To claim that the Claimant was under performing on a lower post during this period when he was asked to perform duties of a higher post leaves many questions unanswered. Why did the Respondent who felt that the Claimant could not be confirmed in employment let him serve in the higher office? The Claimant had submitted that this reason was an afterthought as it was floated for the first time after the filing of this suit. A look at the letter differing the end of probationary period to the Claimant from the Respondent dated 4th June 2010 reads as follows;

“This is to inform you that your confirmation has been delayed for a further period of six (6) months to enable your controlling officer assess your performance further”

However whether the Claimant’s controlling officer did assess the Claimant’s performance and with what results remains unclear because on 21st December, 2010 the Respondent wrote to the Claimant another letter terminating his services and in this, they just stated as follows:

“Please refer to this office letter dated 4th June 2010 where your confirmation in appointment was differed for a period of six (6) months upon the expiry of the mandatory probation period.

The purpose of this letter is to inform you that your probation appointment is hereby terminated with immediate effect.

Please surrender your employment and other official items in your possession to your controlling officer ...”

Basically, the reasons for the termination are not explained and when the Claimant states that reasons stated for this termination being non performance are an afterthought, I agree with him.

Section 43 (1) of Employ Act, provides that;

“in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair, within the meaning of Section 45”.

In this case I find that the Respondent has not demonstrated the reasons for terminating the Claimant’s services. In fact the Claimant’s various letter of commendation have been placed before this court

showing he was a good worker. One such letter is dated 18th October, 2010, just 2 (two) months before the Claimants services are terminated. It is from the Permanent Secretary, Information and Communication and it reads in part:

“RE: COMMENDATION FOR GOOD SERVICE

As part of the team that made it possible for Kenya to successfully host the UPU 2010 Nairobi. Postal Strategy Conference at the United Strategy Conference at the United Nations Office at Nairobi (UNON) from September 22nd to 24th, a global meeting that brought together over 700 delegates, from over 190 Universal Postal Union (UPU), Member State Countries.

I wish on behalf of the Government of Kenya and the Ministry of Information and Communication to thank you personally for the good work that you did in making the conference a memorable and very successful event.

(SIGNED)

Bitange Ndemo, PhD, CBS

PERMANENT SECRETARY”

From this analysis, I find that the Respondent terminated the Claimant’s services unfairly and unlawfully.

That answers my 1st question, what remedies then are available to the Claimant from the Respondent. First and foremost the Claimant performed duties of a higher post for which he was not paid for. The letter appointing him to this post indicate that he was entitled to 70% of the difference in salary between his position and of higher post. The Claimant’s salary at the time was 54,130/=, house allowance, 28,540 and car allowance 10,000/=.

GROSS TOTAL = 92,630/=

Given that the allowance for the higher post was to be 70% of the difference between the substantive pay and the higher pay, what Claimant was entitled to was 70% of the difference between 54,130 and the higher post. What the higher post was, is not indicated by the Claimant nor the Respondent and this court will not go on a fishing expedition to know what the difference was. This prayer of payment for salary for the higher post is not proved so that must fail.

The Claimant’s services were unlawfully and unfairly terminated, I therefore convert the dismissal into a normal termination and order that the Claimant be paid as follows:

(1) The difference in one month’s notice pay in lieu of notice from the basic pay to the Gross pay amounting to 92630 – 54130

= 38,500/=

(2) Compensation equivalent to 12 months salary for wrongful termination

= Ksh.92,630 x 12

= Ksh.1,111,560/=

GRAND TOTAL = Ksh.1,150,060

(3) Claimant be issued with a certificate of service.

(4) Costs of this suit born by the Respondent.

Dated, signed and delivered this 5th day of October, 2012 before Court

HELLEN WASILWA

JUDGE

Appearances: