



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 66 OF 2018

(Formerly Nyeri ELRC 316 of 2017)

JOHN MUTHOMI MATHIU.....CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant is an Advocate of the High Court of Kenya and was employed by the Respondent as a senior legal officer from 28th April 2014 till 3rd September 2014. He was dismissed verbally and he averred that the dismissal from service was callous, malicious, insensitive, inhuman, unlawful, wrongful, illegal and unfair at a time the Claimant was recuperating having been discharged from hospital on 2nd September 2014. No reason was given for the dismissal conveyed by the security officer of the Respondent despite incessant requests for a reason. The Claimant therefore sought payment of the salary for the month of August 2014, the days worked in April 2014, bonus fund salary deduction for 4 months, one month salary *in lieu* of notice, 10 days earned leave, unremitted NSSF deductions, pensions deductions refund under the Employer Pension Scheme as provided for under the NSSF Act, general damages for unlawful, wrongful and illegal termination of employment as well as costs of the suit and interest.

2. The Respondent filed a memorandum of response in which it averred that the Claimant was less than candid in the claim as the period when the contract was terminated was under the probationary period which was for 6 months from 28th April 2014 till 27th October 2014. The Respondent averred that out of trust and confidence in the Claimant he was entrusted to deliver a sum of USD 5,500 in cash to the Respondent's potential business associate outside Kenya as part of the Respondent's capital contribution to a start up business with the potential associate. The Respondent averred that the business opportunity was lost and also the assigned funds as the Claimant declined to return the said funds. The Respondent averred that the Claimant was issued with a dismissal letter dated 30th August 2014 in exercise of the managerial prerogative for this conduct during the probationary period but the Claimant had opted to withhold the said letter as it referred to the misconduct. The Respondent asserts that contrary to averments it was sheer ingratitude on the part of the Claimant to ascribe to it deleterious conduct while it was generous to include the Claimant's pre-existing condition in its medical scheme even when the Claimant was yet to qualify for the medical cover as he was under probation to the tune of Kshs. 243,000/-. The Respondent averred that this was despite being defrauded of the USD 5,500. The Respondent averred that the entire claim was premised on clear misconception of the law on termination of probationary contract and that the Claimant failed to appreciate the import of Section 42(1) of the Employment Act and that it had no obligation to hear the Claimant for any reason stated under Section 41 before arriving at the decision to terminate the probationary contract. The case of **Christopher Kisia Kivango v Amicabre Travel Services Limited [2014] eKLR** and the case of **Carole Nyambura Thiga v Oxfam Nairobi [2013] eKLR** were cited in support of the contention that breaches of probationary contracts are addressed through the law of wrongful or unlawful termination as opposed to the law of unjustified or unfair termination; that an employee whose contract is terminated while on probation has no reason to demand to be shown by the employer other reasons for termination, outside the probationary

contract; and to import unfair termination provisions under Section 41, 43 and 45 of the Employment Act into probationary contracts nullifies fundamental employment law on termination of probationary contracts and blurs the intention of Parliament in creating qualifying periods for employee to access certain rights and obligations; and that Section 42 is a standalone provision which is a reasonable limitation on the constitutional rights flowing from Article 41 as it is the exercise within the domain of the employer's managerial prerogative to determine the suitability of employees while on probation. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified and the Respondent did not call any witness. He stated that he was dismissed without due process and the dismissal came about in the most callous and insensitive manner as he was at the time unwell, had been admitted to hospital and was discharged a day before he was dismissed. He was not paid his August 2014 salary and the benefits due on bonus. He was cross-examined and stated that he was dismissed within 5 months while on probation. He testified that he was diligent in his service and that he had been headhunted by the MD of the Respondent from private practice and his contract was terminated unceremoniously. He stated that as at the time of the issuance of the letter of dismissal which he had sight of in pleadings, he was hospitalized and did not receive it as the address he used was Box 606 Meru and not the address used which was Box 2272 Meru. That marked the end of oral testimony as the Respondent did not call any witness.

4. The Claimant and Respondent filed written submissions. In his submissions the Claimant submitted that it was trite law that the burden of establishing breach of the probationary contract rests with the Claimant and relied on the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** and asserts that he was dismissed without notice in breach of his probationary contract. He thus sought the reliefs sought in his claim.

5. The Respondent submitted that the legal question brought into focus was whether or not an employer has an obligation under Section 43 and 45 of the Employment Act to give valid reasons to an employee prior to termination of a probationary contract. The Respondent submitted that the court was being invited to find that an employee on a probationary contract was entitled to substantive justification or fairness or procedure over and above what is required under the probationary contract. The cases of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** and **Carole Nyambura Thiga v Oxfam Nairobi [2013] eKLR** were cited in support of the Respondent's argument that the provisions of Section 43 and 45 of the Employment Act did not apply to probationary contracts and urged the court to be persuaded by these two decisions. The Respondent placed reliance on the Court of Appeal case of **Nation Media Group Limited v Onesmus Kilonzo [2017] eKLR** and derived a conclusion that the Employment and Labour Relations Court was competent to determine the constitutionality of provisions of the law and give effect to the interpretation of Section 42 of the Employment Act on probationary contracts. The Respondent submitted that the only remedy the Claimant would be entitled to is the 2 weeks salary in lieu of notice in terms of the probationary contract. The Respondent urged the dismissal of the claim with costs.

6. As correctly pointed out by the Respondent, the focal issue is the effect of termination of a probationary contract. In various determinations of this court, there has been conflicting jurisprudence. On my part I am of the school of thought eloquently espoused by my learned brother Rika J. in the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited (supra)**. He stated as follows:-

The correct interpretation is that Section 43 and 45 of the Employment Act, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts. Section

*42 would have no meaning, and probation, which is a period granted to the Employer and the Employee to get to know each other before making any firm commitments, would itself be meaningless. Section 43 and 45 require Employers to prove fair and valid reason or reasons for termination. Assuming these laws are relevant in termination of probationary employment contracts: where an Employee is advised the reason for termination is because he/ she is on probation; and the contract and the law allows for termination while on probation, through the specific mode given under Section 42; is this not a substantive ground in itself? What more substantive justification would be needed, beyond the explanation that the contract has a probationary provision, based on a substantive law under Section 42? Substantive justification requires the Employer to show the correctness, validity or existence of the reason for termination. Should Employers be asked to show the validity, correctness or existence of Section 42 comprising the probation law, in justifying termination? An Employee, whose contract is terminated while on probation, has no reason to demand to be shown by the Employer, other reasons for termination, outside the probationary contract. It is completely illogical to expect the Employer to prove any substantive grounds relating to misconduct, poor performance, physical incapacity, or any of the offences listed under Section 44 [4] of the Employment Act 2007, in terminating contracts of Employees on probation. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damages, weighed against the contractual notice period, or in the assessment of the Court, the gravity of the contractual breach. The effect of the High Court decision of **Samuel G.***

***Momanyi** and that of the Industrial Court in **Mercy Njoki Karingithi** is to nullify certain fundamental employment laws, such as the law of employment probation, and blur the intention of Parliament in creating qualifying periods for Employees to access certain rights and obligations. Employers could find themselves compelled to retain Employees who are not fit for the job from day one. They risk the high cost of administering procedural justice, and in meeting compensation for unfair termination, when they act against relatively new, and unsuitable Employees at the workplace. Employees are not normally recruited at face value; there is a period of uncovering if they are fit for the job. Labour is flexible, and to have a strong, long term, and productive employer-employee relationship, the Parties must be allowed a period of learning each other.*

*The probation law should be retained. Employers should retain a freehand in evaluating Employees' suitability, and in terminating the relationship during probation, where the Employee is found wanting. Where there is breach, such as unilateral extension of the probationary period by the Employer, or where notice of termination is not given, such breaches can be redressed through contractual damages as done in the case of **Catherine E. Nyawira Nyaga**, not through statutory compensation for unfair termination. It is not proper that rules of natural, procedural, and substantive justice under Sections 41, 43 and 45 of the*

Employment Act

2007 are imported into probationary contracts. Section 42 of the Employment Act 2007 is a standalone law, regulating a special, formative, employer-employee relationship, and should be read as a reasonable limitation, on the constitutional rights flowing from Article 41 of the Constitution of Kenya, as well as those rights and protections given under the other provisions of the Employment Act 2007.

7. The learned Judge correctly pointed out that the case of **Momanyi v SDV Transami** declaring parts of Section 42 of the Employment Act was not binding. The Court of Appeal in the case **Nation Media Group Limited v Onesmus Kilonzo** (*supra*) upheld this reasoning. In my considered view, the probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/or her like for an employee already confirmed to position. Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons. The Claimant herein was however entitled to notice. None was given and he would be entitled to the notice of 2 weeks plus the unpaid salary for August 2014. The employee bonus is earned for service in a year and is payable at discretion of the employer and the Claimant therefore cannot recover. The sums claimed for days worked in August are covered by the salary for the month of August. The Respondent did not mount any counterclaim for funds allegedly lost by the Claimant or present evidence that indeed the Claimant was entrusted with the alleged funds. In the premises the court will find for the Claimant as follows:-

- a. Kshs. 320,000/- being salary for August 2014
- b. Kshs. 160,000/- being the 2 weeks notice per contract.
- c. Costs of the suit.
- d. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Meru this 8th day of November 2018

Nzioki wa Makau

JUDGE