



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 337 OF 2013

MERCY NJOKI KARINGITHI

CLAIMANT

v

EMERALD HOTELS RESORTS & LODGES LTD

RESPONDENT

JUDGMENT

1. This is an undefended Cause. It is a very unusual case. Mercy Njoki (Claimant) was appointed by Emerald Hotels, Resorts & Lodges Ltd (Respondent) through a letter dated 24 July 2012 as Executive Assistant. The appointment letter informed the Claimant that she would report for full time duty on 10 August 2012.
2. One of the terms of the employment was that the Claimant would be on probation for a period of two months and during the probation period the contract would be terminable by either party giving 7 days written notice or salary in lieu of notice.
3. On 22 August 2012 the Respondent served the Claimant with a letter dated 13 August 2012 informing her that her appointment was being revoked with effect from 12 August 2012 due to the unprocedural manner it had been carried. The revocation letter further informed her that she would be required to reapply for the same position.
4. The revocation letter also informed the Claimant she would be paid for 2 days worked and 7 days salary in lieu of notice less any lawful deductions.
5. The Claimant being dissatisfied filed a Memorandum of Claim seeking wages for period from 12 August 2012 to 22 August 2012, general damages for loss of employment/earnings and expectation and unfair termination.
6. The Respondent filed a Memorandum of Appearance on 8 November 2013 through the firm of Paul O. Buti & Co. Advocates but did not file any Response.
7. On 26 February 2014, the Court fixed a hearing for 2 April 2014 and directed the Claimant to serve the Respondent with a hearing notice. On the hearing date, the Court being satisfied that a hearing notice had been served (an affidavit of service sworn by Alex P. Nzuki and filed in Court on 2 April 2014 was on record) allowed the hearing to proceed.
8. In testimony, the Claimant stated that before taking up the appointment with the Respondent she had been working with Insulae Africanus Ltd and had tendered a resignation to take up the

appointment with the Respondent.

9. On reporting to duty on 11 August 2012 the Respondent's General Manager instructed her to go home while a work station was being organised for her. On 22 August 2012 she was called and handed the revocation letter. She stated that she was not given notice and that the revocation was unprocedural.
10. The issue(s) arising for determination are, primarily whether revocation/termination of employment during probation is subject to procedural / substantive fairness test and appropriate remedies if Claimant succeeds.
11. Before discussing the identified issues, it is material for the Court to reiterate once again that it is not the practice and procedure in the Industrial Court to file Memorandum of Appearance once a party has been served with Notice of Summons and Statement of Claim.
12. A Respondent is required to file a Response. This practice is based on the Industrial Court (Procedure) Rules, 2010 and on the objective of facilitating the just, expeditious and proportionate resolution of employment disputes within the shortest time possible. Employment enables a person to earn a living and live decently and in dignity.
13. By requiring Respondent's to file Responses, a whole two weeks is saved unlike the situation obtaining under the Civil Procedure Rules where an appearance is entered and then a further two weeks is allowed to file a Defence.

Whether the revocation/termination during probation is subject to procedural and substantive fairness test

14. Clause 3 of the Claimant's letter of appointment was explicit that the first two months would be on probation and that during probation, the appointment was terminable by the giving of 7 days written notice or pay in lieu of notice.
15. The revocation letter informed the Claimant that she would be paid 7 days pay in lieu of notice.
16. Section 42 of the Employment Act ousts the application of the procedural fairness requirements of section 41 of the Act in dismissals during probationary period. The consequence of section 42 of the Act is that an employee who is still serving under probation is not entitled to notification and hearing before a decision to terminate is taken. Natural justice does not apply in such situations.
17. On this basis, the Respondent did not breach the statutory protection of following fair procedure before terminating an employee.
18. But as far as the contract itself was concerned the Respondent was under a duty to give 7 days' notice or pay in lieu of notice. No notice was given but the revocation letter informed the Claimant that she would be paid the equivalent of 7 days wages as notice. But that is not all that is to it.
19. I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.
20. The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period. It is useful for emphasis to cite the relevant provisions of the section 45

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

- (i) related to the employee's conduct, capacity or compatibility;
- (ii)
- (c) that the employment was terminated in accordance with fair procedure.

21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.
22. The fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the Employment Act.
23. However the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable. The employees' right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.
24. Further, Article 41 of the Constitution which protects the right of all workers to fair labour practices is now a Constitutional norm against which all conduct and practices in employment must be measured.
25. With the above, the Court proceeds to discuss whether the revocation meets the substantive fairness threshold test.
26. The reason given in the revocation letter was that the manner of appointment of the Claimant was unprocedural and that the Claimant was free to reapply for the position. The Claimant's employment was not being revoked because of misconduct, poor performance, incapacity or lack of qualifications on her part. It was because of factors to which the Respondent alone was privy/responsible.
27. It is not known who carried out the recruitment but one thing is known because it remains unchallenged. The Claimant's appointment letter was signed by the Respondent's General Manager Diana Shitakha and Administration Manager Adam Mussa, while the revocation letter was signed by the Group Human Resources Manager, Roselyn O. Kweyu and the aforementioned Administration Manager. Without deciding on the fact, a General Manager is presumably in normal circumstances, senior to Group Human Resources Manager.
28. Probation is usually used by employers to evaluate the performance of an employee and to establish if the employee's performance is upto acceptable standard. The probation period should not be used by an employer to deprive or deny an employee of his/her fundamental rights and basic conditions and terms of employment provided for under the primary labour statutes.
29. The Respondent did not file a Response or appear at the hearing. The legal effect and consequence of the failure to file the Response is that on the facts as pleaded there are no factual disputes to be resolved. The Respondent did not deny the material allegations or allege any contrary facts to prove the reason for revocation was unprocedural appointment.
30. The Court reaches the conclusion that the revocation was unfair because the Respondent has failed to prove the reason(s) and that the reason(s) was a valid and fair reason. The revocation had nothing to do with the probationary nature of the employment then and there is no suggestion that the Respondent gave the Claimant an opportunity to reapply for the position after purportedly sending her home to await preparation of a working station for her.
31. Before discussing appropriate remedies, I must confess that I may have reached a different conclusion were it not for the decision of Lenaola J in *Samuel G Momanyi v Attorney General &*

Another (2012) eKLR, declaring that section 45(3) of the Employment Act was inconsistent with Articles 28, 41(1), 47, 48 and 50(1) of the Constitution and therefore invalid. The section provide that

45(3). An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

32. I have my doubts whether the declaration presents the correct the legal position as to whether the termination of an employment contract is subject to Article 47 of the Constitution (right to fair administrative action).
33. I must also note that statutory qualifying period of 13 months to allege unfair termination are replete in statutes in many jurisdictions but since the declaration was made by a court with concurrent jurisdiction and this Court has similar status with the High Court, (but in employment and labour disputes), and because the declaration had a polycentric effect and of the need for certainty in legislation there would be no utility in me reaching a contrary conclusion or discussing the issue any further here. Lenaola J sat as a primary Court (court of first instance) and this Court is similarly determining the present cause as a primary Court. The challenge may need to await the decision of higher Court.
34. Because of the conclusion reached, the Court wishes to observe that limits and boundaries of the right of every worker to fair labour practices under Article 41 of the Constitution appear limitless and depends on the facts and circumstances of each case.

Appropriate remedies

Wages for days worked

35. The Respondent had offered to pay the Claimant wages for 2 days worked. The evidence before Court is that the Claimant was informed of the revocation of her appointment on 22 August 2012. In the view of the Court, the effective date of her termination is 22 August 2012 and she is entitled to wages for 10 days.
36. The Claimant computed the wages at Kshs 13,333/- and the Court would award her the same.

General damages for loss of employment/expectation of earnings

37. Because of the discussion under the head of damages for unfair termination, these heads of relief are declined.

General damages for unfair termination

38. The Court has reached a conclusion that the revocation of employment was unfair. One of the primary remedies for unfair termination/wrongful dismissal is the equivalent of a number of months' gross wages not exceeding twelve months as compensation.
39. The remedy is discretionary and section 49(4) of the Employment Act has outlined some factors the Court ought to consider. The Court may consider any, some or all of them.
40. A party desirous of an award of this relief should place before Court material such as would enable the Court determine which of the factors are applicable.
41. The Court has taken into consideration the circumstances under which the revocation took place and the further fact that the Claimant worked for only two days though legally she was an employee for ten days and is of the view and does not hesitate in finding that that compensation

