REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.90 OF 2016

KENYA UNION OF EMPLOYEES OF POLYTECHNICS,

COLLEGES AND ALLIED INSTITUTIONS (KUEPCAI).....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT,

NAIROBI TECHNICAL TRAINING INSTITUTE.....RESPONDENT

JUDGEMENT

Issue in dispute – unfair termination of Stephen Kivuva (the Grievant)

The claimant is a registered trade union under the provisions of the Labour Relations Act. the respondent is a technical training institute registered under the provisions of the Technical and Vocational Education and Training Act.

The claim is that the grievant was employed by the respondent from 16th January, 2009 as a cleaner. He was paid Ksh.4, 800 per month a salary below the minimum wage which was at ksh.5, 195 per month exclusive of the house allowance. In May, 2010 the wage was increased to Ksh.8, 400 per month and which he continued to earn exclusive of the house allowance until April, 2015.

In the year 2013 the grievant complained to the respondent that he had not been confirmed in his employment to which he was advised to write an application letter for employment despite being on the same job since the year 2009. The shop steward lodged a complaint vide letter dated 16th March, 2015 over the employment malpractice to the grievant and failure to apply the provisions of section 37 of the Employment Act.

The respondent offered the grievant letter of appointment dated 7th May, 2015. The salary offered was Ksh.9, 721 per month which was contrary to the payment structure for civil servants.

Employment was terminated on 11th August, 2015 on alleged probationary terms contrary to the provisions of section 42(2) of the Employment Act.

The claim is also that under the salary structure for civil servants there was provision for the basic monthly wages over the years as follows;

In the year 2009 wage was ksh.9, 721;

In 2010 the wage was Ksh.10, 207;

In 2011 the wage was Ksh.10, 717;

In 2012 the wage was Ksh.11, 370;

In 2013 the wage was Ksh.11, 910;

In 2014 the wage was Ksh.12, 510; and

In 2015 the wage was Ksh.13, 130.

The claimant was not paid as under his contract contrary to section 9 and 13 of the Employment Act.

The claim is there was unfair termination of employment and the grievant is seeking a reinstatement and in the alternative a declaration that he is entitled to the following dues;

a. Unpaid salaries and allowances for days worked in August, 2015 Ksh.13,514.50;

b. Underpayments from January, 2009 to August, 2015;

c. Unpaid medical allowances;

d. Accrued leave days;

e. Leave travelling allowances;

f. Notice pay;

g. Service pay;

h. Compensation.

The claimant is also seeking that the grievant be issued costs and the terminal dues be paid with an interest of 20%, and be issued with a certificate of service.

The grievant testified that he was employed by the respondent through a verbal agreement in January, 2009 as a cleaner at a wage of ksh.4,500 per month and which was increased by Ksh.400 in the year 2010.

On 11th September, 2013 the grievant was advised to apply for employment with the respondent which he did and was issued with a letter of appointment and he accepted on 8th August, 2015. The respondent had both government employees and those

employed by the board.

The grievant also testified that on 6th August, 2015 he was issued with a memo over alleged poor work performance and negligence of duty and alleged late reporting to work. The respondent also alleged that his cleaning area was dirty, that he was drunk on duty to which he replied and offered an apology. The allegations were not true but to resolve the matter he offered to apologise. In reply he was issued with a letter terminating his employment.

In the letter of appointment the grievant had been placed on probation ending 31st August, 2015. The allegations made against him occurred during the probation period.

There was no payment of the due terminal dues. he was unionised and opted to file suit.

Defence

The defence is that the claimant has not provided a Certificate of Registration.

The provisions of the law cited to support the claim do not apply to either the claimant who had no employment relationship with the respondent and the grievant was terminated in his employment under the probationary terms of his appointment.

There was no employment of the grievant from 16th January, 2009 as alleged. Prior to his appointment vide letter dated 7th May, 2015 he had been engaged as a causal employee for 6 days in May, 2014 on a 24 non-continuous days, in June 2014 for 9 non-continuous days, in July 2014 for 23 non-continuous days, in August, 2014 for 22 non-continuous days, in September 2014 for 24 continuous days and in December, 2014.

The documents on re-alignment of salary structure for civil servants relied upon by the claimant took effect on 1st July, 2012 and does not apply to the grievant who was employed on probationary terms on 7th May, 2015 to 11th August, 2015 and the same is not applicable to him.

The defence is also that the grievant was initially engaged on causal terms in May, 2014 and there was no complaint on his employment as alleged; the claims as outlined have no legal or factual basis and the claim that the grievant was entitled to an entry wage of ksh.13, 400 per month is witho9tu proof. There was thus no underpayment.

Termination of employment was consistent with the provisions of the Employment Act. the respondent has been ready and willing to issue the grievant with a certificate of service which is ready for collection at its offices as noted in the letter dated 11th August, 2015 and the claims made should be dismissed with costs to the respondent.

There was no witness called by the respondent.

Both parties file written submissions.

It is on record the ruling of the court on 30th June, 2016 with regard to the standing of the claimant to urge this claim for and on behalf of the grievant and the directions that such was a factual matter to be addressed during the trial.

This ruling led to **Civil Appeal No.210 of 2016** and a judgement therefrom on 21st December, 2018 that the court was correct in directing that this issue be addressed during the full trial of the matter.

Thus as the position stands, the claimant only pleaded that it is a registered trade union and nothing more. There is no Recognition by the respondent or a collective agreement upon which the employees of the respondent had their terms and conditions

of employment addressed and or negotiated.

On his evidence the grievant did not delve into this matter at all. He did not address whether he was unionised under the claimant.

The attendance of the claimant in these proceedings for and on behalf of the grievant were thus not addressed.

On the merits of the claims made, the grievant testified that he was employed by the respondent from 16th January, 2009 as a cleaner on verbal terms and until 7th May, 2015 when he was issued with letter of appointment as a cleaner Job Group E and placed under probationary terms for four (4) months effective 1st May, 2015 at a wage of Ksh.9, 721 per month and with the benefit of a house allowance, medical allowance and NSSF contributions.

By letter dated 11th August, 2015 employment was terminated under the probationary terms of appointment. The grievant was directed to clear with his department and collect his terminal dues.

The claim is that employment commenced on 16th January, 2009 under the provisions of section 9 and 37 of the Employment Act, 2007 and the application of probationary terms and section 42 is unfair labour practice and there should be reinstatement and in the alternative the payment of claimed terminal dues.

Section 8 of the Employment Act, 2007 (the Act) read together with section 37 of Act allow employment on verbal contract and upon the employee being retained on such terms continuously and engaged for work without does not end at end of each day, the rights and benefits under the Act apply to such an employee by conversion of the verbal and casual terms of employment.

In the case of **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR** the Court of Appeal held that;

Our reading of **Section 37** of the **Employment Act** reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR.**

The respondent has not called any evidence. there are work records filed with regard to the grievant. the defence that the grievant was engaged on causal terms for non-continuous period is not challenged in any material way that he was engaged on non-continuous period as follows;

6 days in May, 2014;

24 days in June, 2014;

9 days in July, 2014;

23 days in August, 2014;

22 days in September, 2014 and

24 days in December, 2014.

These averments are supported by the casual employees payment records.

What is apparent is that by letter dated 7th May, 2015 the grievant was appointed by the respondent as a cleaner and issued with letter of appointment spelling out his terms and conditions of employment. This is commensurate with the provisions of section 10 of the Act which allows the employer to issue an employee on causal employment with an employment contract and in this case, following the application and interview of the grievant he was issued with a letter of appointment on probationary terms.

Effectively, employment on written terms and conditions commenced with effect from 1st May, 2015 on probationary terms for four (4) months.

Section 9(2) of the Act allow that;

2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

Section 10 (3) of the Act also allow the employer to issue the employee with a written contract of service spelling out the terms and conditions of employment.

Probationary provisions are part of such terms and conditions pursuant to the provisions of section 42 of the Act.

With regard to the phase of employment prior to 1st May, 2015 the grievants claims that he was protected under the provisions of section 37 of the Act is lost on the defence made and which is not challenged that he only served for given days and without continuous service. the records of employment attached at pages 7 to 28 of the response show payments for causal employees payments for days and dates not exceeding in the aggregate one continuous month.

There is no response to this evidence and record offered by the claimant.

On 3rd June, 2014 the grievant was paid for work for 6 days;

On 9thh June, 2014 the grievant was paid for causal work for 5 days; and

These schedules go on to outline the number of days worked and paid for.

As noted above in the case of **Rashid Mazuri Ramadhani & 10 others,** cited above, the duty is upon the employee pleading the application of section 37 to prove there was work for the same employer *for* a period aggregating to more than one month.

Without proof of continuous employment for the period before 1st May, 2015 the claims made for the period going back to 16th January, 2009 are without foundation.

Going back to the standing of the claimant and the claims made for and on behalf of the grievant, without setting out whether there was recognition or a collective agreement and fundamentally whether the grievant was unionised under the claimant so as to assert any rights outlined in collective agreement or any other private treaty for the alleged period of employment from 16th January, 2009 to 30 April, 2015 before the letter of employment issued, the grounding of the claims made is lost. For the claimant to represent the grievant in these proceedings rationale under the provisions of the Labour Relations Act, 2007 requires recognition and under which the claimant would have had the chance to negotiate terms and conditions of employment for its members and be outlined under a collective agreement. There is no evidence submitted in this regard.

On the appointment of the grievant by the respondent, he was placed under probation for 4 months as outlined above. From 1st May, 2015 the probation period was to end as of 31st August, 2015.

Section 42 of the Act allow an employer to place an employee on probation. Such is lawful, reasonable and for a legitimate purpose one being to allow the employee acquaint himself with the work requirements and to allow the employer assess the employee's work performance before confirmation.

In **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College) [2017] eKLR** the court held that;

.....an employer puts an employee on probation so as to be able to assess his performances and capability within the workforce and the essence of section 42 of the Employment Act, 2007 is to allow the employer terminate the contract of service less time where the employee's performance should be found wanting. The law therefore gives the employer the right to retain an employee on probation for 12 months and terminate employment on short notice as held in **Hesbon Ngaruiya Waigi versus Equatorial**

Commercial Bank Limited [2013] eKLR.

It is therefore not an unfair labour practice for an employee to be given probationary terms upon commencement of employment provided such terms are not applied to disadvantage the employee in the confirmation of his employment. In this regard, the grievant was issued with a notice to show cause why his employment should not be terminated under the probationary period for reporting late for duty, poor work performance, his cleaning area being found dirty, reporting to work while drunk and that on 5th August, 2015 he was absent from duty without official permission.

In response, the grievant stated as follows;

.....I humbly accept and apologise for my mistakes and misconducts that I have been doing to your department that you have been observing one and kindly promise that I will change my behaviour and not repeat them again. …

The grievant admitted to the charges made against him.

He testified that he admitted and apologised to the allegations made on the understanding that this would make him stand on good stead and keep his employment as he was innocent. However, his employment was terminated upon his reply.

Where the grievant felt victimised for being honest, for having apologised over mistakes and misconducts he did not commit, he did nothing upon the letter of termination being issued. If indeed the grievant was unionised under the claimant, recourse ought to have been application of the Labour Relations Act, 2007 with a report to the Minister. This is not addressed.

Where the claimant learnt of the grievants case as its member, there is no engagement as required of a trade union under the provisions of the Labour Relations Act, 2007. Was the grievant then a member of the claimant" This is left bare.

On the grievant admission to misconduct, the admitted charges being gross, summary dismissal under the provisions of section 44 of the Act ought to have issued. The respondent opted to terminate his employment and directed him to clear and be paid his terminal dues. this is fair and reasonable requirement. The grievant should abide and get his terminal dues upon clearance with the respondent save the Certificate of Service should issue unconditionally and under the provisions of section 51 of the Act.

Accordingly, the claims made are hereby found without merit and are hereby dismissed. The claimant shall meet costs due to the respondent.

Delivered at Kericho this 30th day of January, 2020.

M. MBARU

JUDGE

In the presence of: .....