Kwale International Sugar Company Ltd v Mbaya (Civil Appeal E059 of 2022) [2024] KECA 795 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 795 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E059 OF 2022

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

JULY 12, 2024

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LTD ..... APPELLANT

AND

STEPHEN KENGA MBAYA ..... RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Nzei, J.) delivered on 28th April 2022 in Mombasa ELRC No. 816 of 2016.)

JUDGMENT

1. Stephen Kenga Mbaya, the respondent, filed a Memorandum of claim dated 14th October 2016 in a suit against the appellant, Kwale International Sugar Company Ltd, seeking the following reliefs:
    a. one-month salary in lieu of notice Kshs. 70,000
    b. unpaid salary for the days worked from 1st to 14th September 2016 (Kshs. 70,000/30 x 14) Kshs. 32,622
    c. unpaid overtime (Ksh. 2,333/8 x 25 hours) Ksh.7,300
    d. unpaid leave for August 2016 (8 days) Kshs. 18,644
    e. 12 months' salary as compensation for termination
    Kshs.840,000
2. The respondent was employed by the appellant vide a letter of offer of employment dated 29th August 2015 for a two year fixed term employment contract as a transport coordinator at a salary of Kshs. 70,000 per month. The contract was due to expire on 13th September 2016. He worked for the appellant until 14th September 2016 when the appellant's management served him with a letter dated

17th August 2016 reference as "Unsuccessful probation"; that the letter unlawfully terminated his contract prematurely; that further, he was not paid his terminal benefits and salary arrears in lieu was unlawful. He stated that the contract was subject to 6 months' probation, which he completed, and continued in employment.

3. In a Memorandum of response dated 13th April 2017, the appellant stated that the respondent was employed in March 2016, whereafter he was placed on his first probationary period; that the respondent's performance was unsatisfactory; and that his initial probationary period was extended for six months by oral agreement. It further stated that the second probation period was terminated by a letter dated 17th August 2016 when the respondent was given

4. seven days' notice as by law required, paid his dues, and his seven days' notice pay together with his salary.

5. The trial Judge found that his termination was unfair and awarded him a one-month salary in lieu of notice of Kshs. 70,000 and ten months' salary as compensation for unlawful and unfair termination in the sum of Kshs. 700,000.

6. Aggrieved by the Judgment, the appellant has filed an appeal to this Court on the grounds that the learned judge was in error in law in disregarding the provisions of sections 42 and 47(6) of the *Employment Act*, regarding termination of probationary contracts and, as a consequence, in arriving at a wrong finding; in failing to find that the respondent was serving his probation when the letter dated 17th August 2016 terminating his probationary contract was issued; failing to find and appreciate that section 42 (2) of the *Employment Act* did not prohibit the oral extension of a probationary contract; in finding that the respondent's termination was unlawful and unfair; in awarding the respondent one-month salary in lieu of notice and 10 months' salary as compensation for wrongful termination, which was manifestly excessive and unjustifiable given that the respondent had only been in employment for 12 months; and in disregarding the appellant's pleadings, witness testimony and submissions.

7. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Mr. Kulecho, submitted that, by the time of his dismissal, the respondent was under probation and, as such, did not have capacity to file the suit; that, further, his employment was terminated in accordance with the procedure specified for termination of contracts comprising probation provisions; that the contract expressly provided for six months' probation after which he would be confirmed if the company was satisfied with his performance, and that after the lapse of the probation period, the parties orally agreed that the contract be extended for a further 6 months period; that the letter dated 17th August 2016 informed the respondent that his probation would not be extended for a further period since his performance had not met expectations; and that he would be paid his 7 days' pay in lieu of notice and any outstanding remuneration. Counsel expressed that the wording of the letter was clear that his extended probation had been the subject of an earlier extension.

8. Counsel submitted further that a probationary contract may be terminated by 7 days' notice or 7 day's pay in lieu of notice. Once notice is given or payment in lieu thereof was made, section 47(6) of the *Employment Act* barred any person terminated while on probation from making a claim for unfair termination.

9. It was counsel's further submission that the learned judge unjustifiably awarded the respondent one-month salary in lieu of notice and 10 month's salary as compensation for wrongful termination in breach of the guiding principles for grant of remedies under section 49 of the *Employment Act*; that no reason was given for awarding the respondent 10 month's salary as compensation for wrongful

termination, yet the respondent had been in employment for only 12 months. The Court was invited to consider its decision in the case of National Social Security Fund vs. Grace K. Kazungu & another [2018] eKLR for the proposition that the trial court should provide reasons when awarding compensation.

10. On their part, learned counsel for the respondent submitted that the appeal was filed out of time; that copies of the record of appeal filed on 8th July 2022 and supplementary Record of appeal on 19th July 2022 were served upon the respondent's advocates on 14th October 2022, a period of over 80 days late instead of seven (7) days as per rule 90(1) of the Court of Appeal rules; and that, therefore, the appeal should be dismissed.

11 The mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In Peters vs. Sunday Post Limited [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

12 The duty to evaluate the evidence on the record in order to come to its independent conclusion on the evidence has been reiterated in Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

13 Having considered the Record and the submissions by parties, the issues that arise for determination are:

i. whether the respondent was on probation by the time of termination of the contract;

ii. whether the respondent was entitled to one month's salary in lieu of notice;

iii. whether the award of 10 months compensation for unlawful termination was manifestly excessive and unjustifiable; and

iv. whether the appeal was competent.

14 Regarding the issue as to whether the respondent was on probation as at the time of termination of his employment, section 2 of the *Employment Act* provides that:

> " probationary contract" means a contract of employment, which is of not more than twelve months' duration or part thereof, is in writing and expressly states that it is for a probationary period;

15 Section 42(2) of the *Employment Act*, 2007 specifies that:

> 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.

16 Explaining the features of a probationary term of employment, the British Columbia Supreme Court in the case of Ly vs. British Columbia (Interior Health Authority) 2017 BCSC 42, held that:

> " A probationary term of employment is best understood as part of a contract of employment where: a) the employee is held to the requirement that for a specific period of time

that employee must demonstrate certain suitability requirements set by the employer; and b) the employee may be dismissed without reasonable notice (subject to statutory minimums) if he or she does not meet the suitability requirements. If the employee meets the suitability requirements then, after that period of probationary assessment, the employee's contract continues as a contract of employment wherein the requirements of just cause and reasonable notice apply. "

17. In the instant case, the respondent's offer letter dated 29th August 2015 contained a probation clause that read:

> " ...you will be on probation for six months after which you will be confirmed for employment if the company is satisfied with your performance."

18. This meant that the respondent was required to serve a probationary period of six months from the date of the offer letter, which period would have lapsed in February 2016. The appellant contends that the probation period was extended orally for a further 6 months and that, thereafter, the respondent's employment was terminated due to poor performance. The respondent has denied that his probation was extended and instead asserted that his employment was confirmed after six months.

19. Addressing the desired process to be adopted by an employer whilst ascertaining whether or not a probationary period had lapsed, the Nigerian National Industrial Court in the case of Mr. Olajuwon Olaleye vs. Polaris Bank Limited & Ors [2023] 4 CLRN observed:

> " Probation is a short-term measure and where, at the end of his probation, the employee is adjudged unsuitable for the job, the employer could extend the probation or terminate the employment. Where the employer opts for the first option, it must inform the employee that it has adjudged him unsuitable for his job role but would be giving him another opportunity to justify his employment. Extension of probation cannot be implied and a probation which exceeds the agreed period without a formal extension will amount to unfair labour practice. In that case, the employer will be deemed to have confirmed the employee's appointment and cannot argue otherwise."

20. Similarly, in the case of Technical University of Kenya (Formerly The Kenya Polytechnic University College) vs. Odeck (Civil Appeal 443 of 2018) [2024] KECA 525 (KLR) this Court held that:

> " Legally, an employee has a legitimate expectation that the employer will communicate the status of the employment before the end of the probationary period, and if the employer fails to do so, it is estopped by its representation and conduct from alleging that the probation period still subsists.

21. In the instant appeal, the appellant did not provide any evidence to prove that the probation period was extended as of necessity due to poor performance, or that it was extended by agreement with the respondent. In the absence of evidence of extension in the manner prescribed by section 42(2) of the Act, we come to the conclusion, as did the learned judge, that the appellant failed to prove that the respondent was on probation as at the time of his dismissal. It further meant that, by the time of termination, his employment was effectively confirmed.

22. The next issue is whether respondent's termination of employment was unfair. The procedure for termination of employment is set out in sections 41, 43 and 45 of the Act.

23. More specifically, section 41 provides that:

> " 1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> 2. Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.

24. In the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR, the Court, considering the procedures set out above, explained the dismissal process thus:

> " ...Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

25. In the same vein, this Court in National Bank of Kenya vs. Samuel Nguru

Mutonya [2019] eKLR adopted the decision of the court in Jane Samba Mukala vs. Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) where it was observed:

> " a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
>
> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
>
> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

26. The appellant has not shown that it complied in any way with the foregoing mandatory statutory procedural requirements. The respondent was not, prior to termination, notified of the intended termination or given an opportunity to be heard on the reasons for termination, neither was he notified that his contract was to be terminated due to unsatisfactory performance.

27. Furthermore, in asserting that the respondent had not performed to expectation, the appellant did not adduce any evidence to show that there were measures in place to enable them to assess the appellant's performance or indicate what measures were taken to address the alleged poor performance. Without any basis upon which to rate the appellant's performance, we come to the conclusion, as did the learned judge, that the respondent's termination was unjustified.

28. Turning to the question as to whether the award of 10 months' compensation was unreasonable, section 49 of the Act makes provision for a wide range of remedies. In the case of C o-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union, CA No. 188 of 2014, this Court considered the manner of ascertaining the appropriate remedy in each case thus:

> "Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word 'may', which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies ... are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re- engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

29. In the case of Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR, it was held that the Court ought not to interfere with the exercise of such discretion, unless it is satisfied that the judge misdirected himself or herself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

30. In so far as the award for one month's salary in lieu of notice was concerned, it is not in dispute that there was no notice of termination provided. On this basis, we find that the learned judge could not be faulted for awarding Kshs. 70,000 being payment of one month's gross salary in lieu of notice.

31. On the issue as to whether 10 month's salary awarded as compensation was unjustifiable, the record shows that the respondent's contract period was for 2 years. By the time of his termination, he had worked for only 12 months. This notwithstanding, the learned judge went on to award him 10 months' salary as compensation for the reasons that he had not contributed to his termination.

32. In the case of Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR, this Court observed:

> " The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention …."

33. An essential consideration in awarding compensation in a case such as the one before us is the contract period, as well as the unexpired term of the contract as at the time the respondent's employment was terminated. In our view, the learned judge ought to have taken into account that the contract was for a term of 2 years, the remaining period being about 10 months. Given the relatively short contract for which the respondent was employed by the appellant, we consider that the award of 10 months compensation was excessive. Our view is that, in granting such award, the learned judge took into account irrelevant considerations and failed to consider relevant factors which, as a result, has warranted our interference with the award. Given that the contract was for only two years, we consider that an award of 2 months compensation would have been adequate.

34. On the final issue as to the late filing of the appeal, nothing turns thereon in view of the issue having been raised so late in the day and without adherence to the 30 days requirement specified by rule 86 of this Court's rules.

35. In view of the foregoing, the appeal substantially fails, but succeeds only to the extent of the amount awarded as compensation.

36. Consequently, we hereby order and direct that that:

    1. The appeal fails with regard to the challenge on the trial court's finding that the respondent's employment was unfairly terminated.

    3. The order for 1 month's salary in lieu of notice is hereby upheld;

    4. The award of compensation at 10 months gross salary is hereby set aside and substituted for an order of 2 months gross salary at the rate of the last salary paid.

    6. The appellant shall pay to the respondent the costs of the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original. Signed

DEPUTY REGISTRAR