



**Odhiambo v Biodeal Laboratories Limited (Cause E567 of 2021)
[2023] KEELRC 2453 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E567 OF 2021
MN NDUMA, J
OCTOBER 5, 2023**

BETWEEN

NELSON ODHIAMBO CLAIMANT

AND

BIODEAL LABORATORIES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 13/7/2021 against the respondent seeking an order in the following terms:-
 - a. Determination that the Claimant was unfairly, wrongly and unlawfully summarily terminated.
 - b. Determination that the Respondent denied the Claimant his right to fair hearing before the unlawful summary termination.
 - c. An Order for the payment to the Claimant for the actual pecuniary loss suffered as the result of the wrongful termination from the date of such termination as detailed;
 - i. Salary for 7 days worked up to 7th April, 2021 equivalent to Kshs 109,660.
 - ii. Pay for 5 leave days earned but not consumed – Kshs 78,333/=.
 - iii. One-month (30 days) gross salary in lieu of notice – Kshs 470,000
 - iv. Compensation for unlawful termination of employment under the egregious violation of rights of the Claimant twelve months' comprising 12 months x 470,000.00 = Kshs 5,640,000.00/=
 - v. Totalling to Kshs 6,297,993.00 (six million two hundred and ninety-seven thousand nine hundred and ninety-three only).



- d. General damages for infringement of his Constitutional right to dignity and psychological integrity.
 - e. An Order for the payment of interest to the Claimant by the Respondent on the judgment amount.
 - f. Certificate of Service.
 - g. Costs of the suit in favour of the Claimant from date of filing suit to determination.
2. CW 1 the Claimant testified that he was head-hunted to join the respondent while he worked for Medisel Kenya Limited and was employed by the respondent vide a letter of employment dated 4/1/2021 in the position of General Manager with effect from 4/1/2021 to 30th June, 2021, a period of six (6) months.
 3. The claimant was offered a gross consolidated monthly salary of Kshs 470,000. The claimant was placed on three months' probation. The claimant resigned from his previous employer in December, 2020 on the strength of the offer made to him by the respondent.
 4. That upon taking up the new job, he was never issued with any targets that he did not meet and had no warning letter at all. That he had been performing very well in his previous employment.
 5. That on 7th April, 2021, the claimant was issued with a letter of termination by the Chief Executive Officer through the Human Resource Manager. That he was not paid any dues upon termination.
 6. That on 12/5/2021, the claimant wrote to the respondent regarding the unlawful and unfair termination of employment.
 7. The claimant produced the letter of termination which was dated 3rd April, 2021. The termination was said to be on account of unsatisfactory performance and gross misconduct for the last three (3) months. It was alleged that he had not only failed to meet the expected standards but he had also not adhered to the company policies, Rules and Guidelines on attendance as per Clause 2-3-6 of the handbook.
 8. The letter stated that the effective date of termination was 7th April, 2021 which was his last working day.
 9. The claimant wrote a demand letter to the respondent dated 8/6/2021 demanding to be paid his terminal dues and stated that he had handed over all company property and had nothing else to clear from the company. The respondent did not heed the demand hence the suit.
 10. The claimant testified that he had completed his three months' probation period by the date of termination on 7/4/2021. That backdating the letter to 3/4/2021 was meant to place it within the probation period which had lapsed by 7/4/2021 when the claimant received the letter.
 11. The claimant said he was accused of not using the clocking system during the Covid – 19 period. The claimant said that he was aware of the manner of transmission of Covid-19 and had advised the respondent against compelling employees to clock in and out as this would lead to contamination and spread of the pandemic amongst the staff. That this violated the Ministry of Health Guidelines on Covid- 19 in place at the time. That use of hand cover book tied to a pen was inappropriate method of clocking at the time. That many people in the company had contracted Covid – 19. That he had issued internal memos to the staff to comply with the Covid Guidelines in good faith. This was then used as a reason to terminate his employment. The claimant denied that any meetings were held to review his performance during the probation period. That only one probationary evaluation meeting was provided for but it did not occur. No appraisal report was given to him. The claimant denied that



he had declined to be appraised. The claimant also denied that he had absented himself from work as alleged by the respondent.

12. The claimant was subjected to rigorous cross-examination by Mr Bihongo, Advocate for the respondent. He admitted that the probation period was to end on 3/4/2021 and the contract was to end on 30/6/2021. CW 1 insisted that he was not on probation on 7/4/2021 when he received the letter of termination. The claimant said he had no warning letter. He admitted having seen an email from the Chief Executive Officer asking staff to use facial recognition and manual attendance register to clock in to allow proper payroll preparation. CW 1 said he used facial recognition but did not use the manual register due to the COVID – 19 risks involved.
13. CW 1 said he received payment in July, 2021 but did not know what the money paid was for. CW 1 said he was Head of Operations and made recommendations in line with the Ministry of Health Guidelines on prevention of Covid – 19 in good faith to minimize risk of contracting the disease at the workplace. CW 1 insisted he was head-hunted and resigned from his previous job at the behest of the respondent. CW 1 insisted that no evaluation occurred before end of the probation period and termination of his employment. CW 1 said an email dated 30/3/2021 was an invite to a review meeting but the meeting did not materialise. The meeting was to take place on the same date. CW 1 denied that he had declined to attend appraisal meetings. CW 1 said he never got any job description from the respondent.
14. CW 1 said use of Biometric Clocking in system had been suspended in August, 2021 before he had joined the company but he was not aware of the suspension. CW 1 denied having attended any probation review meeting on 22nd and 30th March, 2021. The claimant prays that the suit be allowed as prayed.
15. The respondent did not call any witness. The testimony by the claimant was not controverted at all therefore.

Determination

16. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by the claimant in the absence of any evidence adduced by the respondent in defence of the case.
17. The issues for determination are:-
 - (i) Whether the termination of the employment of the claimant was for a valid reason following a fair procedure.
 - (ii) Whether the claimant is entitled to the reliefs sought.
18. The claim prays for the reliefs sought on the basis that his employment was terminated by the respondent after he had completed his probation period of three (3) months and therefore his employment could only be terminated by the respondent for a valid reason in terms of Section 43(1) and (2) of the *Employment Act*, and following a fair procedure set out under Section 41 of the Act. The claimant states that he was entitled to one month notice in terms of Section 36 of the *Employment Act* and Contract of Service and payment in lieu of leave days not taken.
19. The claimant further prays for compensation for the unlawful and unfair dismissal in violation of Sections 36, 41, 43 and 45 of the *Employment Act*, in terms of Section 49(1) (c) and 4 of the Act.
20. The evidence adduced by the claimant on what transpired is clear, and the claimant was candid and consistent during the very close cross-examination he was subjected to by the advocate for the respondent.



21. The Court has arrived at a considered finding that the claimant was employed on 4/7/2021 and was placed on 3 months' probation. The employment was for a six (6) months fixed period.
22. The Court finds that the termination of the employment of the claimant occurred on 7/4/2021, when he had completed his three months' probation. At that time, the respondent could only terminate the employment of the claimant for a valid reason following a fair procedure as mandated under Sections 41, 43 and 45 of the *Employment Act*. The respondent did not give the claimant a notice to show cause and did not provide the claimant with an opportunity to be heard on any charges levelled against him before his employment was terminated on 7/4/2021.
23. The claimant's employment could only be terminated upon grant of one month notice in terms of Clause 11 of his contract of employment and Section 36 of the *Employment Act*.
24. Therefore, the termination of employment of the claimant was not for a valid reason and the respondent did not follow a fair procedure in terminating his employment. The termination was unlawful and unfair and in violation of Section 36, 41, 43 and 45 of the *Employment Act*, 2007.
25. The Claimant is entitled to compensation in terms of Section 49(1)(c) and 4 of the Act. In this respect, the claimant did not contribute to the termination, the termination was unlawful and unfair and the claimant suffered loss and damage. The claimant lost three (3) months of expected service with the respondent. The respondent unlawfully and unfairly breached the fixed term contract. The claimant was not compensated for the loss and would have wanted to complete the contract.
26. The Court finds this an appropriate case considering the case of *Trevar Marambe v For You Chinese Restaurant* – Cause No 1124 of 2017 eKLR to award the claimant two (2) months' salary in compensation for the unlawful and unfair termination of employment the sum of Kshs 940,000.
27. The Court also awards the claimant one month salary in lieu of notice in the sum of Kshs 470,000.
28. The claimant admitted having received some money in his account on 7/7/2022 in the sum of Kshs 458,152 but he did not know what items of his terminal benefits had been defrayed by this payment. The respondent did not clarify this matter having opted not to testify in the suit. Accordingly, the Court awards the claimant Kshs 109,610 in respect of 7 days worked up to 7/4/2021 and Kshs 78,333 in respect of 5 leave days not taken.
29. The total award will be less the sum of Kshs 458,152 already paid by the respondent.
30. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:-
 - a. Kshs 940,000 in compensation.
 - b. Kshs 470,000 in lieu of one month notice.
 - c. Kshs 109,660 for 7 days arrear salary.
 - d. Kshs 78,333 in lieu of 5 leave days not taken.
Total Kshs 1,597,993.
Less amount paid Kshs 458,152 = Kshs 1,139,841.
 - e. Interest at Court rates from date of judgment till payment in full.
 - f. Certificate of Service to be granted within 30 days.
 - g. Costs of the suit.



DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 5TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr Onyony for claimant

Mr Bihongo for Respondent

Ekale – Court Assistant

