



**Baya v Kwale International Sugar Co. Ltd (Cause 861 of 2016)
[2022] KEELRC 1781 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 861 OF 2016**

**AK NZEI, J
APRIL 28, 2022**

BETWEEN

STEPHEN KENGA BAYA CLAIMANT

AND

KWALE INTERNATIONAL SUGAR CO. LTD RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 14th October 2016 and filed in Court on 17th October 2016, the Claimant sued the Respondent seeking payment of one month salary in lieu of notice, unpaid salary for days worked from 1st to 14th September 2016, unpaid overtime, unpaid leave for August 2016, twelve months salary for unlawful termination, costs of the suit and interest. The Claimant also filed a list of witnesses and a list of documents dated 14th October 2016, both of which accompanied the Memorandum of Claim.
2. The Respondent entered appearance on 26th January 2017 and subsequently filed a Memorandum of Response on 13th April 2017, dated 12th April 2017.
3. On 17th July 2018, the Respondent filed a fresh set of list of documents and list of witnesses, both dated 13th July 2018. This appears to have been done pursuant to leave granted by the Court in that regard on 12th October 2017 and 15th May 2018 in that regard.
4. Trial is shown to have opened on 24th January 2019 when the Claimant was sworn to give evidence before being stood down and then granted leave, which he sought, to file a document (letter of employment) which he had not filed. The Claimant filed a supplementary list of documents on 29th March 2019.
5. When the matter came up for hearing again on 18th September 2019, the Claimant is shown to have testified substantially before being stood down as Counsel representing him sought leave to amend the Claimant's pleadings. Leave was granted to the Claimant to amend his pleadings and witness statement



within fourteen days of the said date. The Respondent was also put at liberty to amend its pleadings within fourteen days of service.

6. On 26th September 2019, the Claimant filed an Amended Memorandum of Claim, dated 25th September 2019, and pleaded, inter-alia,
 - a) that by a letter of offer of employment dated 29th August 2015, the Claimant and the Respondent entered into a fixed term employment contract as transport coordinator for a period of two years at a salary of ksh.70,000 per month.
 - b) that the Claimant worked for the Respondent devotedly and dedicatedly until 14th September 2016 when the Respondent's management served him with a letter dated 17th August 2016 terminating the said contract prematurely.
 - c) that the contract entered into with the Respondent's management was for a period of two years effective from 14th September 2015 and the same was due to expire on 13th September 2017.
 - d) that the Respondent's management's letter dated 17th August 2016 terminating the said contract prematurely and without paying the Claimant his terminal benefits and salary arrears in lieu thereof was unlawful.
7. The Claimant sought the following reliefs:-
 - a.) one month salary in lieu of noticeksh.70,000
 - b) unpaid salary for the days worked from 1st to 14th September 2016 (ksh.70,000/30x14)ksh.32,622
 - c) unpaid overtime (ksh.2,333/8x25 hours)ksh.7,300
 - d) unpaid leave for August 2016(8 days).....ksh.18,644
 - e) 12 months salary as compensation for terminationksh.840,000
8. The Claimant also sought to be paid costs of the suit and interest at Court rates.
9. The Claimant further filed his witness statement afresh, dated 25th September 2019. The statement, which accompanied the amended Memorandum of Claim, basically replicates the averments made and reliefs sought in the Amended Memorandum of Claim.
10. The Respondent does not seem to have amended its Memorandum of Response or filed further witness statements upon being served with the Claimant's Amended Memorandum of Claim.
11. When the suit came up for hearing before me on 2nd December 2021, trial commenced afresh. The Claimant adopted as his evidence in chief his witness statement dated 25th September 2019. He also produced as exhibits the documents listed on his (supplementary) list of documents dated 29th March 2019. He urged the Court to enter judgment in his favour as prayed in the amended memorandum of claim.
12. Under cross-examination and re-examination, the Claimant testified:-
 - a) that his employment was subject to six months' probation, and the condition was that his employment was supposed to be confirmed upon completion of the probationary period if the company was satisfied with his performance.



- b) that the Claimant never received a letter of confirmation.
 - c) that his confirmation was automatic when the Respondent did not communicate after the six months probationary period.
 - d) that there was no oral extension of the probationary period.
 - e) that the Claimant never received any warning or memo alluding to unsatisfactory performance by himself.
 - f) that on 14th September 2016, after the day's work and in the presence of the Respondent's Environment Manager, the Claimant was handed by the Respondent's General Manager a letter dated 17th August 2016, which stated that the Claimant's probation would not be extended further.
 - g) that the Claimant's probation had not been orally extended for six months.
 - h) that the Claimant received his salary for August 2016, and the same did not include notice pay.
 - i) that the Claimant had not given particulars of overtime hours worked, as he did not keep company records, and had not exhibited any permission to work overtime.
 - j) that in 2016, the Claimant took five (5) days leave, and could not recall the actual dates.
13. The Respondent called one witness, one Gibson Kabue (RW-1) who adopted his witness statement recorded on 28th April 2021 as his evidence in chief. He also produced as exhibits the three documents listed on the Respondent's list of documents dated 13th July 2018.
14. The Respondent (RW-1) further testified:
- a) that the Claimant, whose performance was unsatisfactory, was not unfairly terminated.
 - b) that the Claimant's initial probationary period was extended for six months by oral agreement, and the second probation was terminated by a letter dated 17th August 2016.
 - c) that the Claimant was given seven days' notice as by law required and all his dues were paid. That the Claimant's claim should be dismissed.
15. Under cross-examination and re-examination, RW-1 testified:-
- a) that he was employed by the Respondent in March 2016, and was therefore not an employee of the Respondent when the Claimant served the first probationary period.
 - b) that the Claimant's probationary period was extended orally, although there was no evidence that there was an earlier agreement to extend the probationary period.
 - c) that he (RW-1), was not sure when the letter dated 17th August 2016 was served on the Claimant, but should have been after the said date.
 - d) that the Claimant was paid his dues and his seven days' notice pay was paid with his salary, though the witness (RW-1) did not have the Claimant's pay slip in Court to confirm that.
 - e) regarding the Claimant's performance, RW-1 testified that he did not know what the company's (Respondent's) expectation of the Claimant was, and that there were neither warning letters nor disciplinary proceedings regarding the Claimant.



- f) Regarding overtime, the witness (RW-1) testified that he did not have records on when employees reported and when they left.
16. Having considered the pleadings filed and evidence presented by both parties, issues that fall for determination, in my view, are as follows:-
- a) whether the Claimant was serving his contractual probationary period as at the time when the letter terminating his employment was given to him by the Respondent on 14th September 2016.
 - b) whether termination of the Claimant's employment was unlawful and therefore unfair.
 - c) whether the Claimant is entitled to the reliefs sought.
17. On the first issue, Section 42 of the *Employment Act*, 2007 provides:
- “(1) the provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract.
 - (2) 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.
 - (3) No employer shall employ an employee under probationary contract for more than the aggregate period provided under subsection (2).
 - (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.”
18. Turning to the Claimant's contract of employment, the Claimant's letter of offer of employment, addressed to him by the Respondent on 29th August 2015, (Claimant's exhibit no. 1) reads, in part:
- “Kwale International Sugar Company Limited is pleased to offer you a fixed term employment contract as Transport Coordinator for a period of two (2) years on the following terms:
- You will be expected to commence on 14th September 2015.
- You shall be on probation for six months after which you will be confirmed for employment if the company is satisfied with your performance.
- You will be entitled to receive a monthly gross salary of ksh. 70,000(seventy thousand shillings only).
- You will be based in Kwale and any other location directed by the management.
- Confirm your acceptance of this job offer by appending your signature on the acceptance clause. You will then sign a contract later upon joining the company.
- Signed 02/09/2015 (signed)
- H. Kotecha S. Ashok Kumar
- Director – Projects Head Human Resource”



19. On 8th September 2015, the Claimant signed the acceptance clause on the employment offer letter referred to in paragraph 18 above. The acceptance clause reads:-

“ Acceptance

By signing and dating this acceptance below, I Stepehn Baya accept this offer

Signed

dated 8/9/15”

20. Upon signing the letter of offer of employment on 8th September 2015, the Claimant “accepted the employment offer” presented to him by the Respondent, complete with terms and conditions of employment; and by dint of it became an employee of the Respondent. It matters not whether or not the Claimant was subsequently called upon to sign a subsequent contract upon joining the Respondent Company.

21. The Claimant testified that he joined the Respondent company on 14th September 2015 (as per the terms of the employment contract) and worked until 14th September 2016 when he was handed the letter dated 17th August 2016 requiring him to leave the company on allegation of unsuccessful probation.

22. By dint of Section 42(2), of the *Employment Act*, 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 (emphasis added).

23. The Respondent did not in any way demonstrate that the Claimant’s probationary period of six months was extended at any given time. The Claimant denied the Respondent’s allegation that the probationary period was extended by an oral agreement. The allegation thus remained just that, an allegation.

24. Curiously, the Respondent did not tell the Court when the alleged oral agreement was made, and why an agreement to extend a probationary period regarding a written contract of employment would be oral when the subject employment contract and termination thereof were in writing. Can a written contract of employment be deemed to have been supplemented and/or varied by an alleged oral agreement whose date is unknown and which is denied by one of the parties to the written contract? Nay, I do not think so.

25. The Claimant was, by operation of the statute, automatically confirmed on his employment upon expiry of six months from the contractual commencement date of 14th September 2015. If the Respondent was not satisfied with the Claimant’s performance, it ought to have terminated the Claimant’s probationary employment before or at the lapse of the six months contractual probationary period.

26. The Respondent’s letter dated 17th August 2016 purporting to terminate the Claimant’s employment on alleged unsuccessful probation reads in part:

“with reference to the offer letter dated 14th September 2015., the management of Kwale International Sugar Company Ltd regret to inform you that, your probation will not be extended further, nor will you be confirmed to your current position.



The management has decided not to continue your employment beyond your probationary period. This is because your performance during probation period has not met our expectations. As a result, your employment will end immediately.

You are required to return all company property in your possession after which all your dues shall be calculated. You will be paid 7 days in lieu of notice and any outstanding remuneration...”

27. The Claimant testified that the said letter dated 17th August 2016 was given to him on 14th September 2016 by the Respondent’s General Manager after the day’s work, and that the same was given to him in the presence of the Respondent’s Environment Manager. This evidence was not rebutted. The Respondent did not demonstrate that the termination letter was given to the Claimant earlier than 14th September 2016.
28. Having already found that the Claimant’s contractual six months probationary period was never extended and that the Claimant stood confirmed to his employment position by operation of the statute upon the expiry of the contractual six months’ probationary period, I find and hold that the Claimant, who had been in his employment for twelve months from the date of employment (14th September 2015), was entitled to twenty eight days termination notice pursuant to Section 35(1) (c) of the Employment Act, 2007. Further, the Respondent was obligated to comply with Section 41 of the Employment Act if, for any reason, it considered terminating the Claimant’s employment. Failure to comply with the mandatory procedural requirements of Section 41 of the Employment Act 2007 rendered termination of the Claimant’s employment unlawful, and therefore unfair pursuant to Section 45 of the said Act.
29. Although the Respondent alluded to performance by the Claimant which did not meet the Respondent’s expectation (poor performance), those allegations were never proved. The Respondent did not tell the Court what its expectations of the Claimant were, and no warning letters or performance appraisals on the Claimant were produced in Court.
30. On the first and second issues, I find and hold that the Claimant was not serving his contractual six months probationary period at the time of termination as he had long completed the same, and that termination of his employment was unlawful and therefore unfair.
31. On the third issue, it is my finding that the Claimant was entitled to one month notice or payment in lieu thereof. The Respondent did not demonstrate that any amount in lieu of notice was paid. The Claimant is also entitled to compensation for unfair termination of employment. Taking into account the circumstances in which termination of the Claimant’s employment took place and the fact that the Claimant was not shown to have in any way contributed to the termination, I award the Claimant ten months’ salary being compensation for unfair termination of employment.
32. The claim for unpaid salary for days worked from 1st to 14th September 2016 is declined. The Claimant, while denying that any money in lieu of notice was paid to him, testified that what was paid to him was salary. Likewise, the claim, for unpaid leave days is declined. The Respondent produced in evidence leave forms (exhibit no.3). The Respondent demonstrated that the Claimant was twice granted leave days during the year 2016, and that as at 4th July 2016, his leave entitlement was two (2) days. The Claimant did not disclose this position, both in his pleadings and evidence, and did not dispute the leave forms/documents exhibited by the Respondent.
33. The claim for overtime payment is declined. The Claimant did not give particulars of when he worked overtime and the extra hours worked on any given days. Claims for overtime payment are in the nature



of special damages and must always be specifically pleaded and proved. The Respondent's counsel cited the case of *Rogoli Ole Manadiegi –vs- General Cargo Services Limited* [2016] eKLR where the Court held, as follows:

“ it is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The Claimant did not show in the trial Court when he put in excess hours, when he served on public holidays or even rest days.... He did not justify the global figure claimed in overtime; showing specifically how it was arrived at...”

34. Although the award of any costs of Court proceedings are in the Court's discretion, the Respondent pleaded that the Claimant was not entitled to costs of the suit for lack of proper issuance of any demand and notice of intention to sue. A letter of demand and notice of intention to sue dated 23rd September 2016 was however produced in evidence by the Claimant during the trial. This letter was among the documents listed and filed by the Claimant (exhibit no.3). The Respondent did not object to its production and no reason has been shown why the Court should not exercise its discretion in favour of the Claimant regarding costs, should the Court find it just to do so.

35. Finally, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a) One month salary in lieu of noticeksh.70,000
 - b) Ten months' salary being compensation for unlawful/unfair termination of employment (70,000x10).....ksh.700,000
- Total ksh.770,000

36. The aforesaid sum shall be subject to statutory deductions to which the Claimant was subject, pursuant to Section 49(2) of the *Employment Act*, and the employer (the Respondent) shall remit such statutory deductions to the relevant statutory bodies within thirty days of making the deductions.

37. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Azei for Claimant

Mr. Kulecho for Respondent

