



**Irungu v Primefuels Kenya Limited (Cause 657 of 2016)
[2022] KEELRC 44 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 44 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 657 OF 2016
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

JOSEPHAT KINGORI IRUNGU CLAIMANT

AND

PRIMEFUELS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Statement of Claim dated 18th April 2016 against the Respondent for unlawful and unfair termination of employment. He avers that the Respondent employed him by a contract of employment dated 16th May 2015 as Human Resource Manager effective 14th May 2015, at a gross monthly salary of Kshs. 180,000/-. The Claimant avers that on or about 22nd September 2015, the Respondent's workers went on a go slow in solidarity with two of their colleagues charged with sending a threatening message to the Claimant after he had reported the matter to the police. The Claimant avers that the Respondent subsequently commenced disciplinary proceedings against the two workers and as the HR Manager, he initiated the proceedings on behalf of the Respondent. The Claimant avers that the Respondent's workers demanded for his employment to be terminated as a precondition to their returning to work and that the Respondent got concerned on the impact to its business and devised a plan to falsely suspend and terminate his employment. The Claimant avers that the false suspension and termination letters were posted on the Respondent's notice board without his knowledge and that when he objected to the Respondent's actions, he was assured in the Respondent's letter dated 5th October 2015 had no effect on his employment; he would work from home until the situation at the company returned to normalcy; and he would be paid his full salary. The Claimant avers that he did receive his net salary for the months of October and November albeit late and that when he was not paid his December and January salaries, he contacted that Respondent's Managing Director in February 2016 to enquire on the same and was then informed of the Respondent's decision to terminate his employment.



2. The Claimant avers that termination of his employment was unfair, unlawful and in breach of contract because the same was carried out through the telephone; the termination was without cause; he was not informed of any allegations against him; he was not accorded an opportunity to be heard; and he was not paid any terminal dues. It is the Claimant's averment that as the Respondent has refused to settle this claim, he prays for Judgment against the Respondent for his unpaid salary, 12 months' salary as compensation for unfair and unlawful termination, 99 accrued leave days up to 31st January 2016, costs, certificate of service, interest on the amounts, and any further relief this Honourable Court may deem just to grant. The Claimant states in his Witness Statement dated 26th November 2020 that he returned his laptop on 30th August 2016.
3. The Respondent filed its Response to Statement of Claim and Counterclaim dated 4th August 2016 averring that on or about 28th September 2016, its workers staged a strike alleging harassment, intimidation and victimisation by the Claimant during negotiations of a CBA between the Respondent and Kenya Long Distance Truck Drivers & Allied Workers Union. The Respondent avers that it issued the Claimant with a letter of suspension pending investigations and which letter the Claimant acknowledged receipt of and that it also received from the ELRC Nairobi Cause 1768 of 2015, an interim order restraining it from harassing, dismissing, threatening and/or intimidating its employees. The Respondent further avers that it terminated the Claimant's employment on 5th October 2015 and issued him with a termination letter and that the Claimant pleaded with it to instead allow him hand over his HR functions to the Respondent's consultants. It thus denies that the Claimant continued working from home or paid a salary for October and November and avers that it paid the Claimant all final dues owed to him in accordance with the law and terms of his employment. It further avers that when the Claimant's probation ended on 14th November 2015, it did not confirm his employment and that the Claimant was at all material times serving probation. That it responded to the Claimant's demand insisting that his termination was fair and just in the circumstances.
4. The Respondent Counterclaims against the Claimant the sum of Kshs. 60,000/- being the cost of the Dell Laptop Computer it bought for him to enable him carry out his duties during employment and which was at all times in possession of the Claimant. It contends that the Claimant failed, refused and/or neglected to return the said Laptop Computer upon termination of his employment and prays that judgment be entered in its favour on the counterclaim as prayed and that the Claimant's claim be dismissed with costs. The Respondent also filed a Witness Statement made on 12th February 2021 by its HR Administrator, Faith Kamau who asserts that the Claimant's employment was subject to a 6 months' probation period that was to lapse on 14th November 2015. She states that the Respondent's management made a decision not to confirm the Claimant's employment owing to the irretrievable broken down relationship between him and the Respondent's employees and accordingly terminated his employment. She further states that the Claimant carried out the hand over process between October and November 2015 and only maintained his work email because he was a witness in one of the claims lodged by a former employee against the Respondent.
5. The Claimant in a Reply dated 14th October 2016 avers that the Respondent supported him during the subsistence of the go slow by its workers and even took part in major decisions regarding the employees and that at no time did he make a decision without consultation and approval from the Respondent. He avers that the Orders issued in ELRC Nairobi Cause 1768 of 2015 were to prevent the Respondent from taking any actions against the two employees facing criminal charges and that the suit has nothing to do with him. The Claimant further denies that he is at all indebted to the Respondent or that he is in possession of the laptop and prays that the Counterclaim be dismissed with costs and judgment entered as prayed in the Statement of Claim.



6. The Claimant submits that the emails produced in the Claimant's Bundle of Documents from pages 6 to 12 show that he was working for the Respondent months of November 2015, December 2015 and January 2016 and that the Bank Statement at page 23 of his Bundle of Documents further shows he received salary for the months of October and November 2015. The Claimant submits that the Respondent's allegation that he was not confirmed is thus false and misleading because it is trite law that continuing to work after probation amounts to confirmation by effluxion of time as held in *Patrick Korir Rotich v Unilever Tea Kenya Limited* [2016] eKLR. Further, the Court in the case of *Catherine Kathina Kelly v Ilkisonko Sacco Limited* [2016] eKLR held that there is no requirement for a letter of confirmation for an employee who works beyond his probation. It is the Claimant's submission that consequent on the above, he was serving on a permanent basis at the time of his termination on or about 4th February 2016. The Claimant submits that his termination was unlawful and unfair for failure to give him written notice setting out the reasons for termination and before making the decision to terminate his employment as set out in *Banking Insurance Finance Union v Barclays Bank of Kenya Ltd & Another*, Cause No. 95 of 2014 [2016] eKLR. He also cited the case of *Mourine Achieng Madagow & Another v African Banking Corporation Ltd* [2020] eKLR where the Court stated that a dismissal of an employee is rendered unfair within the meaning of Section 45 of the Employment Act when the employer fails to prove a valid reason for the dismissal as under Section 43 of the Act. The Claimant submitted that the burden of proving the reasons for termination therefore rests on the employer and failure to discharge this burden renders the termination unfair. The Claimant also relies on the case of *Allfayo Jagona Imbuya v Board of Management Ivugwi Secondary School* [2018] eKLR where this Court affirmed that termination of employment should not be treated casually without adequate explanation of the circumstances and the reasons taken into account and that the employees' rights under Section 41 of the Employment Act, 2007 should be secured. The Claimant submits that failure to give him an opportunity to be heard in the presence of a fellow employee was another defect in procedure. The Claimant further submits that the Respondent's Counterclaim is without basis since he returned the laptop on 30th August 2016. The Claimant submits that he is entitled to the prayers sought as he stated in his testimony that he did not receive salary for the months of December 2015 and January 2016 and has demonstrated that his case warrants compensation under Section 49 of the Employment Act, considering the circumstances in which the termination took place. The Claimant submits that he is entitled to one month's salary in lieu of notice as provided in Clause 14 of the Claimant's employment contract and that issuance of a Certificate of Service is provided in Section 51 of the Employment Act.
7. The Respondent submits that the Claimant had at the time of termination of his employment worked for less than five months and that his termination was within the probationary period. The Respondent submits that the Claimant's entire claim is premised on a clear misconception of the law on termination of probationary contracts and the Claimant is seeking to reap benefits only accorded to employees already confirmed to their position. The Respondent cites Section 42 of the Employment Act which provides that the provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract and submits that pursuant to this provision, it had no obligation to give the Claimant any formal charges or hear him in his defence before termination, as contemplated under Section 41. The Respondent submits that *Rika J. held in Danish Jalang'o & Another v Amicabre Travel Services Limited* [2014] eKLR that the law relating to unfair termination does not apply in probationary contracts. The Respondent submits that even if the Court were to believe the Claimant's argument that he was terminated on 4th February 2016, the Claimant still worked for less than the minimum 13 months set by Section 45 (3) of the Employment Act and that the Claimant cannot thus bring a claim for unfair termination. Further, it submitted that whereas admittedly the High Court in *Samuel G. Momanyi v The Attorney General & Another* [2012] eKLR invalidated Section 45(3) of



the Employment Act, the Court of Appeal however held in *Nation Media Group Limited v Onesmus Kilonzo* [2017] eKLR that the decision in *Momanyi* (supra) is not binding on judges of the ELRC if they find that it incorrectly interprets the employment law as similarly agreed by Nzioki wa Makau J. in his judgment in *John Muthomi Mathiu v Mastermind Tobacco (K) Limited* [2018] eKLR. The Respondent submits that importing the reasoning in the foregoing decisions, Section 45(3) of the Employment Act is still good law and the Claimant is thus precluded from bringing a claim for unfair termination. The Respondent submits that there therefore no basis for his prayer for 12 months' salary as compensation for unfair termination and that the Claimant was only entitled to one week notice as per his contract, which the Respondent made up for by paying him salaries for the months of October and November. Without prejudice to the foregoing, the Respondent submits that the Claimant's claim for 12 months' salary as compensation for unfair and unlawful termination is unreasonable since he worked for a little less than five months, which factor this Court ought to consider. The Respondent submits that one month's salary is sufficient compensation for an employee who worked for 5 months as held by the Court in *Antony Karanja Wainaina v Adrian Company Limited* [2019] eKLR. The Respondent submits that if the Court were to go by the Claimant's position that he worked until 4th February 2016, he worked for less than nine months and two months' salary would be sufficient compensation, and that two court decisions are instructive in this regard – the case of *Aysha Hafsa Musa v Computer Revolution Limited* [2021] eKLR and that of *Gladys Chelimo Bii v Kenya Power and Lighting Company Limited* [2021] eKLR. The Respondent further submits that the prayer in respect of accrued leave is without merit as it is not pleaded and supported in the body of the claim. The Respondent submits that if the Court is to however consider this claim, the Claimant's accrued leave days at the time of termination were 8.75 as worked until 3rd October 2015 (8.75 x 6000 = Kshs. 52,500/-) or if until the denied date of 4th February 2016 (15.75 x 6000 = Kshs. 94,500/-).

8. The Claimant was dismissed when the Respondent could not take the heat from its employee who had engaged in a go-slow. The Claimant had been engaged as the human resource of the Respondent at a time the Respondent was negotiating the CBA with the union representing some of the workers of the Respondent and these workers urged the dismissal of the Claimant for action he had taken against 2 employees who had been charged with sending threatening messages to the Claimant. The Respondent asserts the Claimant was on probation as no letter of confirmation was issued.
9. The confirmation of an employee is an operation of law unless by writing the employer extends the probationary period in writing. Extension of probationary period must be for just cause and not at the whim of the employer. In the case of *Catherine Kathina Kelly v Ilkisonko Sacco Limited* (supra) Rika J. held

There is no requirement for a letter of confirmation upon expiry of probationary period. It suffices that the employee continues to work under the contract of employment granted to the employee upon expiry of the probationary period and in the absence of a letter of confirmation, the employee converts to a permanent employee by operation of the law.

10. In the case of *Patrick Korir Rotich v Unilever Tea Kenya Limited* (supra) Marete DK Njagi J. held that

.....at this time, his employment had automatically been confirmed by effluxion of time. The confines of probation are guided and guarded by the law and no one would escape from this. This is because probation period is in law a transition period whereby the employer is allowed time and opportunity to test the suitability of new recruit in employment.
11. An employee who works beyond the probationary period without the extension of the probationary period being formally extended is deemed to have been confirmed into position and as such the limiting



Section 45(3) of the Employment Act would not apply to such an employee. As such the cases of Danish Jalang'o & Another v Amicabre Travel Services Limited (supra) and John Muthomi Mathiu v Mastermind Tobacco (K) Limited (supra) do not apply herein.

12. The dismissal of the Claimant was without regard to Section 41 and as such the Claimant was entitled to notice as well as a hearing prior to dismissal. In this case the Respondent copped out and figuratively threw the Claimant under the bus as it was too cowardly to deal with the staff that had threatened the Claimant. The dismissal took effect without a hearing. The Claimant had not worked for the Respondent for long enough to permit him to enjoy the full range of the compensation in Section 49 and as he was relatively new at the Respondent a figure of 2 months compensation would suffice. The Respondent had mounted a counterclaim against the Claimant and failed to prove it and said counterclaim is dismissed albeit with no orders as to costs. The laptop was returned in August 2016 and as such the Respondent is not entitled to receive payment for the Dell Laptop it had issued to the Claimant and which laptop was returned to it.
13. In the final analysis the Claimant succeeds in the suit herein as follows:-
- i. Compensation for 2 months – Kshs. 360,000/-
 - ii. Notice Kshs. 180,000/-.
 - iii. Costs of the suit
 - iv. Interest on i) and ii) above at court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

Nzioki wa Makau

JUDGE

