



**Otieno v Wananchi Marine Products Kenya Limited (Cause
60 of 2016) [2022] KEELRC 1270 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1270 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 60 OF 2016**

B ONGAYA, J

JULY 22, 2022

BETWEEN

KENNETH OMOLO OTIENO CLAIMANT

AND

WANANCHI MARINE PRODUCTS KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on May 27, 2015 through Gakoi Maina & Co. Advocates. The claimant's case is that the respondent employed him as a Boiler Maintenance In-Charge effective February 25, 2013. The agreed salary was Kshs. 55,000.00 per month. His case is that by the letter dated 23.04.2014, the respondent unilaterally, unjustifiably and unlawfully reduced the monthly salary to Kshs. 15,181.00. Further by letter dated April 29, 2014 the claimant sought to have the salary reinstated to Kshs. 55,000.00 per month. The respondent failed to do so and the claimant prays and claims for costs of the suit, interest and payment for:
 - a) Leave on pro-rata Kshs. 22,211.49.
 - b) One month's salary in lieu of termination notice Kshs. 55,000.00.
 - c) Service or gratuity payment Kshs. 31,730.70.
 - d) Compensation for loss of work Kshs. 660,000.00.
 - e) Salary for the month of April, 2014 Kshs. 55,000.00.
2. The response to the memorandum of claim was filed on July 23, 2015 through Messrs Robson Harris & Co. Advocates. The respondent denied the claimant's case and prayed that the suit be dismissed with costs.



3. The amended response to the memorandum of claim was filed on July 20, 2017. It is the respondent's case that the claimant was on probation and he abandoned his work station for 3 consecutive days. In the circumstances, the boilers were not repaired but they malfunctioned occasioning the respondent losses. The respondent therefore stated that the claimant is not entitled as claimed.
4. The claimant filed a reply to the amended response on November 30, 2018. He repeated the pleadings in his memorandum of claim and prayed for Judgment against the respondent.
5. Counsel for the respondent ceased to act in the matter and despite service of a hearing notice, the respondent did not attend at the hearing. The claimant testified to support his case and final submissions were filed for him on July 18, 2022.
6. The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The evidence is that the respondent employed the claimant by the letter dated February 25, 2014. He was employed in the position of Boiler Maintenance In-Charge at Kshs. 55,000.00. He was on probationary service for 6 months. At paragraph 20 of the claimant's submissions it is confirmed that indeed the termination was at a time the claimant was on probation.
7. The Court finds that by that letter of appointment which appears signed on February 25, 2013, parties were in a contract of service. The first paragraph of the letter states that the claimant was being employed effective February 25, 2014. The Court finds that the effective date of employment was on February 25, 2014. In his witness statement, the claimant stated he was employed on February 25, 2014. The Court finds that to be the effective date of employment.
8. On April 23, 2014 the respondent wrote to the claimant stating that the company was undergoing certain changes and his salary would reduce from a gross pay of Kshs. 55,000.00 to a gross pay of Kshs. 15,181.00 with immediate effect. The claimant replied by his letter of April 29, 2014 stating that he did not know any provision of law allowing such reduction of salary and if any the respondent was to guide him accordingly. By that letter of reply, the claimant requested the respondent to reinstate the salary to Kshs. 55,000.00 per month.
9. It is not clear how parties separated but it appears that after the correspondence on the reduction of salary, the contract of service thereafter terminated. The Court finds that as at April, 2014 the claimant was in his second month of service.
10. Section 42(4) of the *Employment Act* provides that a contract for a probationary period may be terminated by either party giving not less than 7 days' notice of termination of the contract or payment by the employer to the employee of 7-days' wages in lieu of notice. The Court finds that provision to apply to the current dispute. The claimant is awarded 7-days' wages being Kshs. 12,833.30 in lieu of termination notice.
11. It appears the respondent alleges that the claimant was absent from duty without leave or lawful cause which would amount to a misconduct requiring due process of a notice and a hearing prior to termination per section 41 of *the Act*. However, Section 42(1) of *the Act* provides that section 41 of *the Act* on notice and hearing in event of misconduct does not apply during probationary service. Accordingly, the Court returns that in the present case the allegations of unfair termination do not emerge at all. Further, the claimant had not served for 12 continuous months as contemplated in section 28 of the *Employment Act* and the Court returns that prorata annual leave had not accrued as alleged and claimed for. The claimant appears not to have been paid salary for April 2014 and his claim for Kshs.55, 000.00 is awarded. Service gratuity is not due as he had served for only 2-months and the contractual or statutory basis for the claim has not been established at all.



12. The Court has considered the mix-up or misleading pleading that the employment was effective February 25, 2013, and that the claimant had worked for 1 year and 2 months. The Court returns that the respondent will pay only 50% of the claimant's costs of the suit.
13. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. Payment of Kshs. 67, 833.30 by September 1, 2022 failing interest to be payable thereon at Court rates from the date of filing of the suit until full payment.
 2. The respondent to pay 50 % claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND JULY, 2022.

BYRAM ONGAYA

JUDGE

