



**Njoka v Bata Shoe Company Limited (Cause 1106 of 2016)
[2022] KEELRC 4149 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1106 OF 2016
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

LEWIS MUSYOKI NJOKA CLAIMANT

AND

BATA SHOE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 9th June 2016. He states that he was employed by the Respondent as a Public Relations Assistant, on 29th August 2014.
2. He was entitled to a monthly salary of Kshs. 50,000, which excluded house allowance. He was to serve probation of 6 months, which was to end on 28th February 2015.
3. The Respondent arbitrarily extended probation through a letter dated 31st March 2015, for a period of 3 months, ending 30th June 2015.
4. He continued working after 30th June 2015. On 12th August 2015, he was issued another extension of probation for a period of 3 months. Extension was unilateral.
5. In total, the Claimant was under probation for 18 months.
6. He avers that he was continually mistreated by the Respondent: he was insulted in the presence of colleagues; he was denied confirmation after completing probation; he was denied reimbursement of out-of-pocket expenses, incurred while on official duty; he was discriminated against on training; he was denied permission to attend training; he was denied newspapers and access to social media, frustrating his role in media monitoring; he was not included in staff medical scheme; he was not issued probation report; projects under him were sabotaged; and he was issued warning letter without just cause.



7. He was denied overtime for excess hours worked. He was not subjected to performance review, and there was no basis for extending probation.
8. The above frustrations compelled the Claimant to resign on 4th March 2016. He was not paid outstanding annual leave of 28 days and other terminal benefits. He avers that he was constructively dismissed.
9. He prays for Judgment against the Respondent, as follows: -
 - a. General damages for unfair and unlawful termination.
 - b. Compensation equivalent of 12 months' salary at Kshs. 612,000.
 - c. Salary for 4 days worked in March 2016 at Kshs. 10,200.
 - d. Accrued annual leave at Kshs. 71,400.
 - e. Service pay at Kshs. 38,250.
 - f. House allowance for 18 months at Kshs. 137,700.
 - g. Overtime for 18 months at Kshs. 91,800.
 - h. Certificate of Service.
 - i. Costs of the suit.
 - j. Interest.
 - k. Any other suitable relief.
10. The Respondent filed its Statement of Response on 19th July 2016. It is admitted that the Claimant was employed by the Respondent as a Public Relations Assistant. He was to work under probation in the first 6 months. He did not perform satisfactorily. A meeting was held involving the Claimant, his Supervisor and a representative of Respondent's Human Resource Department, where it was resolved to extend the Claimant's probation, through the letter dated 31st March 2015. His performance was found wanting at the end of the second extension, and there was a third extension, as pleaded by the Claimant.
11. He was not a member of the Respondent's Medical Scheme or Provident Fund, because he was still on probation. He was not discriminated against. He was treated equally as the other Employees. He was afforded training opportunities and salary increment. He did not complain about the alleged harassment and insults. There was no project under his docket, which was frustrated. He participated in charitable events on weekends, which was not regular work, warranting overtime.
12. He resigned abruptly on 4th March 2016. The Respondent accepted his decision, and advised the Claimant that his dues would be tabulated, less notice due to the Respondent. He was not constructively dismissed. The Respondent prays for dismissal of the Claim.
13. The Claimant gave evidence, and rested his Claim, on 11th November 2021. The Respondent gave evidence through its Human Resource Manager, Peter Giathi, on 16th February 2022, when hearing closed. The Claim was last mentioned on 22nd June 2022, when Parties confirmed filing and service of their Final Submissions.
14. The Claimant adopted his witness statement and documents on record, in his evidence-in-chief. He told the Court that one of his duties, was to promote Children's programmes over the weekend. The



- Respondent would donate shoes to Children facilities over the weekend. The Claimant had access to Respondent's clinic, but would have preferred being enlisted under Respondent's Medical Scheme, to have access to proper hospitals like his colleagues. The clinic offered first aid for work injuries. He worked for 18 months, but was not absorbed in the Medical Scheme.
15. Training was not based on the Claimant's performance. It was mandatory training, where Employees met their Managers. Performance was based on the Children's programmes. The Claimant was issued a warning letter for absence without leave. He had lower back pain, and attended Respondent's clinic on the material day. He was recommended for physiotherapy. The nurse went to the Claimant's house within the workplace, and injected the Claimant. The following day, the Claimant was still unwell. He was away for the 2 days, resulting in the warning letter.
 16. On cross-examination, the Claimant told the Court that he had a written contract. It had a probation clause. He had to satisfy probation of 6 months. He was unsure if it was for 6 months. There were memos issued by the Respondent extending probationary period. He did not agree that his performance was unsatisfactory. He did not write to the Respondent, protesting extension.
 17. Page 20 of the Respondent's documents contains Claimant's performance appraisal. It states that the Claimant needed to show more passion in his work. Page 21 states that the Claimant lacked passion and needed supervision. He did not receive any letter confirming successful completion of probation. He received memo on training, while still under probation. He was to be trained on time and management by an independent trainer. Medical scheme was available upon completion of probation. The same applied to the Provident Fund. The clinic was available throughout. N.S.S.F contributions were deducted monthly. He would clock in and out. Clocking sheets exhibited by the Respondent, did not show any clocking on weekends. There were no records of Children's programmes exhibited by the Claimant. He did not issue notice to the Respondent, on resignation. He did not raise grievances on mistreatment and discrimination in the meeting held with his Manager. He did not know if there were receipts to support the claim for any reimbursements. He never went back to the Respondent after resignation. He was not invited to collect his Certificate of Service.
 18. The contract provided for 25 days of annual leave. Computation of final dues at page 37 of the Response, says there were 4 days of annual leave owed. The Claimant lived within the Respondent's workplace. He was paid house allowance in the first month, although provided with housing. This was corrected later. Overtime pay was provided for in the contract. He was not advised that he would be paid terminal dues, less notice due to the Respondent.
 19. Redirected, the Claimant told the Court that he was on probation for the entire period of 18 months, he worked for the Respondent. He was never consulted on extension of probation. There was no place for passion in the appraisal forms. There were no targets. He clocked in and out on all weekends. He had raised verbal complaints before resignation. He felt humiliated being on probation all that time.
 20. Peter Giathi relied on his witness statement and 13 documents filed by the Respondent, in his evidence-in-chief. He confirmed that the Claimant was employed by the Respondent, as pleaded by the Claimant.
 21. He was placed on extended probation twice, as pleaded. His performance was not good. He was given a target of 80 % in order to be confirmed. He achieved 74%. He lacked passion. He signed the appraisal forms agreeing with the comments made by the Respondent. He lacked passion and needed to be pushed. He was a young graduate from the University of Nairobi. He was given time for moulding. The Respondent thought it would be harsh, to throw out the Claimant. He was trained, mentored and coached, to help him open up his mind. Training would give him a broad understanding of the organization. He was trained on effective communication. There were no pre-authorized excess hours



worked, to warrant overtime pay. He did not work outside the normal hours. He was housed by the Respondent within the workplace. He was paid salary for days worked, and Certificate of Service is ready for collection.

22. On cross-examination, Giathi admitted that the appraisal form did not indicate that there was a target of 80%. Target was in the policy and practice of the Respondent. There were no documents showing that the Claimant was housed by the Respondent. There was a clocking system. Claimant was not on duty on 8th February 2014. He was absent on 9th February 2014. Warning letter issued. Giathi was not aware of another warning letter. Probation was extended severally. N.S.S.F deductions were remitted collectively. The Respondent expected the Claimant to collect his Certificate of Service. It is best practice not post a Certificate of Service through mail. The Claimant was not consulted in computation of his final benefits. Redirected, Giathi restated that the Claimant was housed by the Respondent.
23. The issues are whether the Claimant was constructively dismissed by the Respondent; whether his contract was unfairly terminated; and whether he merits the remedies sought.

The Court Finds: -

24. The Claimant was employed by the Respondent Shoemaker, as a Public Relations Assistant, on 29th August 2014.
25. He was paid a basic monthly salary of Kshs. 50,000 and promised house allowance, or reasonable housing accommodation.
26. His contract, executed by himself and Human Resources Manager Peter Giathi, provided for probation of 6 months.
27. 6 months of probation ended on 28th February 2015.
28. On 31st March 2015, the Respondent wrote to the Claimant, extending probation by 3 months, ending 30th June 2015. He was advised that if he was found unsuitable at the end of the extended period, his contract would be terminated.
29. After 30th June 2015, the Claimant continued working without being advised if probation was completed successfully. 2 months after the end of the extended probationary period, he received a memo dated 12th August 2015, extending probation by 3 months. This extension was described as 'final extension.' He was told to improve on his performance within that period, ending 12th November 2015, failing which he would be released from the Respondent.
30. The Claimant was not advised at the end of the 3rd probation extension, 12th November 2015, if probation was successful. His contract provided that he would be notified in writing, whether he had been confirmed. He continued working after 12th November 2015.
31. The Claimant tendered his resignation with immediate effect on 4th March 2016, about 4 months from the end of the 3rd probationary period.
32. He informed the Respondent that resignation was occasioned by lack of confirmation by the Respondent, to the position of Assistant Public Relations Assistant, despite having worked for 18 months. He informed the Respondent that he had endured ill-treatment, and in his view, the Respondent was no longer willing to be bound by the terms of employment.
33. Did the Claimant's resignation amount to constructive dismissal? Most definitely yes, relying on the Court of Appeal decision in *Coca Cola East Africa Limited v. Maria Kagai Ligaga* [2015] e-KLR.



34. The Respondent acted in a manner that would lead any reasonable Employee, to believe that the Employer, is no longer willing to be bound by the terms and conditions imposed on the Parties, by the contract of employment.
35. The contract of 29th August 2014 bound the Parties to a 6 month-probationary period. Probation ended on 28th February 2015. It was extended for 3 months, beginning 31st March 2015 to end on 30th June 2015. The Claimant was advised that if he was not successful after the 2nd extension of probation, his employment would be terminated.
36. Section 42[2] of the *Employment Act*, allows for probationary period of not more than 6 months. The period may be extended for a period of not more than 6 months, with the agreement of the Employee.
37. The Respondent, as seen above, extended probation for 3 months, from 31st March 2015 to 30th June 2015.
38. Between 30th June 2015 and 12th August 2015 there was no word from the Respondent to the Claimant on the status of his probation.
39. He was advised that that he had been placed on a 3rd probationary period of 3 months, beginning 12th August 2015 and ending 12th November 2015.
40. Considering the period between 30th June 2015 and 12th August 2015, the Claimant would have served extended probation of almost 8 months, between 31st March 2015 and 12th November 2015.
41. The Respondent was in breach of the contract and the law governing the employment relationship.
42. Even after 8 months of prolonged probation, there was no advice given to the Claimant, on the status of his probation, after 12th November 2015.
43. The Respondent neither confirmed him, nor terminated his contract as had been threatened on extending probation. The Claimant went on working.
44. He went on being denied certain benefits, which were only due to an Employee, upon confirmation. He would not access the Medical Scheme. He could only be treated at the Respondent's first aid clinic. Unlike other Employees, he could not attend a hospital under the Medical Scheme. He could not join the Respondent's Retirement Savings Plan under the contract, without confirmation.
45. From 12th November 2015, the Claimant went on working until he resigned on 4th March 2016. He worked for a period of 3 months without being advised by the Respondent, whether he was still on probation.
46. At the time he resigned, he was justified in feeling that the Respondent was no longer willing to continue being bound by the contract between the Parties. Resignation quite easily, fitted the characterization of the concept of constructive dismissal.
47. Even without evidence of other mistreatment and discrimination alleged by the Claimant, the Court is satisfied that imposition of unlawful and unfair probationary extension by the Respondent, created a work environment which was not conducive to the Claimant's normal discharge of his obligations under the contract. The Respondent ignored its obligations under the contract, extended the Claimant's probation unreasonably, and even at the end of the extended probation, let the Claimant to continue working, without advising him whether he was still on probation, or confirmed.



48. It was not shown by the Respondent, that extension of the probationary period in March 2015 and in August 2015, was with the agreement of the Claimant. Variation of the contract, could only be done through a written agreement, signed by the Parties, under clause 15 of the contract.
49. The Claimant's contract entitled him a monthly salary of Kshs. 50,000. Although copies of pay slips exhibited by the Claimant are illegible, computation of dues exhibited by the Respondent, indicates 15 days' salary at Kshs. 25,500, which would confirm that the Claimant's salary was Kshs. 51,000, by the time he resigned.
50. He was housed by the Respondent at Limuru, within the workplace. It was unproductive of the Counsel for the Claimant to harangue Giathi about the absence of a lease agreement between the Parties, to show that the Claimant was housed by the Respondent. Employees who are housed by their Employers do not normally enter into lease agreements. In explaining his 2-day absence from work, over which he was warned, the Claimant told the Court that he was treated by a nurse from Respondent's clinic in his house, within the same compound. He acknowledges living at the Respondent's compound, so why strain judicial economy with unnecessary arguments about non-payment of house allowance? The prayer for house allowance is declined.
51. There is no evidence of authorized excess hours worked by the Claimant, to warrant overtime pay. The sum pleaded of Kshs. 91,800 is not supported by any document, or by the oral evidence of the Claimant.
52. He was subscribed to the N.S.S.F. His contributions were remitted. There are no statements exhibited by the Claimant to show that contributions were deducted and not remitted. The prayer for service pay is declined pursuant to Section 35 [6] of the Employment Act 2007.
53. He did not satisfy the Court that he was owed annual leave of 28 days, as of the date he resigned. Clause 9 of his contract states that the Claimant would be entitled to 25 days of annual leave. Where does he get 28 days of annual leave from? He is awarded 4 days of annual leave conceded by the Respondent, at Kshs. 7,846.
54. He is granted 4 days' salary as offered in the computation of dues dated 9th March 2016, at Kshs. 7,846.
55. He worked for 18 months. To grant him equivalent of 12 months' salary in compensation for unfair termination, and another award of general damages for unfair and unlawful termination, over the same violation, as pleaded, would be an overkill. It would amount to a judicially- approved larceny. The Claimant worked for 18 months and expected to be confirmed in employment. His contract upon confirmation, was term-indefinite. He is granted equivalent of 2 months' salary in compensation for unfair, constructive and unlawful dismissal, at Kshs. 102,000.
56. Certificate of Service shall be released to the Claimant.
57. Costs to the Claimant.
In Sum, It is Ordered: -
 - a. It is declared that the Claimant was unfairly, constructively and unlawfully dismissed by the Respondent.
 - b. The Respondent shall pay to the Claimant 4 days' salary in annual leave at Kshs. 7,846; salary for 4 days worked in March 2016, at Kshs. 7,846; and compensation for unfair, constructive and unlawful termination equivalent of 2 months' salary at Kshs. 102,000.
 - c. Certificate of Service to be released to the Claimant by the Respondent forthwith.



d. Costs to the Claimant.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH
DAY OF SEPTEMBER 2022.**

JAMES RIKA

JUDGE

