



REPUBLIC OF KENYA



KENYA LAW
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**Mulwa v World Concern Development Organisation (Cause 534 of 2016)
[2022] KEELRC 3971 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3971 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 534 OF 2016
MA ONYANGO, J
SEPTEMBER 22, 2022**

BETWEEN

HENRY NYAMU MULWA CLAIMANT

AND

WORLD CONCERN DEVELOPMENT ORGANISATION RESPONDENT

JUDGMENT

1. The Claimant was until November 30, 2012, an employee of the Respondent, an international religious organisation. He was employed as an Assistant Program Officer on June 25, 2012 at a monthly salary of Kshs 170,000/- together with other benefits. He was posted to work in South Sudan.
2. It is the Claimant's averment that the termination of his employment was illegal and contravened the *Employment Act* and the *Constitution* as he was not given notice, the reason for the termination was false and he was not given an opportunity to be heard even though he requested for the same.
3. In the statement of claim dated October 30, 2014 the Claimant seeks the following remedies:
 - (a) A declaration that the Claimant's dismissal was unlawful.
 - (b) Kshs 3,297,920.00 as tabulated below:
 - i. One (1) month's salary in lieu of notice Kshs 170,000.00
 - ii. Damages for breach of contract (i.e. remainder of contract i.e. 6 month's salary) 6 x Kshs 170,000.00 Kshs 1,020,000.00
 - iii. Damages for unfair termination i.e. 12 months (12 x Kshs.170,000.00) Kshs.2,040,000.00
 - iv. 12 days worked for December 2012 while awaiting flight arrangements e.t.c at Kshs.5,660 per day i.e. 12 x Kshs.5,660 Kshs.67,920.00



Total Kshs.3,297,920.00

- (c) The Respondent to issue the Claimant with a Certificate of Service.
 - (d) Costs and interest
 - (e) Any other relief that the Court shall deem fit to grant in the circumstance.
 - (f) Costs of this claim.
4. The Respondent filed a reply to the statement of claim dated December 17, 2014. The Respondent denies the averments in the statement of claim and avers that the Claimant, who was on probationary contract of 90 days from July 16, 2012, and which was extended on September 26, 2012, was dismissed for gross misconduct when he reported to work while intoxicated.
 5. It is the Respondent's averment that reporting on duty while intoxicated is prohibited in the Respondent's terms and conditions of service.
 6. The Respondent avers that upon termination of his employment the Claimant was paid his lawful terminal dues comprising of:
 - (a) 7 days' notice Kshs.38,387
 - (b) Salary for days worked in December Kshs.27,419
 - (c) Benefits accrued Kshs.43,870
 - (d) October pay deductions Kshs.9,057
 7. The Respondent denies, that the Claimant is entitled to the remedies sought and prays that the suit be dismissed with costs.
 8. At the hearing of the claim, the Claimant testified on his behalf while the Respondent opted not to call any witness but to rely on the pleadings and submissions. The Claimant adopted his witness statement and his documents filed with the claim and in the supplementary list of documents dated January 23, 2018 as his evidence.
 9. The Claimant testified that his letter of appointment dated June 25, 2012 provided for probation of three months. That his termination letter dated November 30, 2012 was emailed to him. The reason for termination was violation of probation by taking alcohol. He testified that he did not receive any response to his letter of grievance.
 10. Under cross-examination, the Claimant stated that the Respondent's handbook provided that an employee could be dismissed at any time during probation, without notice. The Claimant further testified that the allegations against him were that he was drunk on a Sunday while at the premises of the Respondent although it was not a working day. The Claimant stated he had completed probation having worked for five months although he had no document to show the same.
 11. Under re-examination, the Claimant stated that he was promoted to Program Manager after two months. That although the handbook provides for review of performance he was not subjected to the same.
 12. The Claimant testified that at the time he was accused of taking alcohol he was in the residential area. That he was never issued with any letter accusing him of being drunk, was not taken through any disciplinary process or asked to respond to the accusations against him and did not undergo any medical



examination to prove he was drunk. He stated the handbook provided for a disciplinary procedure, which he was not subjected to.

Claimant's Submissions

13. In the Claimant's submissions he states that he was not on probation at the time of termination of his employment, that his letter of appointment and the Respondent's Global Employee Handbook both do not provide for extension of probation period beyond 90 days.
14. The Claimant relies on the decision in *Jane Wairimu Machira v Mugo Waweru and Associates* [2012] eKLR where it was held that the Claimant's appointment was confirmed by default upon the expiry of the probation period set in the letter of appointment.
15. The Claimant further submitted that due process was not followed before the termination of his employment, as he was never subjected to any disciplinary process before termination. That the offence he was alleged to have committed occurred outside the working hours and he was not accorded an opportunity to meet the person who alleged that he was drunk.
16. It is further the Claimant's submission that the employee handbook provides that an employee found in possession or use of alcoholic beverages would be subjected to disciplinary action, yet the Claimant was not taken through any disciplinary process.
17. The Claimant relied on the decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the Court held that where the procedure set out under Section 41 of the Act is not complied with, the termination is unfair.
18. The Claimant further relied on the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR where the Court held that in a case of unfair termination or wrongful dismissal, an employer must demonstrate that it observed the dictates of procedural fairness.
19. On whether the reason for termination was justifiable, the Claimant submitted that the Respondent did not lead any evidence to prove that the Claimant was incapable or unwilling to perform his work. That in any event, the alleged drinking occurred on a Sunday outside working hours. That the Respondent therefore failed to establish the grounds of dismissal. The Claimant relied on the case of *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR.

Respondent's Submissions

20. It is the Respondent's submission, that the Claimant was placed on probation for 90 days on July 16, 2012, which was extended due to the Claimant's conduct of drinking at the workplace contrary to the Respondent's policies despite having been previously warned.
21. Relying on the documents produced by the Claimant, the Respondent submitted that according to the letter of appointment the probation period was to start on July 16, 2012 and was extended as corroborated by the letter of termination.
22. It is submitted for the Respondent that the Handbook prohibits an employee from use of alcohol on company property. That the Claimant admitted under cross examination that he was on company property and further that he had been warned previously about consuming alcohol. It is submitted that the Respondent being a Christian charity organisation prohibits the use of alcohol on its premises whether or not on a workday.
23. The Respondent relies on the case of *Mathias Amata Mwalo v Kenya Wildlife Service* [2021] eKLR where the Court dismissed the claim on grounds that the Claimant was on probation.



24. The Respondent further relied on the decision in *Elizabeth Mwikali Mwendwa v Kenya Investment Authority* [2018] eKLR where the Court held that probation period can be extended to a maximum of 12 months.
25. The Respondent further relied on the decision in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR where the Court held that the exclusion of employees holding a probationary contract from the provisions in Section 41 of the *Employment Act* is inconsistent with Articles 41 and 47 of the *Constitution*. It points out that the Court in that case awarded no compensation for unfair termination as the Act expressly excluded persons holding probationary contracts from the provisions of Section 41.

Analysis and Determination

26. Having considered the pleadings and evidence on record, the issues arising for determination are: -
- (i) Whether or not the Claimant was on probation at the time of dismissal from employment;
 - (ii) Subject to the finding in (i) above, whether the Claimant was unfairly dismissed from employment;
 - (iii) Whether the Claimant is entitled to any of the reliefs sought.

Whether the Claimant was on probation

27. Section 42 of the *Employment Act* provides for probationary contracts as follows –
42. Termination of probationary contracts
- (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 a 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.
28. The Claimant's letter of offer of employment is reproduced below –
- “June 25, 2012
- Henry Nyamu Mulwa
- O Box 867-00621, Nairobi, Kenya
- Re: Offer of Employment with world concern Development Organization,
- Dear Henry,
- On behalf of World Concern Development Organization, I am pleased to extend an offer of employment to you as the South Sudan SEAR Assistant Program Manager. This position will be based in Gogrial East in Warrap State, South Sudan.



The salary and benefits package will be as follows:

Consolidated taxable salary - Kshs.170,000/= per month
Medical cover (in and out patient) for you and your family
GIK (Shopping voucher) - Kshs.3,000/= per month
GPA Cover - As per GOK Law

Other benefits after the three months' probation period are as follows:

Pension - 5% employer contribution
Child education allowance - Kshs.5,000/= per child per term for primary school and Kshs.15,000/= per child per term for high school.
Continuing Education benefit - Kshs.20,000/= per annum
Christmas Bonus - 25% of salary with ceiling of 15,000/=
Annual Leave - 21 working days
R&R as per the World Concern South Sudan R&R policy (attached). Also as we discussed, we will re-evaluate your salary after the 90 day probationary period and make the upward adjustment pending satisfactory performance during this period. The projected start date is July 16 to begin orientation in the Nairobi office. If the terms of this offer are acceptable, please sign both the original and copy of this letter, return the original to the Human Resources Office, and retain a copy for your file. Your signature will confirm the salary agreed upon and other terms of your appointment specified in this letter.
Yours faithfully,
Signed] Joern Seigies
South Sudan Country Director
World Concern Development Organization [Emphasis added]

29. The letter of dismissal is dated November 30, 2012 and is also reproduced below –

“November 30, 2012

Henry Mulwa

South Sudan Kuajok

Re: Contract Termination

Dear Henry,

I must regretfully inform you that we will not be extending your contract beyond your extended probationary period as you have violated the terms of our previous agreement of September 26 to avoid partaking of alcoholic beverages (attached). Your use of alcohol on Sunday, November 25, which was witnessed by several staff members, has reinforced the poor judgment that you previously demonstrated and therefore shown you to be unprepared for program leadership with World Concern.

This is also a violation of World Concern Policy on Drug-

Free Workplace Awareness and Notification Requirement which states: World Concern follows the principles of the Drug-Free Workplace Program. Possession or use of alcoholic beverages or illegal drugs on company property or appearing for duty under the influence of alcohol or drugs is not permitted and could result in disciplinary action up to and including termination, depending on the severity of the infraction.

I would like you to arrange to leave Kuajok by flight on Wednesday, 5 December and work with Moses Korsuk to transfer your responsibilities to him over the next several days. We will be providing you with seven days additional pay, through 12 December. You will also be eligible to receive accrued annual leave days, but accrued R&R days are not paid by policy. Upon arriving in Nairobi, please visit with Fidelmah to clear your accounts.

Please let me know if you have any questions about this.

Sincerely,

Signed



Joern Seigies
South Sudan Country Director”

30. The Respondent did not produce any documents. The Respondent also opted not to call any witness.
31. The Respondent avers that the Claimant’s probation commenced on July 16, 2012 and was extended. The letter of offer of employment, although referring to the project start date of July 16, does not specify if this was the date of reporting of the Claimant. This was also not clarified by the Claimant.
32. Be that as it may, 90 days from July 16, would fall on October 15. Subsection 42(2) of the *Employment Act* is clear that probation may be extended for a further period not exceeding six (6) months “with the agreement of the employee”.
33. Other than the letter of termination, which makes reference to extended probationary period, there is no evidence that the Claimant’s probationary employment period was over extended with or even without his agreement or at all. Such probationary period can only be extended in formal writing as was held in the case of Jane Wairimu Machira (supra).
34. Section 10(5) further provides that any changes to the terms of contract must be in consultation with the employee and the contract must be revised to reflect the change and the employee notified in writing. In the instant case, the Claimant’s letter of appointment does not make any reference to extension of probation period after 90 days. Any such change if any, ought to have been done in writing in consultation with the employee.
35. I find that the Claimant was not on probation at the time of termination of his employment as the probation period had long lapsed and there is no communication to the Claimant of extension of the same. The Claimant’s contract was confirmed by operation of the law.
Whether the termination of the Claimant’s contract was unlawful and/or unfair
36. It is not contested that the Claimant’s employment was terminated without him going through the disciplinary process set out in the Respondent’s Employee Handbook. It is also evident from the letter of termination that the Claimant was not taken through any form of a disciplinary process, a fact not denied in the defence.
37. I therefore find that the termination of the Claimant’s employment having not been in compliance with Section 41 of the Act was procedurally unfair.
38. The reason for termination having not been subject to a hearing at all, was never proved. The Claimant has denied that he was intoxicated. He has further averred that the date the incident is stated to have occurred not at work as on a Sunday which was not a working day according to the handbook which provides working hours to be Monday through Friday from 8 am till 5 pm. The Respondent having not adduced any evidence to rebut the averments of the Claimant. I find that the termination of the Claimant’s employment failed both the procedural and substantive tests as set out in Sections 41, 43 and 45 of the Act.

Is the Claimant entitled to any of the remedies sought?

39. Having found the termination unfair, the Claimant is entitled to one month’s salary in lieu of notice which I award
him at Kshs 170,000/-.



40. The Claimant also worked for 12 days as is evident from the letter of termination as reproduced above. I award him salary for the 12 days worked in December 2012 at Kshs.78,461.55.
41. Damages for breach of contract is not payable in an employment contract as the law provides for compensation for such breach. The Claimant is therefore awarded compensation which I assess at four (4) months' salary at Kshs 680,000/-. In awarding the same I have taken into account the manner in which the Claimant's employment was terminated and all relevant factors under Section 49(4) of the *Employment Act*.
42. The Respondent shall pay the Claimant's costs for this suit.
43. In sum, the Claimant is awarded a total of Kshs 928,461.55.
44. The Respondent will further issue a certificate of service to the Claimant in terms of Section 51 of the *Employment Act*.
45. Interest shall accrue on decretal sum from date of filing suit in respect of pay for days worked and pay in lieu of notice and from date of judgment on all other items.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

