



REPUBLIC OF KENYA



KENYA LAW
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**Nyambega v Brookside Dairy Co Ltd (Cause 7 of 2018)
[2022] KEELRC 3937 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3937 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 7 OF 2018
S RADIDO, J
SEPTEMBER 21, 2022**

BETWEEN

WYCLIFFE OKARI NYAMBEGA CLAIMANT

AND

BROOKSIDE DAIRY CO LTD RESPONDENT

JUDGMENT

1. Wycliffe Okari Nyambega (the Claimant) sued Brookside Dairy Co Ltd (the Respondent), alleging unfair termination of employment.
2. The Respondent filed a Response on 12 February 2018, and the Cause was heard on 22 November 2021 when the Claimant testified and on 17 May 2022 when the Respondent's General Manager, Human Resources, testified.
3. The Claimant filed his submissions on 30 June 2022, and the Respondent on 19 July 2022.
4. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

5. The Claimant challenged the procedural fairness of the termination of his employment on or around 22 October 2016 on the ground that he was not afforded an opportunity to be heard and that it was devoid of valid reasons.
6. The Respondent's witness, however, countered that due process was followed before the termination of the Claimant's contract.
7. According to the witness, the Claimant was under probation at the time of termination and that the termination was through the invocation of the contractual term of termination upon notice/pay in lieu of notice by offering the Claimant 7 days' pay in lieu of notice.



8. The appointment letter dated 17 August 2016 issued to the Claimant did not provide for probation at clause 6 as contended by the Respondent, and therefore, the justification by the Respondent has no contractual or legal basis.
9. The Court must therefore take recourse to the *Employment Act*, 2007.
10. Section 35(1)(c) of the Act requires the employer to give written notice of termination of employment at least 28 days in advance. The Respondent did not issue such a notice to the Claimant.
11. Apart from the written notice, section 41 of the Act enjoins the employer to allow the employee an opportunity to make representations in the company of a colleague before deciding to end the contract.
12. The Respondent did not place before the Court any evidence that it called the Claimant to defend himself with respect to the allegations that he loaded products into distribution vehicles without authority or instructions.
13. The Court finds that the termination of the Claimant's employment was unfair.

Compensation

14. The Claimant served the Respondent under a formal contract for about 2 months. Previously, he had served without a formal contract from 2014.
15. Considering the length of service, the Court is of the view that the equivalent of 2 months' gross salary as compensation would be appropriate (gross salary was Kshs 19,000/-).

Pay in lieu of notice

16. The Respondent was paying the Claimant a monthly wage. It did not give written notice but offered 7 days' pay in lieu of notice, falling short of the statutory period.
17. The Court will allow this head of claim (less the amount paid) in the sum of Kshs 14,710/-.

Conclusion and Orders

18. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him:
 - i. Compensation Kshs 36,000/-
 - ii. Pay in lieu of notice Kshs 14,710/-TOTAL Kshs 50,710/-
19. The Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 21ST DAY OF SEPTEMBER 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Mr Nyanga instructed by Nyanga & Co. Advocates

For Respondent Mr Njuguna instructed by Wainaina Ireri Advocates LLP



Court Assistant Chrispo Aura

