



**Osanya v Java House Limited (Cause 1597 of 2016)
[2022] KEELRC 12778 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1597 OF 2016
MN NDUMA, J
OCTOBER 6, 2022**

BETWEEN

JAMES IKE OSANYA CLAIMANT

AND

JAVA HOUSE LIMITED RESPONDENT

JUDGMENT

1. The suit was filed by the claimant on August 11, 2016, seeking the following reliefs: -
 - a. A declaration that the claimant’s termination was substantively and procedurally unfair and unlawful.
 - b. An award of Kshs 396,564 comprising one month’s salary in lieu of notice and equivalent of 12 months’ salary in compensation.
 - c. Payment for overtime hours worked.
 - d. Certificate of Service.
 - e. Costs of the suit.
2. The respondent filed a Memorandum of Response to the claim on September 14, 2016 in which the respondent admits having employed the claimant but differed on the date of employment.
3. The respondent admits having terminated the employment of the claimant but on account of unsuccessful probation on or about June 27, 2016.
4. The claimant pleaded to the contrary that he worked for the respondent as a driver from March 22, 2016 until June, 2015 when he was suspended from work.



5. The claimant joined issue with the respondent in a reply to the memorandum of response on October 21, 2016.
6. The claimant opted to file affidavit evidence on November 18, 2020 and offer himself for cross-examination by the respondent followed by defence case. The claimant filed Affidavit evidence sworn to on November 25, 2020 and the respondent filed affidavit of Maureen Mithamo, the Head of Corporate Affairs at Nairobi Java house in response sworn to on 1st July, 2022 after the Court had deemed the defence case closed and without seeking enlargement of time to file the affidavit. The claimant had also already filed final submissions dated July 7, 2022 by that time. The respondent filed written submissions and list of authorities dated July 22, 2022.
7. That misadventure by the respondent notwithstanding, the court shall proceed to consider affidavit evidence and submissions filed by both parties in determining the merit of the suit.
8. In his testimony, the claimant stated that he was employed by the respondent as a driver on March 22, 2016. He attached a copy of a contract of employment dated the said date and signed by both parties being Christine Wanjiru, Human Resource Manager and the claimant.
9. In terms of Clause 3 of the Contract, the employment was to commence from March 23, 2016 until terminated in terms of the contract.
10. The claimant was placed on three months' probation from March 23, 2016 which could be extended for a further three months' period and the contract was terminable during the period by giving one month' notice or payment in lieu thereof.
11. The claimant's salary was Kshs 28,438 and was to work 52 hours over six days' week period excluding tea and lunch breaks. The claimant was in terms of Clause 5 entitled to overtime at the rate prescribed by the Regulation of Wages (Hotels and Catering Trades) Order.
12. The claimant testified that she worked well until June 27, 2016 when the respondent terminated her services on account of unsuccessful probation.
13. The claimant states that the probation had lapsed on June 22, 2016 and had not been extended. That the allegations of unsuccessful probation were not substantiated and were undefended and no evidence was produced by the respondent to that effect. The respondent had no valid reason to terminate the employment of the claimant. The termination was therefore unlawful and unfair since no lawful procedure was followed to terminate the contract.
14. The claimant be awarded accordingly.
15. R.W.1, Maureen Mithamo, deposed in her affidavit that the claimant was employed as a driver on 2 March 3, 2016 as per the contract of employment.
16. That the claimant was placed on three months' probation with effect from March 23, 2016.
17. That on June 5, 2016, the claimant negligently lost Sungold cooking oil while delivering the same to the respondent's warehouse. The respondent considered this to be gross misconduct and the claimant was placed on suspension by a letter dated June 15, 2016. The claimant was invited to attend a disciplinary hearing on June 20, 2016 upon presenting written response on June 18, 2016 which the claimant did. Sungold cooking oil while delivering the same to the respondent's warehouse. The respondent considered this to be gross misconduct and the claimant was placed on suspension by a letter dated 15
18. The disciplinary hearing was rescheduled for June 22, 2016 and it proceeded accordingly.



19. By a letter dated June 27, 2016, the respondent terminated the claimant's employment for unsuccessful probation.
20. R.W.1 produced the letter of suspension dated June 15, 2016, the response by the claimant dated June 18, 2016 and the minutes of the disciplinary hearing dated June 22, 2016.
21. The respondent states that it had a valid reason to terminate the employment of the claimant and it followed a fair procedure in terminating the employment of the claimant and that the suit lacks merit and it be dismissed with costs.
22. upon considering the evidence adduced and the submissions by the parties, the issues for determination are whether the respondent had a valid reason to terminate the employment of the claimant and if in doing so the claimant followed a fair procedure.
23. In this regard, the court has considered the judgment of Ndolo, J. in *David Namu Kariuki v Commission for the Implementation of the Constitution* [2015] eKLR in which the judge held that: -

“Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time.”
24. The above was the case with the claimant, the respondent having failed to extend the period of probation once it expired on June 23, 2016.
25. However, the respondent was entitled to subject the claimant to a disciplinary process, as it did in terms of section 41 of the *Employment Act* 2007 and if a valid reason to terminate the employment was found in terms of Section 43(1) and (2) of the Act, then the employer could lawfully terminate the employment of the claimant.
26. Considering the rival evidence presented by affidavit in this matter, the court is satisfied that the respondent had a good cause to subject the claimant to a disciplinary hearing which it did. The court finds that the respondent has satisfied the court that it had established a valid reason to terminate the employment of the claimant upon following a fair procedure.
27. Accordingly, the respondent has discharged the burden placed on it in terms of sections 41, 43, 45 and 47(5) of the Act.
28. The claimant on the other hand failed to demonstrate in terms of section 47 (5) that the termination of his employment was wrongful.
29. Like was found by Ndolo, J. in *David Namu Kariuki Case (supra)*, the termination of employment of the claimant was lawful and fair and the suit is dismissed in this respect.
30. The claimant was however, entitled to payment of one months' salary in lieu of notice in the sum of Kshs 28,428 which the court duly awards the claimant.
31. The claimant had the onus of establishing that the he had worked overtime which was not paid for by the respondent. The claimant did not discharge this onus and the claim fails to this extent.
32. The claimant is entitled to a Certificate of Service and the court directs the respondent to provide the same to the claimant.
33. In the final analysis, Judgment is entered in favour of the claimant against the respondent as follows: -
 - a. Payment of Kshs 28,438 in lieu of one months' notice with interest at court rates from date of dismissal till payment in full.



- b. The respondent to issue the claimant with a Certificate of Service within 30 days of this judgment.
- c. The respondent to pay half the costs of the suit to the claimant.

DATED AND DELIVERED AT NAIROBI (ELECTRONICALLY) THIS 6TH DAY OF OCTOBER, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Adoli for claimant

G.M. Muchoki & Co. Advocates for respondent

Ekale – Court Assistant

