



**Fearnhead v Mentor Management Limited (Cause 118 of 2014)
[2022] KEELRC 13263 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 118 OF 2014
MA ONYANGO, J
NOVEMBER 22, 2022**

BETWEEN

LEE FEARNHEAD CLAIMANT

AND

MENTOR MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 3rd February 2014. On 28th February 2014 the Respondent filed its Response to the Claim dated 26th February 2014. On 8th April, 2014 the Claimant filed a Reply to the Respondent's Response to Claim dated 7th April 2014. The Claimant also filed his Bundle of Documents dated 23rd April 2015.

Claimant's Case

2. The Claimant was employed by the Respondent as a Project Director pursuant to the terms set out in the letter of appointment dated 4th June 2012 and subject to the following key terms: -



	Terms	Particular
1.	Commencement	4 th June 2012
1.	Probation	3 Months
2.	Role	Project Director
2.	Reporting to:	Managing Director
5.	Salary	USD.8,400.00 per month
6.	Bonus	Up to 30% gross salary per year
8.	Reimbursable expenses for relocation	Up to USD.10,000.00 (Europe to Kenya)
9.	Annual Leave	25 days per annum
14.	Termination Notice	3 months or payment in lieu of notice
16.	Non complete and no solicitation period	12 Months
18.	Disciplinary procedure	Non-existent
19.	Grievance Recourse	To the CEO
20.	Governing Laws	Laws of Kenya

3. The Claimant avers that he diligently performed his duties as the Project Director of the Respondent from 4th June 2012 and completed his 3 months' probation without any complaint or concern from his line manager, the Respondent's Managing Director.
4. That on or about 30th November 2012 the Claimant lost his father and took compassionate leave went back to Europe to coordinate the funeral and burial arrangements with the knowledge, consent and approval of the Respondent and in particular the Chief Executive Mr. James Hoddell and the Managing Director Mr. Andrew Ward.
5. The Claimant avers that he continued to work remotely from UK from 4th December 2012 despite challenges in receiving and sending emails through his Company email and blackberry.
6. The Claimant avers that he explained to the Respondent CEO and Managing Director that there were funeral challenges which caused delays and that the burial was to take place on 17th December 2012. That the Respondent's Management acknowledged and assured the Claimant of the Respondent's understanding and sympathy.
7. The Claimant avers that he reasonably believed that the office would be closed for Christmas break from 21st December 2012 to first week of January 2013. It therefore did not make sense for him to



return to Kenya after the burial and then go back to UK 3 days later. The Claimant having carried his work laptop and office blackberry continued working remotely from the UK as evidenced by the bundle of emails demonstrating communication with the Respondent CEO, Managing Director and Financial Controller, Samuel Njau. This is also evident from the email dated 29th December 2012 from the Managing Director indicating that “James is dealing with this issue and is currently out of the country and has been since 21st - back on the 2nd”.

8. On 28th December 2012 the Claimant communicated with the Respondent’s Financial Controller to enquire why the Company had not paid his office equipment subscription which resulted in Safaricom disconnecting his access from 17th December 2012 making it difficult for him to access the office system to provide remote assistance on urgent assignments.
9. On or about 27th December 2012 the Respondent wrote to the Claimant a Letter of Termination. The reason for termination was “lack of communication and continued indifference from your part.”
10. On 28th December 2012 the Claimant responded to the Respondent challenging the allegations in the termination letter.
11. On 4th January 2013 the Respondent’s Chief Executive Officer, Mr. James Hodell, wrote to the Claimant offering the Claimant payment of 2 months' salary for December 2012 and January 2013 in full and final settlement which offer the Claimant rejected.
12. On 23rd June 2013 and further on 12th July 2013 the Claimant through his lawyers on record wrote demand letters to the Respondent seeking the Respondent to redress the wrongful and unlawful termination. There being no favorable response from the Respondent the Claimant instituted the instant Claim.
13. The Claimant's position is that he was not absent from work without lawful excuse as alleged by the Respondent. The Claimant’s position is that he was on compassionate leave to attend to his father's funeral and at all times explained to the Respondent’s CEO and Managing Director the progress and delay he was experiencing to finalize the funeral. The Claimant also states he went to great length to work from home while attending the funeral which efforts were frustrated by challenges in accessing the Respondent's office systems and failure by the Respondent to pay the Claimant’s office roaming Safaricom subscription.
14. It is the Claimant’s averment that he did not fail to comply with any company policy. The Claimant further avers that the Respondent did not give him notice requiring him to return to work failing which it would exercise the option to terminate his employment. It is his position that any additional days beyond his leave days would have easily been applied as unpaid leave.
15. The Claimant prays that this Court finds the termination of his employment by the Respondent without giving him prior notice and opportunity to be heard was unlawful, wrongful, unprocedural and illegal both on substance and procedure.
16. The Claimant prays for –
 - a. Determination that the Respondent’s summary dismissal of the Respondent (sic) was wrongful.
 - b. Payment by the Respondent to the Claimant of three (3) months’ salary in lieu of notice being USD.8,400/= x 3 = USD.25,200/=
 - c. Payment of unpaid salary for the Month of December 2012: USD. 8,400/=



- d. General Damages for breach of contract and/or compensation for loss of employment: USD.8,400 x 12 = USD.100,800/=
- e. Relocation allowance as provided under the contract: USD.10,000/=
- f. Reasonable proportion (on pro rata basis) of executive promote.
- g. Reimbursements for expenses incurred on behalf of the company.
- h. Unlawful deductions or underpaid salaries.
- i. Costs of this cause and interest thereon and on other amounts awarded
- j. The Respondent to issue the Claimant with a certificate of service
- k. Any other relief that this Honorable Court shall deem fit to grant.

Respondent's Case

17. The Respondent in response to the claim filed its response to claim dated 26th February, 2014, Respondent's List of Witnesses and Witness statement of Samuel Njau dated 3rd June, 2015, and Respondent's List of Documents dated 20th May, 2015. At the trial, the Respondent called one witness Mr. Samuel Njau, its Finance Director.
18. The Respondent admits appointing the Claimant as a Project Director on 4th June, 2012. It states that the Claimant's probationary period was three (3) months and was subject to confirmation in writing as per clause 1(c) of the letter of employment. The Respondent avers that the Claimant's employment was however never confirmed, as the Respondent had its reservations towards the Claimant's work ethics. The Respondent denies that the Claimant undertook his work diligently, as he did not.
19. It is the Respondent's averment that from the time of his appointment on 4th June 2012 till 29th November, 2012, when he took leave to attend his father's funeral, the Claimant had already exhausted his annual leave days and overused 6.42 days.
20. The Respondent avers that when the Claimant requested for leave to attend his father's funeral, he did not have any leave days left and was doing so on the Respondent's borrowed time. The employment letter also did not provide for compassionate leave.
21. The Respondent states that the Claimant was nonetheless granted five working days compassionate leave from the 30th November, 2012 ending on 7th December, 2012, to enable him attend his father's funeral in the United Kingdom.
22. It is the Respondent's averment that as a Project Director, the Claimant was handling various time sensitive projects and undertook to, in his words, "be picking up emails, and will respond as soon as I can".
23. The Respondent avers that it came as a rude shock and surprise to the Respondent, that as soon as the Claimant was gone, so did his responsiveness to communication from the Respondent and courtesy towards his colleagues and superiors.
24. The Respondent avers that in an email sent on 4th December, 2012, by the Respondent's Chief Finance Officer, the Claimant was informed of the necessity to reset his email password to enable the Respondent access documents and information pertaining to some of the projects the Claimant was working on.



25. That the Claimant's response candidly depicts his demeanour and distaste for his work and colleagues, when he condescendingly, in many words told the Respondent's Chief Finance Officer to desist from using the Claimant's private email address to send him work related queries, while at the same time claiming he was having challenges sending and receiving emails on his work email address. That the Respondent was thus unable to reach the Claimant.
26. The Respondent avers that the Claimant who was away on compassionate leave, even though he did not have any leave days outstanding in that calendar year, did not return to work on 7th December, 2012 as expected. He further did not write to the Respondent to indicate his intention to extend his leave.
27. That on the 9th of December, 2012, the Respondent through its Managing Director, Andrew Ward, was constrained to ask the Claimant via text message, when he planned to return to work.
28. That the Claimant responded to the Respondent's query two days later, that is on 11th December, 2012 via email, where he referred to many things happening in his life but failed to state when he would return to work.
29. That on 15th December, 2012, the Respondent's Managing Director wrote to the Claimant and again reiterated that the Claimant should confirm when he intended to return to work. He also urged the Claimant to communicate and keep the Respondent updated on his plans.
30. That though the Claimant was insistent throughout the proceedings that he was in constant communication with the Respondent, the Respondent's Managing Director's email of 15th December, 2012, tells a different story.
31. The Respondent avers that in an email sent on 15th December, 2012 to the Respondent's Managing director, the Claimant blatantly stated he did not know when he would return, and did not formally request for an extension of his leave.
32. It is the Respondent's position that the Claimant's email to the Respondent's Managing Director sent on 20th December, 2012, stating that he would be travelling to Hungary on 21st December, 2012 and that he would hopefully be back in the office on 2nd January, 2013 was the last nail to the coffin. That the Claimant's decision to travel to Hungary was despite the fact that his father's funeral for which he had obtained compassionate leave was conducted on 17th December, 2012.
33. That the Claimant having unilaterally extended his compassionate leave for more than 20 days and having effectively absconded his duties with little or no co-operation with his colleagues back in Nairobi, the Respondent rightfully hired new personnel and wrote to the Claimant informing him of his summary dismissal.
34. The Respondent avers that it extended an olive branch to the Claimant, purely on a without prejudice basis, and despite him being clearly on the wrong, he chose to file the present proceedings, which have unnecessarily dragged on for 7 years.
35. The suit was heard virtually on 6th July 2021 when the Claimant testified on his own behalf from Dallas, Texas in the United States of America while the Respondent called Samuel Njau, its Finance Director, who testified on its behalf from Diani, Kenya. The parties thereafter filed and exchanged written submissions.
36. The facts of the case as captured in the pleadings, evidence and submissions are not contested. The issues for determination are whether the Claimant was still on probation at the time of termination of his employment, whether the termination of his employment was unfair and if he is entitled the remedies sought in his statement of claim.



Probation

37. Probationary contract is defined in Section 2 of the Employment Act as follows –

“probationary contract” means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period;

38. Section 42 of the [Employment Act](#) provides for termination of probationary contracts in the following terms:

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.

39. The Claimant’s letter of appointment provided for probation as follows –

- (c) Your employment is subject to a probationary period of three months during which time either party may terminate this agreement by giving one month written notice to the other party, or payment in lieu thereof. At the end of the probationary period, the Company shall confirm in writing whether or not your employment has been confirmed (“Confirmation”). During the probationary period your performance will be closely monitored and there will be regular meetings with the development director to provide guidance and assess progress.”

40. The Claimant’s employment commenced on 4th June 2012.

He therefore completed the three months’ probationary period on 4th September 2012.

41. The termination of the Claimant’s employment was by letter dated 27th December 2012 by which time the Claimant had worked for more than six months.

42. There is no evidence that the Claimant’s probation period was extended. There is further no evidence of adverse reports on his performance during probationary period. It was the duty of the Respondent to either confirm the Claimant’s probationary period or to confirm his employment. Where a probationary contract is not extended and no adverse report is made about the Claimant’s performance during probation period, the employer is deemed to have confirmed the Claimant’s employment by operation of the law.

43. The Claimant was thus not on probation at the time of termination of his employment on 27th December 2012 as his probationary contract had not been extended in terms of either Section 42 of the [Employment Act](#) or Clause 1(c) of the Claimant’s employment contract.



Unfair Termination

44. The [Employment Act](#) provides for the procedure for termination of employment at Section 41 of the Act as follows: –

41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

45. The Act further provides for proof of reason of termination as follows –

43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

46. Section 45(1) of the Act prohibits unfair termination while Section 45(2) provides for circumstances when termination would be unfair as follows –

1. No employer shall terminate the employment of an employee unfairly.
2. A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.

47. In the instant suit, the reason for termination as stated in the letter of termination is absence from work. The letter is reproduced below –

“ 27th December 2012

Lee Fearnhead



9 Highfield Avenue
Kiveton Park
Sheffield S26 6Ne
United Kingdom

Dear Lee,

Re: Absence from work

I hope that all is going as well as can be expected for you
and your family in the UK.

As you can imagine things have been very busy here with the anticipated budget overruns and with the rapid value-engineering exercise required to keep us to the 2014 opening.

In 12 we were pleased to offer you the position of Project Director in recognition of your experience and expertise and we hoped that you would accept and fulfil the position with the same enthusiasm with which it was offered to you. However since you left on 28th November, despite numerous attempts to contact you, both by phone and e-mail, we have been unable to ascertain whether or when you intend to return to your place of work. Your absence and the ensuing uncertainty have left Mentor in an uncomfortable position as there are numerous issues which you are aware of that require your attention and input. Difficulties have been compounded by you making access to any files on these matters impossible for us. In spite of personal tragedy, the position of Project Director requires a high level of commitment and communication. We therefore assume by your actions that you are no longer in continuing in this role.

While we appreciate that you have been in a difficult position in the last weeks, you nevertheless have an obligation to Mentor as your employer to abide by the provisions of your employment contract and particularly Clauses 14(b) thereof. The week of compassionate leave provided for in Company policy has been significantly overrun, now extending to over 4 weeks, with no indication from you as to when you intend to return, and this is in addition to the overrun, in your leave allocation which predated recent events.

We therefore consider that your contact of employment is terminated. Quite apart from being in breach of Clause 14(b), we simply cannot continue with a lack of communication and continued indifference from your part. Please could you arrange for all Company possessions including the laptop computer, keys, access cards and all data files generated during your employment to be returned to the Company's offices forthwith.

If you do not intend to return to Nairobi then please let us know so that we can notify the owners of V >m apartment and please inform us as to of the whereabouts of your rental car and keys so that we in also arrange for the restitution of the same.

Although I am sorry for your loss you will understand that we have a business to run and require all staff I respect the terms of their contracts of employment. If you would like to discuss this at all please do not hesitate to contact me as I would be very happy to talk through the above with you. In the meantime thank you for your contribution to date and we wish you the very best for 2013.

Yours Sincerely

Signed



James Hoddell

CEO”

48. Section 44(4)(a) of the [Employment Act](#) provides that absence from work without leave or other lawful cause constitutes gross misconduct for which an employer may summarily dismiss an employee. However Section 41(2) of the Act provides that before dismissal under Section 44(4) the employer shall hear the employee and consider his representations as well as the representations of the employees’ representative. Section 41(1) envisages that the employee been informed of the intention to dismiss him and his right to defend himself against any accusations of gross misconduct against him, and his right to be accompanied to a disciplinary hearing by either a fellow employee or a union shop floor representative and has been heard before the decision to terminate is made by the employer.
49. In the instant case it is debatable whether or not the Claimant was absent without permission or lawful cause. Under Clause 7 of the Claimant’s contract compassionate leave is provided for as follows –
- “7. Compassionate Leave
- a. An employee is entitled to take one calendar week compassionate leave, in the event of the death of a close relative, i.e. parents, spouse, child, or sibling. Such leave shall be at full pay, and shall not count towards your annual leave entitlement.
 - b. A leave application form is not required under such circumstances.”
50. It is not contested that the Claimant was granted compassionate leave on 30th November 2012 to attend his Father’s funeral which was to lapse on 7th December 2012. By text message on 9th December 2012 the Respondent’s Managing Director Mr. Andrew Warral asked the Claimant when he intended to report back to work. A reminder was sent on 10th December 2012. The Claimant responded by text message on 11th December explaining that he had poor email connectivity and would send an email update when internet connection was available. He did respond later the same day (at 11.12 pm) explaining that his Father’s funeral was delayed due to delay of coroner’s report. He stated that he expected the funeral to be held on 17th December 2012. Thereafter the family intended to clear his Father’s house and sell it.
51. After another reminder on 15th December 2012 the Claimant informed the Managing Director Mr. Andrew Ward by his email of even date that he was not sure when he would get back to work due to the fact that the family was still sorting out the paperwork following his Father’s death. That the UK law was complicated and the fact that it was Christmas season slowed down everything. He promised to let Mr. Ward know his date of resumption of duty as soon as he knew the date.
52. On 20th December 2012 the Claimant informed Mr. Ward that he would be reporting back to work on 2nd January 2013 when he presumed the office would be opening after the Christmas break.
53. According to the Respondent’s submissions, the reason for termination of the Claimant’s contract under Clause 14(b) of the contract was that the Claimant had overrun his compassionate leave of seven days by over a month and had made no indication of his intention to return to work.
54. The Respondent acknowledges that the Claimant extended his leave to 2nd January 2013 without further leave being granted to him. It is therefore not true that at the time of writing the letter of termination of employment, the Respondent did not know the Claimant’s date of reporting for duty.



55. At paragraph 39 of the Respondent's submissions, it is admitted that according to the decision in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the Claimant was entitled to a hearing before termination. It is however stated that the Claimant was not available for the hearing as his whereabouts made it impossible to do so.
56. As has been pointed out in the Claimant's submissions, the Claimant continued to work remotely during the period he was away. The correspondence in the Claimant's bundle of documents dated 23rd April 2015 attest to this.
57. It is also on record that the Claimant kept the Respondent aware of what was going on during the period he was away as is evident from emails exchanged between the parties, albeit not regularly, due to internet interruptions, part of which was caused by the Respondent.
58. Apart from asking the Claimant to give an indication of when he intended to report back to work, the Respondent did not notify him that failure to do so would lead to the termination of his employment. It also did not invite the Claimant to show cause why his employment should not be terminated for desertion of duty.
59. Section 41 of the *Employment Act* is couched in mandatory terms that an employer must notify an employee of the grounds for which it intends to terminate his employment and give the employee an opportunity to defend himself before action is taken. If this is not done, the termination is unfair.
60. Again the reason for termination must be valid and must be proved by the Respondent. The reason given by the Respondent was that the Claimant had overrun his compassionate leave and failed to give an indication when he intended to report back.
61. Clause 14(b) of the Claimant's letter of appointment reads:
- “The Company may terminate this agreement and you will become a 'Bad Leaver' immediately upon the occurrence of any of the following events:
- a. ...;
- b. If you, without leave or other lawful cause, absent yourself from your place of work;
62. It is not true that the Claimant was absent without leave or lawful cause as the Respondent was aware that the Claimant had gone to arrange for and attend the burial of his father which was delayed up to 17th December 2012.
63. It was also aware as reported to it by the Claimant that after the funeral which occurred just days before Christmas, the formalities under the United Kingdom law took time to conclude. The Claimant explained that after 17th December 2012 he assumed that because the office was going to close for Christmas in three days, there was no need for him travelling to Kenya then going back to Europe for Christmas. His requests to be informed of the exact date for closing the office for Christmas and opening for the new year were not responded to by the Respondent hence his assumption of the two dates.
64. More fundamentally, there is no evidence that the Claimant was summoned to report back on a particular date and failed to do so.
65. From the foregoing, I find that there was no valid reason for termination of the Claimant's employment. I further find that the Respondent did not comply with the mandatory statutory



procedure for termination of employment under Section 41 of the Act. The termination was therefore unfair under Section 45(2) of the Employment Act.

Remedies

66. The Claimant prayed for notice, unpaid salary, general damages and/or compensation for breach of contract, relocation allowance, reasonable proportion of executive promote, reimbursements for expenses, unlawful deductions or underpaid salaries, costs, interest and certificate of service.
67. The Claimant is entitled to pay in lieu of notice under Section 49(1)(b) of the Act. I award him three (3) months' salary in lieu of notice as provided in his contract being USD 8,400 x 3 = USD 25,200.
68. The Claimant is also entitled to salary up to the date of termination of his employment being 27 days
$$\frac{8,400}{30} \times 27 = \text{USD } 7,560.$$
69. Having found the termination unfair, the Claimant is entitled to compensation. Having considered all the factors set out under Section 49(4) of the Act and especially the reasons and circumstances under which the Claimant left employment, his position in the company and the length of service, in my view compensation equivalent to three months' salary is reasonable. I thus award him the same being USD 25,200.
70. The Claimant's contract provided for a relocation allowance upon termination of employment up to a maximum of USD 10,000. I award him the same.
71. The Claimant prayed for reasonable proportion of executive promote to be proved at the hearing. The same was not proved. The Claimant did not even explain what that prayer entails. The prayer is dismissed for want of proof.
72. The Claimant prayed for unspecified reimbursements of expenses incurred on behalf of the company. The same was not proved and is accordingly dismissed.
73. The Claimant further prayed for unlawful deductions for salary which were also never specified or proved. The same fails and is dismissed for want of proof.
74. The Claimant is entitled to certificate of service in terms of section 51 of the Employment Act which the Respondent is directed to issue to him.
75. Having been successful in the case, the Claimant is awarded costs of the suit.
76. In conclusion, judgment is entered for the Claimant against the Respondent in the total sum of USD 67,960 made up as follows: -
 - i. Pay in lieu of notice USD 25,200
 - ii. Salary for December 2012 USD 7,560
 - iii. Compensation USD 25,200
 - iv. Relocation allowance USD 10,000 Total award USD 67,96
 - v. Certificate of service
 - vi. Costs
 - vii. Interest from date of judgment.



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

MAUREEN ONYANGO

JUDGE

