



**Oseme v Swahili Beach Resort Ltd (Cause 42 of 2019)
[2022] KEELRC 13470 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 42 OF 2019
AK NZEI, J
DECEMBER 8, 2022**

BETWEEN

DAVID OMONDI OSEME CLAIMANT

AND

SWAHILI BEACH RESORT LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent *vide* a statement of claim dated May 30, 2019 and pleaded, inter-alia:-
 - a. that the Claimant was, *vide* a letter of offer of employment dated August 8, 2018, employed by the Respondent as an Assistant Financial Controller with effect from September 1, 2018 at a starting gross monthly salary of Kshs 180,000, which was subsequently reviewed to Kshs 200,000 upon successful completion of probation.
 - b. that the Claimant worked diligently and faithfully until on or about February 20, 2019 when the Respondent unlawfully and unfairly terminated his services without any justifiable reason *vide* an evenly dated termination letter.
 - c. that the Claimant was not informed of the reasons for the termination, was not given an opportunity to make representations and was not issued with a termination notice, and that the termination was substantively and procedurally unfair, and was unlawful.
 - d. that at the time of termination, the Claimant was paid a monthly gross salary of Kshs 180,000, which amount was lower than the Claimant's statutory entitlement, and was contrary to the provisions of Clause 3.1 of the offer of employment letter which entitled him to Kshs 200,000 gross salary upon completion of the probationary period.



- e. that the Claimant duly and satisfactorily completed his probation period on December 31, 2018, and was automatically confirmed in employment by operation of the law as from January 2019 as he continued working for the Respondent.
 - f. that upon the unlawful and unfair termination, the Claimant was only paid Kshs 167,904.70, and the Respondent refused to pay his full terminal dues in accordance with the provisions of the Employment Act.
2. The Claimant set out his claim against the Respondent as follows:-
- a. a declaration that termination of the Claimant's employment was unfair, wrongful and unlawful.
 - b. a declaration that refusal to pay the Claimant his full terminal dues was unfair.
 - c. one month salary in lieu of notice.....Kshs 200,000
 - d. unpaid salary balance for January 2019.....Kshs 20,000
 - e. unpaid 18 days leave balance $18/26 \times 200,000 \times 1$Kshs 138,461.54
 - f. 19 days worked in February 2019.....Kshs 146,153.85
 - g. 12 months salary compensation for unlawful termination and loss of employment ($12 \times 200,000$).....Kshs 2,400,000
 - h. Certificate of Service.
 - i. damages for breach of the Claimant's reasonable expectation.
3. Along with the statement of claim, the Claimant filed his written witness statement (dated May 30, 2019), reiterating the averments contained in his statement of claim and a list of documents listing seven documents. The listed documents included the offer of employment letter dated August 8, 2018, copies of the Claimant's payslips, requisition form dated October 1, 2018, termination letter dated February 20, 2019, a property clearance checklist dated February 20, 2019, a bank payment voucher dated February 20, 2019 and a demand letter dated April 6, 2019.
4. The Respondent entered appearance on October 2, 2019 and filed Response to the Claimant's claim on the same date. The Respondent denied the Claimant's claim and pleaded:-
- a. that the Respondent contracted the Claimant under probationary terms.
 - b. that the Respondent complied with Section 42 of the Employment Act in terminating the Claimant's services and that the termination was procedurally and substantively fair.
 - c. that the Claimant's contract was subject to probation under Section 42(1) of the Employment Act, and could be terminated without application of sections 41, 43 and 45 of the Act with regard to procedural and substantive justification; and that termination could be effected without ascribing reasons.
 - d. that Clause 3.1 of the employment letter dated August 8, 2018 entitled the Claimant to Kshs 180,000 while on probation and Kshs 200,000 upon confirmation and/or successful completion of his probationary period, which sum was subject to statutory deductions.



- e. that the Respondent extended the Claimant's probation period for a further period of two months *vide* its letter dated January 1, 2019, in strict compliance with Section 42(2) of the *Employment Act*; and that the Claimant's services were procedurally terminated.
- f. that the Claimant received his terminal dues as by law required, and was issued with a Certificate of Service.
- g. that the Claimant was paid:-
 - i. Payment in lieu of notice as staff on probation (180,000/30X14) = Kshs 84,000
 - ii. Unpaid leave days (180,000/30X18)= Kshs 108,000
 - iii. 19 days worked in February 2019 (180,000/30X19= 114,000), and that the Claimant was over paid by Kshs 6,000
5. The Respondent further pleaded that the remedies sought by the Claimant were not due as the contract between him and the Respondent was not a commercial relationship but a special relationship that must be insulated from greed associated with the profit making motives inherent in commercial contracts, which the Claimant blatantly exhibits.
6. Documents referred to in, and filed together with the Respondent's Response to the claim included an extension of probation letter dated January 1, 2019, the Claimant's payslip for February 2019, a recommendation letter dated February 1, 2019 and a copy of the Claimant's employee performance appraisal.
7. On November 20, 2019, the Respondent filed a written witness statement of one Edna Ogalo dated October 11, 2019 and a list of documents dated October 29, 2019, listing the aforesaid documents, the Claimant's employment letter dated August 8, 2018 and a Certificate of Settlement dated February 20, 2019.
8. On February 16, 2021, the Respondent filed a supplementary list of documents dated February 15, 2021, listing two copies of cheques drawn in favour of the Claimant, each for Kshs 83,952.35. On May 30, 2022, the Respondent filed a witness statement of one Geoffrey Mukolwe dated May 21, 2022.
9. The trial opened on February 17, 2022 when the Claimant testified and closed his case.
10. The Claimant adopted his witness statement dated May 30, 2019 and produced in evidence the documents referred to in paragraph 3 of this judgment. The claimant further testified:-
 - a. that his employment commenced on September 1, 2018, and that his three months' probationary period ended on December 1, 2019, upon which his gross monthly salary of Kshs 180,000 was to rise to Kshs 200,000.
 - b. that upon completion of the probationary period, termination notice was to be one month.
 - c. that the Claimant's employment was terminated effective February 19, 2019 *vide* a termination letter dated February 20, 2019, given to the Claimant while at work on February 20, 2019; and that no reason for the termination was given.
 - d. that he, the Claimant, was not on probation when his employment was terminated.
11. Cross-examined, the Claimant testified that under his letter of offer of employment, the Respondent could make payment in lieu of notice. That the Claimant was paid his dues as tabulated in the termination letter.



12. The Claimant further testified that the appraisal form exhibited by the Respondent was shown to be dated January 25, 2019, by which time the Claimant had completed his probationary period.
13. The Respondent's witness, Geoffrey Mukolwe (RW-1), testified on May 31, 2022. He adopted his witness statement dated May 21, 2022 as his testimony, and produced in evidence the documents referred to in paragraphs 6,7, and 8 of this judgment. RW-1 further testified that the Claimant was never confirmed as a permanent employee, and that the initial three months' probationary period was extended for a further two months due to performance related issues. That the Claimant was terminated before the end of the extended probationary period; and his calculated dues were paid as evidenced in his payslip for February 2019.
14. Cross-examined, RW-1 testified that the Claimant started working on September 1, 2018, and that his three months' probationary period ended on December 1, 2018 and that no evaluation of the Claimant was done as at December 1, 2019; and that although the Claimant was not issued with a confirmation letter, he continued working for the Respondent.
15. The Respondent's witness (RW-1) further testified that the letter extending the Claimant's probationary period was dated January 1, 2019, and was extending the probationary period as from January 1, 2019, after the lapse of the initial probationary period. The witness told the Court that he had no proof that the Claimant's consent was obtained before the extension, and agreed that the extension letter did not refer to any such consent.
16. The Respondent (RW-1) confirmed that the Claimant's termination letter dated February 20, 2019 gave January 19, 2019 as the Claimant's last working day, and that the letter did not give any reason for the termination.
17. It was RW-1's further evidence that the recommendation (letter) given to the Claimant by the Respondent was dated February 1, 2019 and indicated that the Claimant worked for the Respondent from September 24, 2018 to February 19, 2019, a day before the letter of termination. He however maintained that the Claimant's termination had not been pre-determined. The witness further testified that the Claimant was not issued with any show cause letter and that he was just called and given the termination letter.
18. Parties herein did not agree on the issues for determination. Upon considering the pleadings and evidence adduced by both parties, issues that emerge for determination, in my view, are as follows:-
 - a. whether the Claimant was on probation as at the time of his termination.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
19. On the first issue, it was a common ground that the Claimant's employment commenced on September 1, 2018, and that his employment was subject to three months' probationary period. It was further a common ground that the three months' contractual probationary period lapsed on December 1, 2018, and that although the Claimant was not given a letter of confirmation, he continued working for the Respondent. It was a further common ground that on January 1, 2019, the Respondent, without seeking and obtaining any consent from the Claimant, wrote a letter to the Claimant purporting to extend the already lapsed probationary period by a further two months with effect from January 1, 2019.
20. The Claimant's probationary period of three months had long lapsed as at January 1, 2019 when the Respondent purported to extend the same by two more months. The purported extension was, but



an act in futility. Even where an employer wishes to extend an employee's probationary period upon the lapse thereof, such extension can only be effected with the employee's agreement. That was not the case in the present case. Section 42(2) of the [Employment Act](#) provides:-

“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.”

21. The Claimant referred the Court to the Court's decision in the case of [Lear Shigadi Sinoya v Avtech Systems Limited \[2017\] eKLR](#) where the Court held as follows:-

“where there is need to extend the probationary period, such must be agreed upon with the employee. In [Peris Nyambura Kimani v Dalbit Limited](#), Petition No 63 of 2014, the Court held that once the probation period lapses, and the employer does nothing to confirm the employee, this cannot be shifted to any other date as the period has passed and by operation of the law the employee is confirmed, and should be paid the salary due upon confirmation from the date when probation period ended. The duty is upon the employer to call and advise the employee when the probation period has lapsed. Where an employer allows the same to pass without any action, the employee stands confirmed into full employment with the due benefits.”

22. The Claimant further referred the Court to the Court's decision in [David Namu Kariuki v Commission for the Implementation of the Constitution \[2015\] eKLR](#) (Ndolo, J) where it was held as follows, and I agree:-

“17. The law requires an employer to confirm an employee upon satisfactory completion of probation and if, for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period of time as provided under Section 42(2) of the [Employment Act](#) 2007.

18. once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time (see [Jane Wairimu Macharia v Mugo Waweru and Associates](#) (Cause No 62 of 2012). That said, the Court finds that the Claimant was confirmed in his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the Court.”

23. I find and hold that the Claimant in the present case stood confirmed to his appointment upon expiry of the three months' probationary period that ended on December 1, 2018, and that the contractual monthly salary payable to him upon confirmation became payable to him upon such confirmation. The Claimant was, therefore, not on probation as at February 19, 2019 when his employment was terminated by the Respondent.

24. On the second issue, termination of an employee's employment cannot be said to have been fair unless it is shown that there was both procedural and substantive fairness in such termination. Section 41 of the [Employment Act](#) provides a mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment. The Section provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

25. Substantive fairness, on the other hand, is provided for under Section 45 of the *Employment Act* which provides 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.”

26. Section 43(1) of the *Employment Act* provides:-

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”

27. It was held as follows in the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

28. In the present case, the Respondent did not comply with the mandatory procedural requirements set out in Section 41 of the *Employment Act* 2007, and did not give any reason for terminating the Claimant’s employment. This is evident from the termination letter dated February 20, 2019 which simply states:-

“we refer to your current contract dated August 8, 2018 appointing you as Assistant Financial Controller. The company wishes to terminate this contract with immediate effect as stated in your signed contract that either party may terminate an employment by giving 7 days’ notice. Your last working day shall be February 19, 2019....”



29. The Court of Appeal held as follows in the case of [Kenfright \[EA\] Limited v Benson K Nguti \[2016\] eKLR](#):-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent’s contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

30. It is my finding that termination of the Claimant’s employment by the Respondent was procedurally and substantively unfair; and I so declare.

31. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of nine months’ salary at the rate of Kshs 200,000 per month, being the salary payable to the Claimant upon confirmation. Thus Kshs 200,000X9 = 1,800,000. I have taken into account the circumstances in which the Claimant’s employment was terminated.

32. Having been confirmed to his appointment as already stated in this judgment, the Claimant’s employment was terminable by giving one month notice or payment of one month salary in lieu thereof. This is in accordance with Section 35(1) (c) of the [Employment Act](#) 2007 and Clause 5.1 of the Claimant’s employment contract. I award the Claimant Kshs 200,000 being one month salary in lieu of notice, less Kshs 84,000 shown to have been paid to him in lieu of notice upon termination. I also award the Claimant Kshs 20,000 being unpaid salary balance for the month of January 2019. The Respondent never denied having paid the Claimant Kshs 180,000 as salary for the month of January 2019. Under Clause 3.1 of the Claimant’s contract of employment, the Claimant’s gross salary was to be reviewed upwards from Kshs 180,000 to Kshs 200,000 upon confirmation. The Claimant was confirmed to his position by operation of the law in December 2018. He was entitled to Kshs 200,000 gross salary in January 2019.

33. The claims for unpaid leave days and 19 days worked in February 2019 were shown to have been paid to the Claimant upon termination, and are declined.

34. Finally, and having considered submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent for:-

- a. The equivalent of nine months’ salary being compensation for unfair termination of employment.....Kshs 1,800,000
 - b. Balance of one month salary in lieu of notice (Kshs 200,000 – 84,000)..... Kshs 116,000
 - c. Unpaid salary balance for January 2019.....Kshs 20,000
- Total Kshs 1,936,000

35. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#) 2007.

36. The Respondent shall issue a Certificate of Service to the Claimant within thirty days of this judgment.



37. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER 2022.

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr Aringa for Claimant

Mr Ndambuki Respondent

