



**Kenya Building Construction Timber Furniture Industries Employees  
Union v Aegis Construction Ltd (Employment and Labour Relations Cause  
E704 of 2020) [2024] KEELRC 1206 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1206 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E704 OF 2020  
AN MWAURE, J  
MAY 14, 2024**

**BETWEEN**  
**KENYA BUILDING CONSTRUCTION TIMBER FURNITURE INDUSTRIES  
EMPLOYEES UNION ..... CLAIMANT**  
**AND**  
**AEGIS CONSTRUCTION LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimants filed a Memorandum of Claim dated 1<sup>st</sup> October 2020.

**Claimant’s Case**

2. The Claimants is a duly registered trade union representing unionisable employees whereas the Respondent is a registered company in Kenya engaged in construction business.
3. The Claimant avers that the parties have a Recognition Agreement and Collective Bargaining Agreement (‘CBA’) through the Roads and Civil Engineering Contractors Association, which the Respondent is a member.
4. The Claimant avers that the Grievants are its members and were employees of the Respondent until their dismissal on November 2017.
5. The Claimant avers that the Grievants are:
  - a. Jason Mawira Kiambi – employed by the Respondent as a tipper driver on 15/1/2017, earning a salary of Kshs 25,000;



- b. Elijah Kathurima – employed by the Respondent on June 2016 as an excavator operator, earning a salary of Kshs 30,000;
  - c. Anthony Kimathi- employed by the Respondent on 1/9/2016 as a pick-up driver, earning a salary of Kshs 17,000;
  - d. Johana Mwenda - employed by the Respondent on 29/9/2017 as a tipper driver, earning a salary of Kshs 29,000;
6. The Claimant avers that the Grievants worked diligently for the Respondent and had never been reprimanded or served with any warning letter until their termination which was executed with no clear reason.
  7. The Claimant avers that the Grievant reported the matter to its office whereby its officials accompanied them to the Respondent’s office for settlement of the matter. However, despite several meetings, it became apparent the Respondent lacked a clear reason for the termination.
  8. The Claimant avers that the Respondent agreed to pay the Grievants’ terminal dues but after several unfulfilled promises, it was forced to report the dispute to the Ministry of Labour for conciliation.
  9. The Claimant avers that the Minister duly appointed a conciliator who took up the dispute and invited both parties for conciliation meetings. The Respondent agreed to pay the terminal dues but failed to do so as agreed prompting the conciliator to issue a certificate to enable the Claimant file this cause.

### **Respondent’s Case**

10. In opposition to the Memorandum of Claim, the Respondent filed a Statement of Response dated 26<sup>th</sup> June 2023.
11. The Respondent avers that the 1<sup>st</sup> Grievant, Jason Kiambi, was employed as a driver on 01/02/2017 earning a monthly salary of Kshs 21,000 plus 20% house allowance.
12. The Respondent avers that the 1<sup>st</sup> Grievant was placed on probation for 6 months from the date of employment which was extended for a further 6 months on 14/07/2017.
13. The Respondent avers that the 1<sup>st</sup> Grievant’s services was terminated on 15/11/2017 while serving the second phase of his probationary contract. It denies unlawful dismissal and affirms the termination was in line with section 42 of the *Employment Act*.
14. The Respondent avers that the 2<sup>nd</sup> Grievant, Elijah Kathurima’s termination was fully heard and determined in another court of competent jurisdiction being Meru Chief Magistrate’s ELRC Cause No. 24 of 2019, hence this claim is res judicata.
15. The Respondent avers that the Grievant has since been paid the decretal sum in full and the matter is fully settled.
16. The Respondent avers that the 3<sup>rd</sup> Grievant, Anthony Kimathi, was employed as a driver effective 01/12/2016 earning a monthly salary of Kshs 13,442 plus 20% house allowance.
17. The Respondent avers that the 3<sup>rd</sup> Grievant was initially placed on 6 months’ probation which was extended for a further 6 months on 02/06/2017.
18. The Respondent avers that it exercised its right to terminate during this period by issuing a 7-day termination notice on 15/11/2017.



19. The Respondent avers that the 4<sup>th</sup> Grievant, Johana Mwenda, was employed as a driver on 01/10/2012 earning a monthly salary of Kshs 13,442 plus 20/% house allowance.
20. The 4<sup>th</sup> Grievant was initially served a 6 months' probation period. Within this period, the Respondent issued him with a 7-day termination notice in line with section 42 of the [Employment Act](#).
21. The Respondent avers that no terminal dues were payable to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Grievants since the termination occurred while they were still on probation.

### **Evidence in Court**

22. The Claimants' witness (CW1), Jason Mawira Kiamba adopted the three witness statements sworn by himself, Anthony Kimathi and Johana Mwenda as his evidence in chief as per the letter of authority dated 07/11/2023.
23. CW1 testified that the Grievants were employed by the Respondent in Meru, however, himself and Johana were transferred to Nyeri where they were terminated.
24. CW1 testified that he did not receive a letter of appointment. He was sent to Human Resource, Nairobi where he was asked to go back to Nyeri and when he got back to Nyeri, he was informed his contract was terminated. This was in November 2017 and he was informed there was no more work.
25. CW1 testified that he was a member of the Claimant union in Meru, therefore, they reported the matter in the union's Meru office. He joined the union in March or April 2017, after he was employed and his colleagues were also members.
26. CW1 testified that the case was subsequently reported to the labour office where the employer agreed to pay the Grievants, however, they have never been paid their dues.
27. CW1 testified that he had worked for the Respondent for about 11 months before his termination. He was still on probation when he was terminated.
28. CW1 testified that the union was never paid union dues by the respondent as they were paying themselves.

### **Respondent's case**

29. The Respondent's witness (RW1), Paul Kiiru, stated he works for the Respondent as a Human Resource Officer.
30. RW1 produced his witness statement dated 26/06/2023 and documents PKI-PK9 as his evidence in chief and exhibits.
31. RW1 testified that the Respondent does not have either a Recognition Agreement or CBA with the Claimant union.
32. RW1 testified that the Grievants were employees of the Respondent, however, they never informed the Respondent they were members of the union and the Respondent never remitted any dues to the union on their behalf.
33. During cross-examination, RW1 testified that he was employed by the Respondent in 2022.
34. RW1 testified that there's no CBA between the Respondent and the Claimant union which is needed for the union to file a claim on behalf of the Grievants. Further, the Grievants had not informed the Respondent they were members of the union. They had a duty to inform the employer.



35. RW1 testified that Jason was employed on 01/02/2017 and not 15/01/2017. On 14/07/2017, the Respondent extended Jason's probation period for another 6 months, however, there is no letter or correspondence to the effect that he was given notice of the extension and that he agreed that the probation period be extended.
36. RW1 testified that Jason was terminated on 15/11/2017 when he was at the Meru site. And there are no records of Jason by the Respondent.
37. RW1 testified that Anthony's letter of appointment is unexecuted and there is no evidence to show Anthony consented to the extension of his probation period.
38. RW1 testified that the Respondent's records show that Johana was employed on 01/09/2017.
39. RW1 testified that his predecessor, David went to the Meru labour office and acknowledged there is a letter addressed to David from Charles, the Claimant union's branch secretary in reference to the conciliation.
40. RW1 testified that he is not aware if his predecessor responded to the letter or if he finalised the dispute.
41. RW1 testified that the Grievants are not entitled to any dues as they were still on probation.
42. During re-examination, RW1 testified that the Grievants were called to sign their letters of appointment but they never did so.
43. RW1 testified that the Grievants verbally agreed to the extension of their probation period.

#### **Claimant's Submissions**

44. It is the Claimant's submission that Section 42(2) of the *Employment Act* requires the employer to seek the employee's consent before extending the probation period. The alleged extension of the Grievant's probation period were not in writing as provided under section 42(2).
45. The Claimant submitted that the Respondent's claim that the employees were terminated while serving their probation period failed as he did not to prove the authenticity of the employment contracts.
46. The Claimant submitted that there is no evidence that the Grievants were informed of the reasons of their termination nor were they granted a form of hearing before their termination as required under section 41 of the *Employment Act*.

#### **Respondent's Submissions**

47. The Respondent submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Grievants' did not adduce evidence at the trial, the 1<sup>st</sup> grievant who had authority to testify on their behalf did not produce such authority.
48. The Respondent further submitted that the 1<sup>st</sup> Grievant could not confirm the 3<sup>rd</sup> and 4<sup>th</sup> Grievants' date of employment; whether they had been issued with employment contracts; whether the contracts were for a probationary period; for how long and whether the probationary period could be extended and whether they gave consent to such extension.
49. It is the Respondent's submission that that the Grievants' employment was fairly and legally terminated as they were all on probationary contracts when they were dismissed.
50. The Respondent submitted that it was not aware of the holding in *Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR; where a 3-judge



bench declared Section 42(1) of the Employment Act null and void to the extent that it excluded an employee holding a probationary contract from the provisions of Section 41 of the Employment Act. It therefore chose to apply Section 42(1) of the Employment Act and it would be unjust to condemn the Respondent for applying the law which was later found by this Court to be inconsistent with the Constitution.

### **Analysis and Determination**

51. Having considered the pleadings, affidavits, submissions and evidence on record, the issues for the Court's determination are:
  - a. Whether the Grievants were under probation at the time of their termination
  - b. Whether the Grievants were lawfully and fairly terminated.
  - c. Whether the Grievants are entitled to the reliefs sought.
52. It is not disputed that the 2<sup>nd</sup> Grievant, Elijah Kathurima's case was heard and determined in another court of competent jurisdiction being Meru Chief Magistrate's ELRC Cause No. 24 of 2019, and the decretal sum fully settled. The case was withdrawn by the Claimant union and so his case is marked as settled.
53. The court is aware that two grievants Antony Kimathi Maina and Johana Mwenda authorised Jason Mawira to testify on their behalf as per their letter of authority to testify dated 7<sup>th</sup> November 2023. Jason Mawira actually confirmed in his evidence in court on 7<sup>th</sup> November 2023 that he had authority to testify on behalf of Antony Kimathi and Johana Mwenda and to adopt their witness statements as well as his witness statement as their evidence in chief. So the three grievant are therefore well represented in court and their witness statements are on record.

### **Whether the Grievants were under probation at the time of their termination**

54. It is the Respondent's submission that the Grievants were lawfully and fairly terminated in line with Section 42 of the Employment Act as they were on probation.
55. The Respondent relied on letters of appointment allegedly in reference to the Grievants' employment, however, the same are not executed by the Grievants hence they cannot be authenticated as legally binding. CW1 testified that they were never given the letter of appointment.
56. Further, to this the Respondent averred that the extension of the probation period was allegedly consented by the Grievants verbally. Section 42(2) of the Employment Act provides that 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.
57. The Respondent failed to prove that the extension of the alleged probation period was done upon consultation and agreement of the Grievants and merely stating they agreed to the extension orally is not authentic and obviously cannot be proved.
58. In view of the foregoing, the Respondent has failed to prove that their 1<sup>st</sup> and 3<sup>rd</sup> Grievants were still on probation when their employment was terminated. The court can only take it that their employment had been confirmed since the probationary period had expired.
59. The 4<sup>th</sup> Grievant was however still on probation when he was terminated.



## Whether the Grievants were lawfully and fairly terminated.

60. It is trite law that for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness as well established in the often cited case of Walter Onuro Ogal vs Teachers Service Commission (2013) Cause 955 eKLR.

61. Procedural fairness is provided for under Section 41 of the *Employment Act* which reads:

- “(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.”

62. On the other hand, substantive justification is provided for under Section 43, 45 and 47(5) of the *Employment Act* that states: -

Section 43:

- “(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.”

Section 45(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 employees 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.”

Section 47(5):

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred



shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

63. In view of the foregoing, the Respondent failed to prove that the termination of the 1<sup>st</sup> and 3<sup>rd</sup> Grievants’ employment was just and fair as it did not comply with the above provisions of the Employment Act hence was procedurally and substantively unfair.
64. Further to the above and in respect to the 4<sup>th</sup> Grievant case, even if the court should agree to the Respondent’s justification that it was unaware that Section 42(1) was declared bad law, the Respondent still failed to give the Grievants valid reasons for the termination.
65. In Okumu v Good Man Agencies Limited (Cause 1895 of 2017) [2022] KEELRC 13514 (KLR) (9 December 2022) (Judgment), the Court held:-

“It should be noted that the Employment Act has not ousted the requirement for substantive fairness when it comes to termination of an employee serving under probation. Put another way, the provisions of sections 43 and 45 of the Employment Act remain applicable to employees who are on probation.

On this score, I find useful guidance in the determination by Radido J in the case of Mercy Njoki Karingithi vs Emerald Hotels Resorts & Lodges Ltd [2014] eKLR, where the learned judge held that:

“I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.

The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period.....

It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (respondent) and rights of employee (claimant) and vice versa.

The fundamental rights of employees not to be unfairly terminated and the claimant in this case, as provided for in section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the Employment Act.

However, the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable. The employees’ right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.”

66. Accordingly, the Respondent was bound to give reasons for the termination of the Grievants’ employment, and justify the same even if any of them were still on probation it is not sufficient to say they relied on section 42 of the employment act. The Respondent failed do so, hence, the termination of



the three grievants was unfair within the meaning of sections 41, 43 and 45 and 47 of the Employment Act.

67. Having determined the termination of the Grievants' employment was unfair and unjust, the Claimant union is entitled to reliefs sought.

#### **Reliefs awarded**

68. Jason Mawira

1. One month salary in lieu of notice kshs 25,000/-
2. One month leave equivalent 25,000/-
3. Underpayment is not specifically proved and is declined.
4. Seven days arrears not proved in specifics and so is declined.
5. Two months equivalent of compensation for unlawful termination considering he had worked for the respondent for only a few months as per the guidance in section 49(c) of the employment act 50,000/-
6. Total awarded to Jason Mawira is kshs 100,000 plus interest at court rates from date of judgment till full payment.
7. Costs are also awarded to the grievant.

69. Antony Kimathi

1. One month salary in lieu of notice kshs 17,000/-
  2. One month leave payment 17,000/-
  3. Underpayment is not specifically proved and is declined.
  4. Seven days arrears not proved in specifics and so is declined.
  5. Two months equivalent of compensation for unlawful termination considering he had worked for the respondent for only a few months as per the guidance in section 49(c) of the employment act 34,000/-
  6. Total awarded to Antony Kimathi is kshs 68,000/- plus interest at court rates from date of judgment till full payment.
- Costs are also awarded to the grievant

70. Johana Mwenda

1. One month salary in lieu of notice kshs 29,000/-
2. One month leave 29,000/-
3. Underpayment is not specifically proved and is declined.
4. Seven days arrears not proved in specifics and so is declined.
5. Two months equivalent of compensation for unlawful termination considering he had worked for the respondent for only a few months as per the guidance in section 49(c) of the employment act 58,000/-



6. Total awarded to Johana Mwenda is kshs 116,000/- plus interest at court rates from date of judgment till full payment.

Costs are also awarded to the grievant

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2024.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

