



**Koeth v Majlis Manda Island Resort Limited (Cause E009 of 2025)
[2025] KEELRC 2988 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2988 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E009 OF 2025
M MBARÚ, J
OCTOBER 30, 2025**

BETWEEN

TONY SEWE KOETH CLAIMANT

AND

MAJLIS MANDA ISLAND RESORT LIMITED RESPONDENT

JUDGMENT

1. The claimant is an adult. The Respondent is a limited liability company.
2. The respondent employed the claimant on 15 June 2024 as a general manager at a salary of \$5,500 per month. The respondent agreed to pay a net salary of Ksh. 150,000, while the two property owners of the company were to pay in US dollars to an account designated by the claimant.
3. On 2 November 2024, the claim informed one of the directors, Federico Moccia, that he was experiencing a severe toothache requiring immediate medical attention. Moccia approved his request for medical leave and treatment in Nairobi.
4. On 12 November 2024, the claimant received a termination notice through email, backdated to 8 November 2024. The letter contained several allegations that had not been brought to the claimant's attention. These included alleged misconduct.
5. The claim is that termination of employment was irregular, unfair and in bad faith. At the time, the claimant was earning a salary of Ksh.2, 079,000 and is seeking compensation for breach of his employment contract. His claim is for the following:
 - a. 3 months' salary in notice Ksh.2,079,000;
 - b. Pay for 8 days in November 2024 Ksh.184,800;
 - c. 12 months compensation Ksh.8,316,000;



- d. Certificate of service;
 - e. Costs of the suit.
6. The claimant filed his witness statement and reiterated his claim.
 7. The claimant filed his written submissions that the respondent employed him under a written contract. Parties agreed on the terms and conditions of service. On 2 November 2024, he sought medical leave, and Moccia, one of the directors, allowed him, and he proceeded to Nairobi. However, he was shocked to receive a notice terminating his employment on 12 November 2024, backdated to 8 November 2024.
 8. The claimant submitted that there was no prior notice of any mistake, and that he was not allowed to respond to the alleged mistake stated in the termination of employment notice. Under sections 43 and 45 of the *Employment Act*, the employer is required to give reasons and allow the employee to make their representations before termination, which did not occur. This resulted in an unfair termination of employment, as held in *Judith Mugure Mboroki v Kenya Nut Company Limited* [2015] eKLR and in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR.
 9. The claimant submitted that, under his contract, he was entitled to 3 months' notice of termination, which is due in this case. For the unfair termination of his employment, he is entitled to maximum compensation for 12 months. For the 8 days worked in November 2024, he was not paid his due salary. He also claims the costs of the suit.
 10. In reply, the respondent admitted to the employment relationship and stated that he claimed to have been employed as the general manager on 15 June 2024. His salary comprised \$5,500, of which part was to be paid in Kenyan Shillings (KSh). 150,000, and all was paid in full.
 11. The response is that the claimant's performance during the probationary period was consistently unsatisfactory. He routinely delegated his responsibilities to subordinate staff, failed to exercise due diligence in the daily management of the resort, and failed to monitor operational reports, thereby falling short of the expectations for his office. His conduct necessitated the extension of his probation period under clause 5 of his contract.
 12. On 2 November 2024, the claimant reported experiencing a toothache and was advised to seek medical attention and to consider travelling to Nairobi if Lamu was inadequate. On 3 November 2024, the claimant travelled to Nairobi without seeking formal leave, signing any leave form or documentation. He did not appoint any staff to take over operations. He only informed the chef with whom he had a personal relationship, which was unprofessional.
 13. On 4 November 2024, the management became aware that the claimant was absent from duty and, despite multiple attempts to reach him, he could not be contacted. The claimant, as the general manager, had a duty and responsibility to oversee and manage over 160 employees. His abrupt and uncommunicative absence left the respondent without leadership.
 14. When Moccia eventually contacted the claimant, he admitted that he had failed to inform management about his absence and apologised, hence admitting to misconduct. He stated that he would be back to work in a few days, which was vague. He did not furnish the respondent with any medical records or certificate of illness as required under clause 12 of the employment contract.
 15. The claimant's conduct amounted to abscondment of duty, which is gross misconduct under section 44(4) of the *Employment Act* (the Act). In view of his silence until 8 November 2024, the respondent



decided to terminate his employment and issued a notice on 12 November 2024, effective from 8 November 2024. The claim acknowledged receipt of the notice via email on 26 November 2024.

16. The termination of employment was fair and justified under the law. The abscondment of duty amounted to gross misconduct subject to summary dismissal. The claimant held a high role and responsibility, which he abandoned without notice, leaving the respondent's operations without leadership.
17. The claims made are without merit and should be dismissed with costs.
18. The respondent filed the witness statement of Stefano Moccia, who reiterates the response.
19. The respondents submitted that the claimant was under probation at the time of his summary dismissal. Due to unsatisfactory work performance, the respondent had considered extending the probation period, as he had failed to demonstrate leadership at the resort. In *Patrick Korir Rotich v Unilever Kenya Limited*, the court held that an employer may extend a probationary period in accordance with due process of law. The employer can also terminate employment during the probation period upon following the procedures under section 41 of the Act, as held in *John Muthomi Mathiu v Mastermind Tobacco (K) Ltd [2018] eKLR*.
20. In this case, the claimant failed to inform anyone of his absence from work, and despite all efforts to contact him, from 2 to 8 November 2024, his whereabouts remained unknown. He did not apply for leave or inform any of the respondent's senior officers. This was irregular and unprocedural, and as a senior officer, he abdicated his duties.
21. The claims sought are not justified, as the summary dismissal was lawful and justified, as held in *Coastal Bottlers Ltd v Kimathi Mithika*, Civil Appeal No. 21 of 2017.

Determination

22. From the pleadings and written submissions, the issues for determination are whether there was an unlawful and unfair termination of employment. Whether the remedies sought by the claimant are justified.
23. The respondent has heavily relied on the fact that, at the time the claimant's employment was terminated by summary dismissal, he was on probation. They had contemplated extending the probation period, but he absented himself from work, which constituted gross misconduct and led to summary dismissal.
24. Employers should treat the probationary terms of an employment contract with great caution. Section 42 of the Act, which allows for probation, has since been addressed by a three-judge bench in *Monica Munira Kibuchi & 6 others v Mount Kenya University & another [2017] KEELRC 1745 (KLR)* and held that an employee on probation is entitled to due process under section 41 of the Act and to treat the employee otherwise is unconstitutional. The Court declared Section 42(1) of the Act null and void to the extent that it excluded an employee holding a probationary contract from the provisions of Section 41 of the Act:

Further, in addition to the inconsistencies among Sections 42(1), 42(2) and 41 considered earlier in this Judgment, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*. To this extent therefore we find and hold that Section 42(1) in so far as it excludes an employee holding a probationary contract from the



provisions of Section 41 of the Employment Act, is inconsistent with Articles 41 and 47 of the Constitution hence null and void.

This will suffice.

25. Absence from work without permission is defined under section 44(4)(a) of the Act as gross misconduct subject to summary dismissal. Such absence alone is however subject to the mandatory provisions of section 41(2) of the Act where the employee should be issued with notice and allowed to attend in the presence of a fellow employee of his choice to make his representations before employment is terminated as held in *Kenya Union of Sugar Plantation and Allied Workers v Butali Sugar Mills Limited* (Cause 41 of 2021) [2022] KEELRC. The Court of Appeal reiterates this position in the case of *Otana v Equity Bank Limited* [2025] KECA 1324 (KLR). An employee who is absent from work must be summoned and given a hearing. If such fails, notice terminating his employment must be issued.
26. However, absence from employment due to illness, sickness or need to seek medical attention by the employee is treated differently and separately under sections 30 and 34 of the Act.
27. An employee who is ill, sick or in need of medical attention is allowed to be absent from his employment. The employee is permitted to issue notice to the employer through a third party. The law is generous to the extent that the employee is allowed to resume duty after treatment on condition that he produces a Medical Certificate from a recognised medical facility.
28. In the case of *Ahmed Aden Hire v Natif Jama & County Government of Garissa* [2016] KEELRC 20 (KLR), the court held that an employee who is sick, unwell or requires attending and seeking medical attention has the right secured under sections 30 and 34 of the Act. Where the employee is absent from work due to sickness and has sought medical assistance, he must inform the employer of his circumstances within a reasonable time. In this regard, the law allows the employee to use a third party to communicate his circumstances to the employer. This allows an otherwise seriously sick employee to inform the employer of their inability to work due to illness, as held in *Dorothy Ndung'u v Machakos University* [2016] eKLR.
29. The court, while addressing a similar issue as herein in the case of *Stephen Kariuki and another versus Michael Njoroge and Sandstone Logistic Limited/Cylinder Works Limited*, Cause No.888 of 2010, held that;

... where an employee is sick and away from work, Upon resumption of duty, an employee who has been sick must submit a medical certificate from an authorised medical practitioner. The essence of section 30 and 34 of the Act is essentially to give an explanation for absence from work by providing the requisite documents as otherwise, absence from work without a just cause is a subject for summary dismissal under section 44(4) of the Employment Act, 2007.
30. In this case, I do not doubt that the claimant became ill and required medical attention starting from 2 November 2024. However, the duty in law is placed upon him, as the one alleging illness and thus absence from work, to obtain a medical certificate from a medical practitioner and present it to the employer. Otherwise, absence from work without due cause is a matter subject to summary dismissal under section 44(4) of the Act.
31. The claimant pleaded that he had a toothache. He sought treatment in Nairobi. While at it, he received notice of termination of his employment on 12 November 2024. To confirm his need for medical attention, he has not mitigated his circumstances by attaching a Medical Certificate from a recognised



medical practitioner. Where such a record was not submitted to the respondent due to the notice terminating employment, he has not submitted it to the court to assist in analysing his claims of alleged unfair termination of employment.

32. The court found the claimant frustrated his employment through his conduct.
33. He cannot claim unlawful or unfair termination of employment.
34. Due to his employment being frustrated, no notice pay is due.
35. The claim is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30TH DAY OF OCTOBER 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

