

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO E 151 OF 2023

CAROL ACHIENG
MUGA.....CLAIMANT

VERSUS

CCI KENYA
LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The dispute between the parties was triggered by the Respondent’s decision not to confirm the Claimant’s contract of service after her probationary term came to a close. Whilst the Claimant contends that the decision was unlawful, the Respondent avers that it (the decision) was legitimate.

Claimant’s Case

2. The Claimant avers that the Respondent hired her services as a Human Capital Shared Services Manager with effect from 10th January 2022. She contends that the contract between the parties had an initial probationary term of three months.
3. The Claimant avers that although the probation period ought to have come to an end in April 2022, the Respondent extended it for a further three months from 14th April 2022. It

is her case that she was supposed to be confirmed in service once the extended probation came to a close.

4. The Claimant contends that she served the Respondent diligently and with dedication during the probationary term. As such, she contends that she had legitimate expectation that her contract would be confirmed.
5. The Claimant avers that on 18th July 2022, her last day on probation, she received an email from the Respondent inviting her for a probation review meeting at 2 PM on the same day. She contends that the invite did not give her sufficient notice for the proposed review session.
6. The Claimant avers that she nevertheless availed herself for the session which lasted about two minutes. She contends that all that the Respondent did during the meeting was to issue her with a letter informing her that she was no longer going to work for it.
7. The Claimant avers that the Respondent's Chief People Officer informed her that the termination of her contract was with immediate effect. She contends that the Respondent asked her to immediately hand over and vacate its premises.
8. The Claimant avers that the Respondent did not give her an opportunity to discuss her performance before she was relieved of her employment. As such, she contends that the decision to terminate her services contravened provisions of *the Employment Act*.
9. The Claimant avers that the Respondent did not give her the reasons for its decision. As such, she contends that it (the

Respondent) breached her legitimate expectation that she was going to remain in its employment beyond the probation period. In the premises, she seeks the various reliefs which she has set out in the Statement of Claim.

Respondent's Case

10. The Respondent does not admit the claim. Whilst acknowledging that the parties had an employment relationship, it maintains that the same was legitimately terminated following the Claimant's failure to live up to its expectations.
11. The Respondent avers that the Claimant was initially hired on a three months probationary contract but did not live up to its expectations. As a consequence, it avers that her probationary term was extended by a further three months.
12. The Respondent contends that it informed the Claimant about her poor performance both after the lapse of the first probationary term and the second probationary term. It avers that it held the first probationary review meeting with the Claimant on 22nd March 2022 when she was notified of the areas she had not performed well. It avers that as a result of this, her probation was extended from April 2022 to July 2022.
13. The Respondent avers that despite extending the Claimant's probation period, she still did not improve in her performance. It contends that she still exhibited challenges in respect of: late submission of leave reports; inaccuracies in and failure to prepare the payroll on time; failure to

update sick leave balances; wrong coding of employees leading to wrongful salary deductions; absenteeism; and improper delegation of payroll responsibilities.

14. The Respondent avers that it pointed out to the Claimant the above weaknesses but there was no improvement. Consequently, it contends that it summoned her to the last review meeting on 8th July 2022 during which, a decision was made to terminate her services.
15. The Respondent avers that it was within its right not to confirm the Claimant's employment having regard to her poor performance. As such, it contends that the Claimant cannot claim that she had legitimate expectation that her contract would be confirmed.
16. The Respondent avers that it paid the Claimant her terminal dues including: notice pay for seven days; salary for the days worked in July 2022; and accrued leave days. As such, it contends that it acted within the law whilst closing the employment relationship between them.

Issues of Determination

17. After analyzing the pleadings, evidence and submissions by the parties, the following issues present for resolution:-
 - a) Whether the Claimant's contract of service was improperly terminated.
 - b) Whether the Claimant is entitled to the reliefs which she seeks through this suit.

Analysis

18. The *Employment Act* defines the term “probationary contract” to mean a contract of employment which is of not more than twelve months duration, is in writing and expressly states that it is for a probationary period. Going by this definition, it is apparent that a probationary contract is for a limited duration. It only graduates into a full term contract of service if it is confirmed.
19. The essence of a probationary term in a contract of service is to provide the employer the opportunity to assess the employee’s suitability for the position he has been recruited into before the contract can be confirmed. Speaking to this reality, George Ogembo in his publication titled “*Employment Law Guide for Employers*”, 2nd Edition (page 63) states as follows:-
- “Probation can loosely be defined as ‘testing the employee’s work performance’ on the parameters of performance, commitment and general suitability for the role taken up. A probationary contract is a conditional employment contract in that the employee’s continuation with the contract of employment is conditional on his ability to perform the work in accordance with the expectations of the employer.”*
20. Because of the nature of a probationary engagement, an employee on this kind of contract has no guarantee of employment until after his/her contract has been confirmed. As such, he/she cannot reasonably invoke the notion of legitimate expectation to contend that he/she reasonably

expected that the employer will retain him/her in his/her positions beyond the probationary period. Whether the employee is suitable to continue in service is a matter which is left to the employer to determine.

21. The question which an employer must grapple with is whether an employee on probation enjoys security of tenure as does an employee whose terms of engagement have been confirmed. Is such employee's position protected in the sense that he can only lose his employment for valid reasons and in accordance with fair procedure?
22. Section 42 of *the Employment Act*, which deals with probationary contracts of service, provides as follows:-
 - a) *The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*
 - b) *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.*
 - c) *No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*
 - d) *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.*

23. Section 41 of the Act provides as follows:-

a) 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.

b) 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.

24. Essentially, section 41 of the Act affords an employee certain protections in respect of his/her contract of service. An employer cannot legitimately terminate an employee's employment except for valid reasons and in accordance with due process.

25. However, section 42(1) of the Act states that section 41 thereof does not apply to probationary contracts. In effect, section 42(1) of the Act supposedly abrogates the

protections granted under section 41 with regard to employees who are serving under probation.

26. In light of the foregoing, the position that was hitherto adopted by most employers was that employees on probation were neither entitled to be furnished with reasons for non-confirmation of their contracts nor to a hearing before their contracts could be legitimately terminated. It was considered that all that an employer required to do in order to validly terminate a probationary contract was to issue the affected employee with a seven days' notice to terminate the contract or to pay him salary for seven days in lieu of the notice to terminate his contract.
27. However, this position was perceived as unjust and discriminatory. And hence the filing of the case of ***Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR*** to challenge the constitutionality of section 42(1) of *the Employment Act* which excludes employees serving on probationary terms from enjoying the protection that is accorded by section 41 of the Act.
28. In a unanimous three Judge bench decision, the learned Judges in the aforesaid case declared that section 42(1) of *the Employment Act* was inconsistent with articles 41 and 47 of *the Constitution* in so far as it purported to exclude employees on probationary contracts from enjoying the protection granted to other employees under section 41 of

the Act. As such, the court declared the provision as null and void.

29. The effect of the pronouncement by the court in the aforesaid decision was to affirm the fact that employees on probationary contracts are entitled to protection from arbitrary deprivation of their employment in more or less the same way as employees whose contracts of service have been confirmed. As such, before an employer can terminate the services of an employee on probation, he (the employer) must demonstrate that he has valid grounds to justify the decision and must process the employee's release in accordance with fair procedure.
30. Commenting on the subject, George Ogembo in the publication on employment law alluded to earlier (*Employment Law Guide for Employers*) (see page 67) states as follows:-

“Any party may terminate the probationary contract by giving not less than seven days’ notice or seven days’ wages in lieu of notice. The provision allows parties relative flexibility to exit from an employment relationship at the initial stages in cases of extreme incompatibility or employees’ inability to perform to the required standards. The relevant question is whether an employer is compelled to hear and consider any representation of the employee before termination of the probationary contract. The court has proceeded to declare and hold that section 41(2) of the Employment

Act in so far as it excludes an employee holding [a] probationary contract from the procedural safeguards contained in section 41 of the Employment Act is null and void. This in effect implies that an employer is under an obligation to present the employee with formal charges or hear him in his defense. In light of the foregoing, should it be determined prior to the expiry of the probation period that the employee is not satisfactorily rendering his service, the employer may terminate the probation contract only after according an employee a fair hearing.”

31. It should be appreciated that the enactment of *the Employment Act* predates the promulgation of *the Constitution of Kenya 2010*. As such, provisions in the Act which appear to be inconsistent with provisions of *the Constitution 2010* must fall by the wayside if they cannot be read with the necessary modification to align them to *the Constitution*.
32. It is in this context that section 42(1) of the Act which appears to limit the right to be heard for employees serving on probation ought to be considered. As was observed by the court in the case of ***Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)*** (supra), the provision is inconsistent with article 47 of *the Constitution* which protects, inter alia, the right to fair administrative hearing and the right to be accorded sufficient time to prepare for one’s case.

33. With regard to the standard of proof, the law only requires that the employer demonstrates on a balance of probabilities that he had valid reasons to justify his decision. As such, it is sufficient if he is able to demonstrate that he had reasonable grounds to entertain a genuine belief that the grounds to support the impugned decision existed at the time it was made.
34. In the instant case, the Respondent contends that it terminated the Claimant's employment on 8th July 2022 after it subjected her to a performance review process on the same day and found her performance unsatisfactory. It contends that the Claimant was invited to the performance review meeting of 8th July 2022 through a calendar invite which the Claimant contends was shared with her on the evening of 7th July 2022.
35. The Respondent avers that the Claimant's performance was wanting and that she had been notified of this fact through various email correspondence. As a matter of fact, it contends that the Claimant was issued with an email dated 13th April 2022 which detailed areas which she needed to address before her probation was extended by three months. It contends that despite this, the Claimant did not register satisfactory improvement resulting in the decision not to confirm her employment.
36. Conversely, the Claimant avers that her performance was satisfactory. She alleges that the Respondent did not give her a Job Description to guide her on what was expected of

her. She further contends that the Claimant did not inform her that the meetings she was summoned to on 22nd March 2022 and 8th July 2022 were meant to review her performance.

37. In addition, it is the Claimant's case that the Respondent did not accord her sufficient time to prepare for the meeting of 8th July 2022 during which the decision to terminate her services was made. Further, she contends that the Respondent did not give her a chance to express herself on the matter at hand during the session of 8th July 2022.
38. As was pointed out earlier in the decision, an employee who is serving on probation is entitled to due process before his contract can be legitimately brought to a close. This requirement flows from section 41 of *the Employment Act* and section 4 of *the Fair Administrative Action Act* read together with articles 41 and 47 of *the Constitution*.
39. Section 4 of *the Fair Administrative Action Act*, which breathes life into the right to fair administrative action under article 47 of *the Constitution*, obligates a person who is making a decision which is likely to affect another to, inter alia, provide the person who is likely to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action. On the other hand, section 41 of *the Employment Act* contemplates hearing of an employee before a decision to terminate his contract is made.

40. From the evidence on record, the Respondent informed the Claimant of the meeting of 8th July 2022 through a calendar invite that was sent out on the evening of the previous day. This left the Claimant with less than twelve hours to prepare for the session. In the court's view, this did not afford her sufficient time to prepare for the meeting.
41. In arriving at this position, the court has considered comparative case law on the matter. For instance, in the case of ***Mbugua v New Muthokinju Hardware Ltd [2025] KEELRC 748 (KLR)*** where the issue in contention was the validity of the employer's decision to terminate the employee's probationary contract, the court held that the one day notice to the employee to invite her to a performance review meeting at which the decision to terminate her contract was rendered was inadequate.
42. The court also notes that the Respondent did not tender in evidence the calendar invite it sent to the Claimant on 7th July 2022 to enable it (the court) discern its (the calendar invite) content. This is despite the Claimant having issued a notice to the Respondent to produce and show the court the invite. As such, it remains unclear whether the invite set out the issues which the Claimant was to be confronted with at the meeting of 8th July 2022 to enable her prepare her responses, if at all.
43. Further, there is no evidence to confirm that the Respondent granted the Claimant the opportunity to account for her performance during the session of 8th July 2022. No minutes

for the session were tendered in evidence to speak to this matter.

44. According to the Claimant, all that the Respondent's management did on the material date was to inform her that her contract would not be confirmed and to hand her the letter of termination. The Respondent's witness did not tender cogent evidence to controvert the Claimant's contention in this respect.
45. Having regard to the totality of the material before the court, it is apparent that although the Respondent may have had legitimate grounds to consider not confirming the Claimant's contract, it did not observe due process in closing the contract. Evidently, the Claimant was not granted adequate time to prepare for the penultimate meeting of 8th July 2022 at which the decision to terminate her contract was made. Similarly, there is no cogent evidence to demonstrate that she was granted an opportunity to give an account of her perceived poor performance before she was handed the letter of termination of her contract. Consequently and for this reason, the court faults the Respondent's decision to terminate the contract between the parties.
46. The Respondent has relied on the case of ***Theuri v Integrated Payment Services Limited [2024] KEELRC 1506 (KLR)*** to contend that the three Judge bench decision in ***Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General***

(Interested Party) (supra) is bad law. However, I am persuaded that the holding in the case of **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)** (supra) expresses the correct legal position on the subject at hand. Indeed, the Court of Appeal has recently expressed a similar view in the case of **Red Lands Roses Ltd v Mugo [2025] KECA 96 (KLR)**. As such, I opt to rely on the **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)** (supra) case to arrive at my decision in the suit.

47. The next issue for determination relates to whether the Claimant is entitled to the reliefs which she seeks in the suit. According to the Statement of Claim, the Claimant prays for, inter alia: a declaration that her contract was unfairly terminated; compensation for unfair termination of her contract; general damages for unfair labour practice; costs of the suit; and interest.
48. The court has already established that the Respondent did not adhere to fair procedure in processing the Claimant's release from employment. As such, it declares that her contract of service was unfairly terminated.
49. The Claimant seeks compensation for unfair termination of her contract which is equivalent to her salary for twelve months. However, it is not lost to the court that she was still under probation when her services were terminated. Whilst she is entitled to compensation for unfair termination of her

contract, the fact that the contract was terminated during its probationary term militates against a high award as proposed by her. Alluding to this reality, George Ogembo in his aforesaid treatise titled *Employment Law Guide for Employers* (page 69) expressed himself on the subject as follows:-

“An employee may seek damages for unfair termination of [a] probationary contract but the range and quantum of remedies are meagre. As a precursor to regular employment, probation contemplates a situation in which an employee would have served a limited period of time in employment. In the circumstances, he is unlikely to benefit from the full remedies for unfair termination....”

50. Having regard to the foregoing, which I am entirely in agreement with, I award the Claimant compensation for the unfair termination of her probationary contract which is equivalent to her salary for one month, that is to say, Ksh. 210,000.00.
51. The award is subject to the applicable statutory deductions.
52. I award the Claimant interest on the aforesaid amount at court rates from the date of this decision.
53. I award the Claimant costs of the case.
54. Any other relief which was sought but which has not been expressly granted is deemed to have been declined.

Summary of the Findings and attendant award

55. After evaluating the evidence on record, the submissions by the parties and the applicable law, the court makes the following findings and attendant orders:-
- a) The court finds that the Respondent irregularly terminated the Claimant's probationary contract of service.
 - b) The court awards the Claimant compensation for unfair termination of her contract in the sum of Ksh. 210,000.00.
 - c) The award is subject to the applicable statutory deductions.
 - d) The court awards the Claimant interest on the aforesaid sum at court rates from the date of this decision.
 - e) The court awards the Claimant costs of the suit.
 - f) Any other relief which was sought but which has not been expressly granted is deemed to have been declined.

**Dated, signed and delivered on the 30th day of October,
2025**

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI