

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

ELRC CAUSE NO E1042 OF 2023

ERIC MUIRURI
WAKARIMA.....CLAIMANT

VERSUS

GOLDEN JUBILEE LIMITED T/A MERCURE AND PULLMAN
HOTEL
UPPERHILL.....RESPONDE
NT

JUDGMENT

Background

1. The dispute between the parties stems from the Respondent's decision to terminate the Claimant's contract of service during the probationary term of the contract. The Claimant contends that the decision was unlawful. Conversely, the Respondent posits that the decision was taken after the Claimant failed to meet its performance expectations.
2. The Claimant avers that the Respondent hired his services as a Food and Beverage Manager with effect from 26th September 2022. He contends that their contract had an initial probationary term of six (6) months.
3. The Claimant avers that he worked diligently until 16th January 2023 when the Respondent irregularly terminated his services. He contends that prior to this decision, the

Respondent had invited him to a performance review meeting which was held on 21st November 2022.

4. The Claimant avers that the Respondent informed him that the reason the contract was terminated was that his probation had been unsuccessful. However, he asserts that the Respondent had not set the performance levels which were expected of him.
5. The Claimant contends that the Respondent's decision to terminate his services was driven by malice and was discriminatory. He contends that unlike other employees, the Respondent did not evaluate his performance or put him on a performance improvement plan (PIP) prior to taking the impugned decision. As such, he avers that his contract was unfairly terminated. Consequently, he prays for the various reliefs which are set out in the Statement of Claim.
6. The Respondent admits that the parties had an employment relationship. It affirms that the Claimant was appointed to the position of Food and Beverage Manager vide the letter of appointment dated 3rd August 2022.
7. The Respondent contends that the letter contained the terms and conditions of engagement for the parties. It further states that the letter stipulated the key responsibilities for the position which the Claimant was hired to.
8. The Respondent avers that although the letter was issued on 3rd August 2022, the date for commencement of the employment relation between the parties was 26th

September 2022. It further avers that the contract had an initial probationary term of six (6) months.

9. The Respondent avers that during the term of the contract, it was noted that the Claimant's performance was unsatisfactory. For instance, it contends that he: would fail to notify the management about his inability to report to work whenever he fell sick; did not develop an effective plan for operations in his department resulting in activities in the department falling behind schedule; and did not implement projects which were assigned to him.
10. The Respondent asserts that as a result of the foregoing, it invited the Claimant to a performance review meeting on 21st November 2022. It avers that the meeting provided the Claimant an opportunity to answer to the poor performance accusations against him.
11. The Respondent avers that during the meeting, its General Manager highlighted the areas where the Claimant had weakness and advised him on how to improve. It further avers that the Claimant was given the opportunity and support to improve after the session.
12. The Respondent avers that it warned the Claimant of the consequences of failure to register improvement in his output. It contends that despite this, the Claimant's performance did not improve.
13. The Respondent avers that it issued the Claimant yet another letter dated 13th December 2022 reminding him of the need to register improvement in his performance but to

no avail. Consequently, it contends that a decision was taken to terminate his services with effect from 16th January 2023.

14. The Respondent denies that it discriminated against the Claimant. It posits that he has not provided particulars of the alleged discrimination.
15. The Respondent asserts that the decision to terminate the Claimant's services was arrived at in accordance with the law. As such, it contends that the suit is without merit and should be dismissed.

Issues for Determination

16. After analyzing the pleadings, evidence and submissions by the parties, the following issues present for determination:-
 - a) Whether the contract of service between the parties was legitimately terminated.
 - b) Whether the Claimant is entitled to the reliefs which he seeks in this action.

Analysis and Determination

17. There is no dispute that the disputants had an employment relationship. According to the evidence on record, the relation commenced on 26th September 2022. It is further apparent that the relation was subject to a probationary term which was yet to expire at the time the contract of service was terminated.
18. The law on probationary contracts is encapsulated in sections 41 and 42 of *the Employment Act*. Section 42 of the Act entitles an employer to engage an employee on a probationary contract as long as the cumulative period for such engagement does not exceed twelve (12) months.

19. The purpose of this arrangement is to provide the employer with an opportunity to gauge whether the employee's skill set meets his (the employer's) requirements. If it does not, the employer has the liberty to end the employment relationship.
20. Section 41 of *the Employment Act* grants employees a measure of security of tenure for their contracts of service. An employer is not entitled to terminate the services of an employee without justification and in disregard of the tenets of fair procedure.
21. However, the section expressly excludes employees serving on probationary contracts from the protection it provides. In effect and if the provision is anything to go by, a contract of service for an employee who is serving on probation may be terminated without the employer stating the reason for the decision as long as the employee is issued with a notice of seven (7) days to terminate the contract or is paid an amount that is equivalent to his salary for seven (7) days in lieu of notice.
22. The legitimacy of this exclusion was challenged in the case of ***Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] KEELRC 2310 (KLR)***. The learned Judges of the court held that it was unconstitutional to deprive employees on probation of the protection that is offered under section 41 of *the Employment Act*.
23. The Court of Appeal affirmed this position in the case of ***Red Lands Roses Ltd v Mugo (Civil Appeal 68 of 2016)***

[2025] KECA 96 (KLR) (24 January 2025) (Judgment).

Commenting on the matter, the learned Judges of the court observed as follows:-

“After hearing the matter, the ELRC, by a judgment dated 30th July 2021 held that, to the extent that section 42(1) of the Act excludes an employee on probation from the provisions of section 41 of the Act, it was inconsistent with Articles 41 and 47 of the Constitution and therefore null and void.

To the best of our knowledge, that decision of the ELRC has not been challenged in this Court or reversed. It is also not the subject of appeal in the appeal before us. In short, the decision of the ELRC in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another (supra) represents the law, taking into account the jurisdiction and mandate conferred upon ELRC by Article 162(2) (a) of the Constitution and section 12 (1) of the Employment & Labour Relations Court Act.”

24. From the foregoing, it is apparent that despite the proclamation in section 42(1) of *the Employment Act* purporting to deprive employees serving on probation of the protection provided under section 41 of the Act, these category of employees enjoy this protection. As such, the aforesaid limitation is superfluous.
25. The foregoing being the case, it needs no gainsaying that the Claimant in the instant suit was entitled to the protections granted by section 41 of *the Employment Act*.

What the court has to determine is whether the Respondent abided by those protections.

26. From the evidence that was presented to court, there is no doubt that the reason why the Respondent terminated the Claimant's services was the latter's alleged inability to discharge his duties satisfactorily. It is the Respondent's case that the Claimant's performance was wanting prompting the decision not to confirm his contract of service.
27. Section 41 of *the Employment Act* recognized poor performance as one of the grounds upon which an employer may terminate an employee's contract of service. However and as is the case with other grounds, the employer must process the decision to terminate a contract of service on account of poor performance in accordance with the dictates of fair procedure.
28. Poor performance implies performance that is below a set standard. It presupposes that the employer and the employee: have agreed on measurable and achievable targets; have designed an objective mechanism for evaluating attainment of the targets; and that the employee has been assessed and found to have failed to meet the targets.
29. If the employee's performance is considered to be wanting, the employer is expected to give him an opportunity to improve before any adverse action can be meted on him. This should be done under the supervision of and with the assistance of the employer. And hence the concept of PIP.

30. Where the poor performance persists despite such interventions, the employer is entitled to commence the process of discharge of the employee from his employment. This should be by the employer convening a performance hearing meeting at which the employee is accorded a chance to account for his inability to discharge his responsibilities to the expected standard. It is only if the employee fails to give a satisfactory account for his poor performance during this session that the employer may be entitled to terminate the contract of service between them.
31. The above procedure is not entirely codified. Most of it has developed through case law.
32. Speaking to the matter in the case of **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR**, the Court of Appeal observed as follows:-

“.....The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

33. In **Dayo v Ecart Services Kenya Limited [2025] KEELRC 139 (KLR)**, Ndolo J, quoting with approval the case of **Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR**, observed thus:-

"....an employer alleging poor performance by an employee must demonstrate the existence of an objective performance evaluation system as a benchmark for assessing the performance and providing support for improvement."

34. In **Mutua v Vert Limited [2025] KEELRC 694 (KLR)**, the trial Judge, quoting with approval the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010)**, observed as follows:-

"The proper procedure once poor performance of an employee is noted is to point out the shortcomings to

the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

35. In the instant case, it is evident that the Respondent issued the Claimant with a letter of appointment dated 3rd August 2022. Whilst the letter speaks to the Claimant’s broad responsibilities, it does not set his key performance indicators (KPIs).
36. The KPIs for an employee (which comprise his agreed performance goals) are set for every performance measurement cycle based on the employee’s responsibilities. It is against these targets (goals) that the employee’s performance is evaluated (see chapter nine of George Ogembo’s *‘Employment Law Guide for Employers’*, 2nd Edn).
37. Whilst there is evidence that the Respondent spelt out the Claimant’s general responsibilities in his letter of appointment, there is no evidence that the parties distilled the KPIs for the Claimant from the broad responsibilities. As such, it is incorrect for the Respondent to assert that the Claimant was aware of his performance targets against which his performance was to be evaluated.
38. Indeed, the fact that the Respondent did not develop specific performance targets for the Claimant was conceded by the defense witness during cross examination when she stated as follows:-

“I know we were to set clear targets against which the Claimant was to be assessed. This was not done.”

39. I have looked at the performance management procedure in the Manual which the Respondent tendered in evidence. Whilst it speaks to some aspects of performance management, it does not address questions of target setting and evaluation. As such, it is apparent that the Respondent did not have a verifiable performance evaluation matrix in place. Absent this, the court has no basis for declaring that the performance review which the Claimant was subjected to was based on an objective and verifiable matrix.
40. The court acknowledges that the Respondent subjected the Claimant to a performance review meeting on 21st November 2022 during which it was concluded that his output was below par. However, there is no record to suggest that the Claimant was placed on a PIP after the aforesaid meeting under the guidance of the Respondent.
41. What is discernible from the minutes of the session is that the Respondent's management asked the Claimant to come up with a plan for his department to ensure that he delivered. Whilst the management made reference to the fact that they were there to support the Claimant, the kind of support which they offered him is not apparent. As a matter of fact, they did not tender evidence of the actual support that was extended to the Claimant to assist him to improve after the meeting of 21st November 2022.
42. After the session of 21st November 2022, the Respondent was required to subject the Claimant to further reviews to determine whether he had improved. Based on the results of subsequent reviews, the Respondent was to either process

the Claimant's release from employment or extend his probationary contract or confirm his contract of service.

43. There is evidence that the Respondent was still unhappy with the Claimant's performance after 21st November 2022. This is evident from its letter to him dated 13th December 2022.
44. Having reached this conclusion, the Respondent ought to have convened a subsequent formal performance hearing session for the Claimant in terms of section 41 of *the Employment Act*. The Respondent is not entitled to rely on the performance hearing of 21st November 2022 to contend that it satisfied the requirements of the aforesaid section of the law because the session of 21st November 2022 was spent when the Respondent communicated the decision to give the Claimant an opportunity to improve after the session. When it was established that the Claimant had still not improved after the aforesaid process, it was expected that he will be subjected to a fresh hearing session which was to seal his fate.
45. As the record shows, instead of the Respondent proceeding as suggested above, it issued the Claimant with the letter dated 16th January 2023 terminating his services. The letter was not backed by a fresh performance hearing session after the session of 21st November 2022 which had been spent. This, it appears to me, was contrary to the procedure that was developed in the case of ***Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR***, and adopted by the Court of Appeal in the case of ***National Bank of Kenya v***

Samuel Nguru Mutonya (supra). For this reason, I declare the decision to terminate the Claimant's contract as procedurally unfair.

46. The Claimant contends that the Respondent subjected him to discriminatory treatment. Discrimination entails differential treatment on account of negative attributes such as one's race, ethnicity, political affiliation, gender, sex among others.
47. Although the Claimant pleaded discrimination, he did not provide clear particulars of the accusation. Indeed, he admitted as much during cross examination. The only averment he made in the pleadings was that the Respondent did not subject him to performance evaluation like other employees. However, he did not provide particulars of the alleged differential treatment. Absent this, it was not possible for the defense to effectively respond to the accusation.
48. In their final submissions to court, the Claimant's lawyers assert that the Claimant was discriminated because he was not evaluated or placed on a PIP like other employees. Yet, the Claimant did not tender material to enable the court to determine whether the Respondent evaluated other employees whose performance was wanting differentially.
49. Having regard to the foregoing, the court arrives at the conclusion that the Claimant did not present cogent preliminary material to establish a *prima facie* case for discrimination. Consequently, the claim for discrimination fails.

50. The Claimant has claimed a number of reliefs. However, the court notes that his services were terminated during the probationary term of his contract, a factor which limits the reliefs which the court can grant him (see ***Muga v CCI Kenya Limited [2025] KEELRC 2980 (KLR)***).
51. Having regard to the foregoing, the court grants him compensation for the unfair termination of his contract of service which is equivalent to his salary for one month, that is to say Ksh. 330,000.00.
52. The aforesaid amount is subject to the applicable statutory deductions.
53. The Claimant is awarded interest on the amount at court rates from the date of this decision.
54. The court awards the Claimant costs of the suit.

Summary of the Determination

- a) The court finds that the Respondent irregularly terminated the Claimant's contract of service.
- b) The court awards the Claimant compensation for the unfair termination of his contract in the sum of Ksh. 330,000.00.
- c) The amount awarded is subject to the applicable statutory deductions at the time of termination of the contract.
- d) The Claimant is awarded interest on the amount at court rates from the date of this decision.
- e) The court awards the Claimant costs of the suit.

Dated, signed and delivered on the 15th day of December, 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