



**Kariuki v Software Group Ke Limited (Cause E308 of 2024)
[2026] KEELRC 1146 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEELRC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E308 OF 2024
BOM MANANI, J
APRIL 30, 2026**

BETWEEN

GIDRAPH F KARIUKI CLAIMANT

AND

SOFTWARE GROUP KE LIMITED RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted this action to challenge the Respondent’s decision to terminate his contract of service. He contends that the Respondent engaged him as a Business Development Manager – East Africa through its letters of offer and appointment dated 3rd December 2021 and 5th January 2022 respectively. He contends that the contract provided for a probationary term of six months.
2. The Claimant contends that despite satisfactorily serving the probationary term, the Respondent did not formally confirm his contract at the end of the aforesaid term. He contends that in law, the contract was deemed as confirmed once the probationary period came to an end.
3. The Claimant asserts that he continued to discharge his duties diligently after the contract of service was confirmed by operation of law. However, he contends that the Respondent made attempts to frustrate execution of his mandate. For instance, he alleges that it (the Respondent) issued a travel freeze on foreign travels, a matter he contends undermined his ability to prospect for clients out of the country.
4. The Claimant asserts that the Respondent eventually terminated his services unlawfully through its letter dated 6th December 2022. He contends that the reason it (the Respondent) gave for its decision was his alleged poor performance.



5. The Claimant contests the validity of the aforesaid justification. He contends that contrary to the assertion in the letter of termination, his performance was satisfactory and that this had been confirmed by the results of a performance review which was conducted on 20th July 2022.
6. The Claimant further asserts that the Respondent issued him with a seven days' notice to terminate his contract purporting that the contract was still under probation when this was not the case. He contends that at the time the employment relationship between the parties was terminated, his contract had already been confirmed by operation of law and he was entitled to the full protection of the law which regulates termination of employment contracts.
7. The Claimant thus contends that termination of his services was unfair because: the decision was not supported with a valid reason; the Respondent's contention that he was guilty of poor performance was an afterthought; the Respondent did not adhere to the procedure for closure of a contract of service; the Respondent did not give him adequate notice for termination of the contract; and the Respondent did not grant him an opportunity to be heard before the decision was rendered.
8. The Claimant contends that at the time of the impugned decision, the Respondent was undergoing a financial downturn. As such, he contends that it (the Respondent) ought to have declared a redundancy instead of terminating his services on unfounded allegations of poor performance.
9. The Claimant further contends that prior to the alleged improper termination of his services, the Respondent had not remitted part of his salary. He contends that despite termination of the employment relationship, the Respondent did not pay him his exit dues including the salary arrears.
10. The Claimant avers that as a consequence of the foregoing, he was unable to meet his financial obligations as and when they fell due. He for instance contends that he was not able to continue servicing his mortgage and financing his family's medical insurance cover.
11. The Claimant contends that the Respondent ensnared him into accepting employment with it despite knowing that it had financial challenges. He describes the Respondent's conduct as inconsiderate and unfair and contends that he has suffered emotionally as a result. As such, he prays for the various reliefs set out in the Memorandum of Claim.
12. On its part, the Respondent admits that the parties had an employment relationship. It contends that the Claimant was engaged on probationary terms for six months in the first instance but this period was extended by another six months after it became apparent that his performance in the first six months had not been satisfactory.
13. The Respondent contends that its policy on employee performance sets a minimum overall score of 3.0 for satisfactory performance. Yet, it avers that the Claimant only managed to score 2.70 which was below expectation.
14. The Respondent avers that despite extending the Claimant's probation by six months, his performance did not improve. As a result, it contends that it did not confirm his contract.
15. Contrary to the position expressed by the Claimant, the Respondent asserts that the employment relationship between them was not confirmed after the lapse of the initial probationary period. It contends that the Claimant was issued with a formal letter dated 1st July 2022 which extended the probation period to December 2022.



Issues of Determination

16. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
 - a. Whether the Claimant's contract was confirmed after the lapse of the initial six months' probationary period or whether the probation was extended.
 - b. Whether the contract between the parties was lawfully terminated.
 - c. Whether the Claimant is entitled to the reliefs which he seeks in the cause.

Analysis

17. It is apparent from the evidence on record that the parties take diametrically different positions on the first issue. Whilst the Respondent contends that the Claimant's probation was extended up to December 2022, the Claimant asserts that his contract was confirmed by operation of law after the probation period lapsed on 5th July 2022.
18. First, it is important to point out that section 42 (1) of the *Employment Act* limits the period of probation under a contract of service to one year to be served in at least two phases of six months each. Having regard to this, it is apparent that the Respondent was entitled, with the concurrence of the Claimant, to extend the latter's probationary term as long as the period did not exceed one year.
19. The Respondent's case is that it extended the probationary period by a further six months from 5th July 2022. It contends that it notified the Claimant of this decision through its letter dated 1st July 2022. It further avers that the reason for the decision was the Claimant's unsatisfactory performance.
20. In contrast, the Claimant asserts that the probation period was not extended. He contends that the only reason why the term would have been extended was poor performance. However, he asserts that his performance was satisfactory implying that the contract had to be confirmed on 5th July 2022.
21. The Claimant contends that despite his expectation that the Respondent would confirm the contract on 5th July 2022, the latter did not do so. However, he contends that it (the Respondent) allowed him to continue working beyond this date implying that the contract was confirmed by operation of law.
22. The Claimant denies that he was issued with a letter to extend the probation period. He contends that the first time he saw the letter dated 1st July 2022 by which the Respondent purportedly extended the probation was when the letter was presented to court in these proceedings.
23. Despite the Claimant's contention that his contract was confirmed by operation of law on 5th July 2022 and that he was unaware of the purported extension of his probationary term, the evidence on record suggests the contrary. The court has in mind the Claimant's own email dated 7th December 2022 to one of the Respondent's officers through which he sought to be advised on why his probation had been brought to a close before its due date.
24. This inquiry by the Claimant was in December 2022 long after the initial probation period had come to a close in July 2022. The fact that he was still discussing his probation in December 2022 implies that he was aware that the probation had been extended beyond July 2022. It is in this context that the court does not believe his assertion that he was unaware of the Respondent's letter dated 1st July 2022 by which the probation period was extended.



25. As indicated earlier in the judgment, extension of the probation period requires the concurrence of the employee. This concurrence may be express or implied.
26. In the instant case, there is no evidence that the Claimant expressly acceded to extension of his probationary term. However, it is apparent that he impliedly consented to the extension when he agreed to continue serving under the renewed probationary term.
27. Having regard to the foregoing, the court arrives at the conclusion that the Claimant's contract was not confirmed by operation of law at the close of the initial probation period on 5th July 2022. On the contrary, the probationary term was extended with his implied concurrence by another six months up to December 2022.
28. The next question for consideration is whether the contract between the parties was lawfully terminated. The law on probationary contracts in Kenya is set out in sections 2, 41 and 42 of the [Employment Act](#). Section 2 of the Act requires probationary contracts to be in writing. Section 42 of the Act sets out the term and manner of termination of a probationary contract. On the other hand, sections 42(1) and 41(1) of the Act exclude these contracts from the protection provided under section 41 thereof.
29. Although sections 41(1) and 42(1) of the [Employment Act](#) seek to exclude probationary contracts from the protections enjoyed by employees whose contracts have been confirmed, this attempt was declared unconstitutional by the court (see *Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another* [2021] eKLR & *Red Lands Roses Ltd v Mugo* (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment)). As a result, employees on probationary contracts enjoy similar security of tenure of their employment as employees whose contracts have been confirmed.
30. The aforesaid reality applies to the Claimant. As such, the Respondent was duty bound to terminate his services in accordance with the provisions of, inter alia, the [Employment Act](#).
31. Section 41 of the [Employment Act](#) obligates an employer who wishes to terminate a contract of service to notify the affected employee of the reasons why he proposes to terminate the contract. Further, the employee is entitled to be heard on the allegations against him before a decision to terminate his services is rendered. He is also entitled to be accompanied by a fellow employee or shop floor representative of his choice during the process.
32. The above requirements apply a cross board irrespective of the reason for termination of a contract of service. This includes termination of the contract on account of poor performance.
33. Case law sets out the requirements which must be satisfied before an employer can terminate an employee's contract of service on the ground of poor performance. First, there must be evidence that the parties had set practical performance targets for a defined period. Second, the employer must have put in place mechanisms to determine whether the targets have been satisfactorily attained. Third, the employee's performance must have been evaluated to ascertain whether he has met the set targets. Fourth, if the employee did not attain the targets, there must be evidence that he was put on a performance improvement plan but still did not show improvement. Finally, there must be evidence that the employee was subjected to a performance hearing in accordance with the procedure set out under section 41 of the [Employment Act](#) (see *Mukala v Ol Tukai Lodge Ltd* [2013] KEIC 634 (KLR) & *Dayo v Ecart Services Kenya Limited* [2025] KEELRC 139 (KLR)).
34. In the instant case, whilst the Respondent alleges that the Claimant's performance was poor, it has not provided evidence to demonstrate that it (the Respondent) subjected him to a performance hearing as required by section 41 of the [Employment Act](#). There is no evidence that it (the Respondent) formally



- notified the Claimant that it intended to release him from service by not confirming his contract on account of poor performance before he was relieved of his duties. There is no evidence that it (the Respondent) convened a session during which the Claimant was given a chance to account for his alleged poor performance in the presence of a colleague or shop floor representative of his choice before he was issued with the letter which terminated his services.
35. The totality of the evidence on record demonstrates that the Respondent did not comply with the applicable procedural strictures whilst terminating the Claimant's services. It is so declared.
36. The next issue for determination is whether the Claimant is entitled to the reliefs which he seeks through this action. From the Memorandum of Claim, the reliefs which the Claimant seeks are listed as follows:-
- a. A declaration that termination of his contract was unfair and unlawful.
 - b. One month's salary in lieu of notice to terminate his contract.
 - c. Compensation for unfair termination of his contract which is equivalent to his salary for twelve months.
 - d. General damages for unfair labour practices.
 - e. Interest on the foretasted.
 - f. Costs of the case.
37. In the preceding sections of this decision, the court has held that the decision to terminate the Claimant's services was procedurally flawed. Accordingly, it is hereby declared that the Respondent unlawfully terminated the Claimant's services.
38. The Claimant prays for pay in lieu of one month's notice to terminate his contract. However, the court has found that his contract was terminated within the probationary period which entitled him to a termination notice of seven days.
39. In the Respondent's letter to the Claimant dated 6th December 2022, the Respondent gave him seven days' notice. As such, the court finds that the notice which was granted to the Claimant accords with the law. Accordingly, the claim for one month's salary in lieu of notice fails.
40. The Claimant has claimed for compensation for unfair termination of his contract. In quantifying the amount to grant under this head of reliefs, the law obligates the court to consider various factors including the period of service by the employee (see section 49 of the *Employment Act*).
41. The court notes that the contract between the parties was terminated within the probationary term which was hardly one year after the employment relation had commenced. Having regard to this, the court awards the Claimant compensation for unfair termination of his contract which is equivalent to his salary for one month, that is to say, Ksh. 1,022,670.00.
42. The Claimant has prayed for general damages for unfair labour practices. However, the court declines this relief in order to avoid duplication of awards since the Claimant has already been awarded compensation for unfair termination of his contract.
43. The Claimant is granted the prayer for interest on the amount granted at court rates from the date of this decision.
44. The Claimant is awarded costs of the case.



45. The award is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.

Summary of the Findings and Award

46. After evaluating the pleadings, evidence and submissions on record, the court makes the following findings and consequential orders:-
- a. The court finds that the Claimant's probationary term was lawfully extended to December 2022.
 - b. The court finds that the Respondent unfairly terminated the Claimant's contract of service.
 - c. The court declines the Claimant's plea for salary in lieu of notice to terminate his contract.
 - d. The court awards the Claimant Ksh. 1,022,670.00 as compensation for unfair termination of his contract.
 - e. The court declines the Claimant's plea for general damages for unfair labour practices.
 - f. The court awards the Claimant interest on the sum awarded at court rates from the date of this decision.
 - g. The court awards the Claimant costs of the case.
 - h. The award is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF APRIL, 2026

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.

