



g) Costs of the Suit.

2. The Respondent filed a Memorandum of Response dated 11<sup>th</sup> October, 2023, in response to the Claimant's claim.
3. Conversely, the Claimant filed a Reply to the Respondent's Memorandum of Response dated 20<sup>th</sup> November, 2023, responding to the Respondent's Memorandum of Response.
4. The Claimant's case was heard on 7<sup>th</sup> May, 2025, when the Claimant (CW1) testified in support of his case. He adopted his witness statement dated 18<sup>th</sup> September, 2023, and produced his list and bundle of documents of even date, as exhibits in the matter, and which were admitted as Claimant's exhibits Nos. 1-9.
5. The Claimant also called a second witness (CW2) named John Kabura, who testified in support of his case.
6. Although the Respondent filed a witness statement sworn by one Antony Wagacha, it opted not to call a witness and sought instead to rely on its response to the claim.
7. Submissions were received from both parties and have been duly considered.

### **The Claimant's case**

8. The Claimant's case is that he was employed by the Respondent as a Software Engineer, Frontend Web Applications, from April 2022, earning a gross monthly salary of Kshs. 90,000.

9. He contends that after an initial three month probation, he was issued a one-year contract starting 9th July 2022, which also included a three month probationary period, and that upon completion of this probation and a performance evaluation by his supervisor, his performance was rated as satisfactory and excellent, leading to his continued service under the contract.
10. The Claimant states that he consistently performed his duties diligently and received commendations from his supervisor, with no prior complaints about his performance, which led to his confirmation after probation.
11. He avers that on 17th December 2022 at 10:00 p.m., which time was outside his working hours, he received an email terminating his employment on alleged poor performance, which claim he contends was unsupported by any evidence.
12. The Claimant maintains that the termination was unfair, malicious, and did not meet legal standards. He further alleges that the Respondent subjected him to unfair labour practices, including discrimination and denial of equal protection.
13. The Claimant further asserts that the Respondent lacked any clear performance evaluation policy, had never raised concerns about his performance, and did not place him on a performance improvement plan prior to termination.

14. The Claimant asserts that even if the termination had been based on poor performance as alleged, he was still entitled to procedural fairness and the substantive justification for the termination, which he was not granted. He further avers that the termination was carried out with malice and in an unfair manner.
15. The Claimant contends that the termination was procedurally and substantively unfair because the Respondent never communicated any allegations of poor performance prior to dismissal, it failed to issue notice or accord him a hearing, and relied on reasons that were unjust and not genuine. He further states that he was not placed on a performance improvement plan, nor given training or timelines to address any alleged shortcomings.
16. The Claimant further avers that the termination caused him significant hardship, as he has dependants, and resulted in financial distress, mental anguish, and irreparable loss, for which he holds the Respondent fully liable.
17. The Claimant contends that the Respondent's actions were unconstitutional and violated his right to fair labour practices under Article 41 of the Constitution, including protection from unfair and exploitative treatment. He contends further that his termination lacked transparency, reasonable notice, and a fair hearing, thereby breaching both Article 41 and his right to fair administrative action under Article 47.

18. He further avers that the termination infringed on his dignity and socio-economic rights by depriving him of his livelihood, and violated his right to a fair hearing by denying him a capability hearing and an opportunity to appeal.

19. Additionally, the Claimant asserts that the Respondent breached Sections 41, 43, and 45 of the Employment Act by failing to provide a valid reason for termination and for failure to follow due process.

20. It is his position that the Respondent's actions contravened the Constitution, statutory law, and applicable labour practices, entitling him to remedies for the losses suffered.

21. The Claimant told the court that he received Kshs. 60,000 of his salary through Mpesa and Kshs. 50,000/- through his Bank account.

22. He avers that the probation period was 3 months and that he did not receive notice of extension of probation.

23. CW2, who testified that he was the Claimant's supervisor and that he never appraised the Claimant. He confirmed that the Claimant held the position for three months.

24. The Claimant's prayer is that the Court grant him the relief sought.

### **The Respondent's Case**

25. The Respondent states that it employed the Claimant as a Software Engineer, Frontend Web Applications, from 9th July

2022, and not April 2022 as he alleges. The Respondent further maintains that the Claimant's salary was Kshs. 50,000 per month, which was subject to statutory deductions, as provided under the employment contract, and denies his assertion that his salary was Kshs. 90,000.

26. The Respondent states that the employment was governed by a contract dated 1st August 2022, but which was effective 9th July 2022, and avers that the Claimant remained on probation at all material times, pending confirmation.

27. The Respondent denies the Claimant's assertions regarding satisfactory performance and maintains that the decision not to confirm his employment was due to poor performance, particularly in back end work.

28. It avers that performance concerns arose around November 2022 during testing of an in-house application, after which the Claimant was invited to several meetings to explain challenges and was offered support to improve his performance, but despite this, his performance remained unsatisfactory, leading to the issuance of several warnings, including a final warning on 4th December 2022, before the decision not to confirm his employment.

29. The Respondent contends that the termination was lawful and fair, being in line with the Employment Act on probationary employees and the employment contract. It

further denies allegations of discrimination and lack of performance management measures, reiterating that due process was followed and the decision was justified.

30. The Respondent asserts that the Claimant's performance, particularly in back-end work, was properly evaluated and found to be poor. It maintains that the Claimant was informed of the appraisal results and the need to improve, invited to meetings to explain any challenges affecting his performance, and offered assistance to enhance his output.

31. Further, the Respondent states that the Claimant was given prior warnings, including notice that failure to improve would result in non-confirmation of his employment.

32. The Respondent prays that the Claimant's claim be dismissed with costs.

### **Analysis and Determination**

33. I have considered the pleadings, the Claimant's testimony, and the rival submissions. The following issues arise for determination: -

- i. Whether the Claimant was on probation at the time of termination.
- ii. Whether the termination of his employment was substantively and procedurally fair.
- iii. Whether the Claimant is entitled to the remedies sought.

**Whether the Claimant was on probation at the time of termination.**

34.The Respondent contends that the Claimant remained on probation throughout his employment, while the Claimant asserts that he had successfully completed probation and was confirmed to the position.

35.Section 42(2) of the Employment Act provides that a probationary contract shall not exceed six months, but is extendable once to a maximum of twelve months with the consent of the employee.

36.The court record shows that the Claimant was initially engaged by the Respondent as a consultant vide a contract for consultancy services dated 21<sup>st</sup> March, 2022, and the contract was valid for two months.

37.My reading of the said contract clearly shows that this initial agreement was not a contract of service, but was instead a contract for services, meaning that the Claimant herein was initially engaged as an independent contractor and not an employee of the Respondent.

38.The record further shows that the Respondent later engaged the Claimant vide an employment contract made on 1<sup>st</sup> August, 2022, and which indicates its commencement date as 9<sup>th</sup> July, 2022.

39. This latter contract of employment thus gives credence to the Respondent's assertion that it did not employ the Claimant earlier than July, 2022.

40. Clause 2.2 of the employment contract issued to the Claimant provides that the Claimant will serve for a probationary period of three (3) months, during which time his performance will be closely monitored and evaluated.

41. The evidence therefore shows that the Claimant's probation period was, by simple arithmetic, to end on 9th October, 2022. The Claimant's employment having been terminated on 17<sup>th</sup> December, 2022, places him at approximately 5 months' service.

42. On his part, the Claimant alleges successful completion of probation and that he was subsequently confirmed. The Respondent produced no evidence of formal extension of probation or documentation showing continued probationary status. In ***Danish Jalang'o & Another v Amicabre Travel Services Ltd [2014] KEELRC 254 (KLR)***, the Court held that an employer must prove the existence and terms of probation, and that ambiguity is resolved in favour of the employee.

43. Further, in ***Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Co. Ltd [2012] KEELRC 4 (KLR)***, the Court held that failure to communicate the extension of probation results in automatic confirmation by conduct.

44. In light of the foregoing, I am persuaded that the Claimant was not on probation as at the time of termination of his contract.

**Whether the termination of his employment was substantively and procedurally fair**

45. A termination of employment is considered fair and lawful where the employer adheres to the mandatory requirements of Sections 41, 43, and 45 of the Employment Act, 2007.

46. Section 43 of the Employment Act demands that the employer prove valid and fair reasons for the termination of the employee's contract of service.

47. The Respondent's position is that it terminated the Claimant's services on account of poor performance. Poor performance is no doubt a ground for termination or even dismissal, but only if both substantive justification and procedural fairness are proven.

48. The Respondent did not produce any documentary evidence to show that the Claimant's work was ever appraised or evaluated so as to arrive at a conclusion of poor performance. In ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR***, the Court emphasized that allegations of poor performance must be supported by demonstrable evaluation and measurable criteria.

49. Further, no written warnings were tendered in evidence in respect of the poor performance despite allegations that

several warnings were issued. Similarly, the Respondent did not set out the specific area where the Claimant's performance fell short.

50. Poor performance cannot, in my view, be vague, it must be tied to clear targets and evaluation tools. **(See *Njoroge v Cold Solutions Kiambu Sez Limited* [2023] KEELRC 2686 (KLR)).**

51. The Respondent's position is further weakened by its decision not to call any witnesses to substantiate its assertions.

52. In the premise, I conclude that the Respondent failed to discharge its burden under Section 43, and I hold the termination of the Claimant's employment substantively unfair and unlawful.

53. On procedural fairness, Section 41 of the Employment Act requires that an employee be notified of the allegations against him in the presence of a fellow employee or union representative, and allowed an opportunity to make representation.

54. The evidence before the court shows that the Claimant was notified of the termination of his employment through an email at 10:00 p.m. Nothing shows that a disciplinary hearing was conducted, and the Respondent did not at all allege having mounted one. There was also no show cause

notice issued, nor was there a formal termination process prior to the nightly termination email.

55. In ***Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR***, the Court expounded on the provisions of Section 41 thus:-

***“To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.***

***27. The notice also ought to inform the employee that disciplinary action, which might lead to termination of employment, is under consideration. In other words, the notice should be set out in clear terms”.***

56. Further, in ***Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR***, the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

57. In light of the foregoing, I hold that the Respondent failed to demonstrate compliance with Section 41 of the Employment Act, which renders the termination procedurally unfair.

58. On constitutional violations, the Claimant alleged discrimination and violation of his Constitutional rights. He, however, did not present evidence of differential treatment or provide a comparator or factual basis for discrimination. In ***GMV v Bank of Africa Kenya Ltd [2013] eKLR***, the Court held that allegations of discrimination must be specifically proved.

59. In the end, I hold that the Claims of discrimination and constitutional violations are not proven.

**Whether the Claimant is entitled to the remedies sought.**

**Compensation**

60. Having found the termination of the Claimant's employment both procedurally and substantively unfair, entitles him to compensation pursuant to Sections 49 and 50 of the Employment Act, 2007.

61. Considering that the Claimant was only in the service of the Respondent for five (5) months, and further considering the lack of due process in the termination of his contract, I deem an award of three (3) months' salary sufficient compensation for the unfair termination of his employment and is hereby awarded.

**Salary in lieu of notice**

62. Under Section 35 of the Employment Act, 2007, the Claimant is entitled to 1 month's salary in lieu of notice. The claim is thus merited and is allowed as prayed.

### **General Damages for Constitutional Violations**

63. There was no proof of constitutional violations. The claim, therefore, fails.

### **Salary Basis**

64. On the applicable salary, there is a dispute on how much the Claimant's salary was. The Claimant contends that his salary was Kshs. 90,000, while the Respondent contends that the Claimant's salary was Kshs. 50,000/- as is shown in his contract of employment.

65. The Claimant told the court that he received dual payment, one by Mpesa, and the second through his Bank account, which was not rebutted by evidence from the Respondent.

66. The Claimant has further produced in evidence his bank statements and Mpesa messages indicating that he indeed received dual payment from the Respondent, and which, in my view, is proof that the Respondent did not make the full payment through the bank as it alleges.

67. In the circumstances, the Court adopts Kshs. 90,000 as the applicable gross salary.

68. In whole, the Claimant's Claim succeeds, and orders granted as follows:-

- i. A declaration that the termination of the Claimant's employment is unfair and unlawful.
- ii. That the Respondent shall pay the Claimant three (3) months salary as compensation for the unfair termination at Kshs. 270,000/-
- iii. That the Respondent shall pay the Claimant one month's salary in lieu of notice at Kshs. 90,000/-
- iv. The Respondent will bear the costs and interest on ii & iii from the date of this judgment until payment in full.

69. Judgment of the Court.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2026.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Ogada present for the Claimant  
Ms. Ogonyo present for the Respondent  
Ms. Esther S- C/A