



REPUBLIC OF KENYA



**Mtana v Avic International Real Estates (K) Limited & another (Cause E205 of 2023) [2025] KEELRC 562 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 562 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E205 OF 2023  
CN BAARI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**MTANA MWAHUNGA MTANA ..... CLAIMANT**

**AND**

**AVIC INTERNATIONAL REAL ESTATES (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PAN PACIFIC SERVICES SUITE HOTEL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant's Memorandum of Claim is dated 8<sup>th</sup> March, 2023 and filed in court on 15<sup>th</sup> March, 2023. Under the claim, the Claimant seeks the following reliefs: -
  - a. A declaration that his termination from employment was unfair and unlawful;
  - b. Notice pay;
  - c. Pay for accrued leave days
  - d. 12 month's pay for compensation for unlawful termination of employment;
  - e. Costs of this suit;
  - f. Interest on all the above;
  - g. A Certificate of Service;
2. The Respondents entered appearance on 6<sup>th</sup> April, 2023, and subsequently on 26<sup>th</sup> April, 2023, lodged a memorandum of Response.
3. The matter proceeded for hearing on 3<sup>rd</sup> April, 2024, with the Claimant testifying in support of his case. The Claimant's second witness and the Respondent's witness were later heard on 3<sup>rd</sup> October, 2024, after which both parties closed their respective cases, paving way to filing of submissions.



4. Submissions were received from both parties.

### **The Claimant's Case**

5. The Claimant's case is that by an offer letter dated 14<sup>th</sup> July, 2022, the 1<sup>st</sup> Respondent offered him employment as a Human Resource Manager on a salary of Kenya Shillings Three Hundred and Sixty Five Thousand (Kes. 365,000.00) only.
6. The Claimant avers that the offer letter that he was issued with was from the 1<sup>st</sup> Respondent, but was assigned a role under the 2<sup>nd</sup> Respondent. He states further that it was an express term of the aforesaid offer letter that the Claimant's position was "Pan Pacific Serviced Suites Hotel-Nairobi-Human Capital & Development Manager".
7. It is his case that the offer letter stipulated that he was required to complete the resignation procedures with his former employer and to thereafter, report to his new assignment on 1<sup>st</sup> August, 2022.
8. The Claimant contends that he dutifully reported to duty on 1<sup>st</sup> August, 2022 as was stipulated in the aforesaid offer letter, and proceeded to diligently and effectively carry out the duties assigned to him. He further states that his direct supervisor was the 2<sup>nd</sup> Respondent's General Manager, Mr. Paolo Marro, whom he diligently and cordially worked with.
9. The Claimant states that there were no disputes and/or disciplinary issues attributed to his work output or work ethics during his tenure with the Respondents.
10. It is his case that to his utter shock and dismay, on 21<sup>st</sup> October, 2022, he received a letter similarly dated, stating that his probationary period lapsed on 14<sup>th</sup> October, 2022 and that his employment with the Respondents had been terminated.
11. He states further that it was surprising for him to receive the email and termination letter from the 1<sup>st</sup> Respondent's Integrated Management Department (from Mr. Yimenghan Liu because).
12. It is his case that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Respondents conducted any performance appraisal or assessment prior to issuing the termination letter.
13. The Claimant therefore contends that the termination letter dated 21<sup>st</sup> October, 2022 did not give a valid reason for termination, but merely stated that an assessment of his work had been done, and that his employment would not be confirmed.
14. That being aggrieved by all the above, he sought advice from his Advocates, advise which he believes to be true, that the decision and manner in which he was terminated was in contravention of the Respondent's obligation to terminate on account of a valid reason and to carry out the said termination procedurally as prescribed under the Employment laws in Kenya.
15. On cross-exam, the Claimant confirmed that he was paid for the notice period to 31<sup>st</sup> October, 2022. He further confirmed that it is not mandatory for an employer to confirm employees on probation.
16. The Claimant further confirmed on cross-exam that he had since secured another employment.
17. It is his prayer that his claim be allowed.



## **The Respondents' Case**

18. It is the 1<sup>st</sup> Respondent's case that on or about 14<sup>th</sup> July 2022, the 1<sup>st</sup> Respondent issued a Letter of Offer to the Claimant engaging his services as an employee of the Company. It states that Claimant accepted their offer by an email dated 15<sup>th</sup> July 2023.
19. It is the 1<sup>st</sup> Respondent's position that it seconded the Claimant to the 2<sup>nd</sup> Respondent, Pan Pacific Serviced Suites Hotel- Nairobi, as a Human Capital & Development Manager.
20. It is their case that under the Agreement, the Claimant was to be paid a consolidated salary of Kenya Shillings Three Hundred and Sixty-Five Thousand only (Kshs.365,000.00) subject to statutory deductions towards NSSF, PAYE, NHIF etc. as applicable.
21. The Respondents aver that the same Agreement also stipulated that the Claimant's employment would be for an initial fixed term probationary period of three (3) months with an option for extension for a further period of three months at the instance of the 1<sup>st</sup> Respondent before confirmation. It is their further case that during the probationary period, either party was at liberty to terminate the employment contract by giving seven (7) days' notice to the other or payment in lieu of such notice.
22. They state that the Claimant's assignment/secondment at the 2<sup>nd</sup> Respondent commenced on 1<sup>st</sup> August 2022. That accordingly, the probationary period stipulated under his contract ran from 1<sup>st</sup> August 2022 to 31<sup>st</sup> October 2022.
23. They state that during the probation period, the 1<sup>st</sup> Respondent elected to terminate the Claimant's employment, and not to confirm him to the position he held. It avers that vide an email dated 21<sup>st</sup> October 2022, the Claimant was informed that the Company would not be confirming his employment and that he would be paid salary until 31<sup>st</sup> October 2022.
24. The Respondents state that the Claimant's instant claim was ill advised as the Respondents abided by the terms of the Claimant's probationary contract when terminating his services. It is their further assertion that the Claimant's claim for unfair and unlawful termination is without basis as his employment was terminated strictly in accordance with the terms of his probationary contract.
25. On cross-examination, RW1 confirmed that the Respondents are one company and that they were aware that the Claimant was working elsewhere, when he quit to take up the position with them.
26. RW1 further confirmed that there were enrolment procedures when the Claimant was employed. He further told court that he had no evidence of the assessment said to have been conducted prior to the termination and further that they do not have official communication on the assessment.
27. It is the witness' further testimony that the Claimant was trained, but that he had no evidence of the training. He further confirmed that the Respondents did not consider extending the probation.
28. It is RW1's evidence that the Claimant was not taken through any procedure prior to termination.
29. It is the Respondents' prayer that the entire claim be dismissed with costs.

## **The Claimant's Submissions**

30. On the Respondents' objection to the jurisdiction of the Court, the Claimant submits that Section 45(3) of the *Employment Act*, 2007 ceased to be law by virtue of the declaration made by Justice Lenaola, as he then was, in the case of Samuel G. Momanyi V Attorney General & another [2012] eKLR, where he declared Section 45(3) of the *Employment Act* 2007 inconsistent with the provisions



of *the Constitution* of Kenya, 2010 particularly Articles 28, 41(1), 47, 48 and 50(1) as the said Section purports to deny employees the rights and freedoms enshrined in the said Articles of *the Constitution*.

31. To buttress the foregoing assertion, the Claimant placed reliance in the case of *Evans Kiage Onchwari V Hotel Ambassadeur Nairobi* [2016] eKLR for the holding that: -

“I however find it necessary to comment on the constitutionality of Section 42(1) of the *Employment Act* which ousts the procedural fairness requirements under Section 41 as far as probationary contracts are concerned ... the Court was referred to decisions of *Rika Jin Danish Jalang'o & another v Amicabre Travel Service Ltd* and *Dixon Andama v Amani Tiwi Beach Resort* where my brother Judge held that in terminating probationary contracts, the substantive justification and procedural fairness requirements under Sections 43 and 45 are not obligatory. I hold a different view. Article 41 of *the Constitution* guarantees employment and Labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of *the constitution*. To limit enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold of Article 24. To this extent, I agree with the holding of *Lenaola J in Samwel G. Momanyi v The Attorney General & Another* that Section 45 (3) of the *Employment Act* is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”

32. It the Claimant’s further submission that it is now trite law that an Employer must give a reason for termination and the reason must be one that is recognized by law. That an Employment contract such as the one in this case, that provides for termination by issuance of notice without giving a valid reason is therefore an unlawful and invalid contract.
33. The Claimant submits that the Respondent in contravention of Section 43 of the *Employment Act*, failed to discharge its obligation to prove that the reason for termination was valid and as such, this Honourable Court ought to find that the termination was unfair on that account.
34. It is his submission that it is settled that prior to terminating the services of an employee for valid reason, the employer must follow due process which extends to post termination rights such as the right to appeal, payment of any accrued benefits and issuance of a certificate of service. He submits further that the right to be heard is a principle of natural justice that is enshrined in *the Constitution* of Kenya, 2010 and that this right can neither be limited nor derogated.
35. The Claimant finally submits that he is entitled to 12 months, being payment for compensation for unlawful termination of employment.

### **The Respondents’ Submissions**

36. The Respondents submit that in the Statement of Claim dated 8<sup>th</sup> March 2023, the Claimant has inappropriately instituted proceedings against the 2<sup>nd</sup> Respondent, a party that is neither the employer nor the employees in the matter before this honourable court. They submit further that the Claimant was seconded to work with the 2<sup>nd</sup> Respondent, but that there was no contractual relationship between the 2<sup>nd</sup> Respondent and the Claimant.
37. They submit that the Claimant’s submissions on the need for an appraisal prior to termination are unfounded and misguided as he fails to appreciate the clear distinction between an employer’s exercise of discretion when deciding not to confirm an employment contract following probation, and termination on account of poor performance.



38. It is their submission that the Respondent gave the Claimant the requisite notice that his employment would not be confirmed, giving 10 days' notice as opposed to the 7 days envisaged under the contract. They submit further that unlike the termination procedure provided under Section 41 of the Act, Section 42(1) exempts the requirements for reasons and a hearing during a probation period. They sought to rely on the case of *Mary Kemunto Oyugi v Canton Building & Construction Limited* [2018] eKLR, to support this position.
39. The Respondents' further submission is that the remedies for unfair termination as provided under Section 45 of the Act are limited to an employee 'who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination ...'. That the Claimant herein had only been in the employ of the 1<sup>st</sup> Respondent for three (3) months before the decision not to renew his contract was made, and accordingly, he is not entitled to the damages for unfair termination under the Act.
40. It is their submission that the Claimant is not entitled to any remedies provided for unfair termination under Section 49 for unfair termination and his prayer for 12 months' compensation is unwarranted.

### **Analysis and Determination**

41. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' submissions, the following issues crystalize for determination: -
  - i. Whether the 2<sup>nd</sup> Respondent should be party to this suit
  - ii. Whether the Claimant was unfairly terminated
  - iii. Whether the Claimant is entitled to the remedies sought.

### **Whether the 2<sup>nd</sup> Respondent should be party to this suit**

42. The 1<sup>st</sup> Respondent's argument is that the 2<sup>nd</sup> Respondent should not have been made party to this suit on the premise that it recruited the Claimant and send him to serve the 2<sup>nd</sup> Respondent on secondment. It suggests that on this basis, the 2<sup>nd</sup> Respondent should be struck out of the suit.
43. It is not denied that the 1<sup>st</sup> Respondent recruited the Claimant, issued him with a probationary contract and further seconded him to serve the 2<sup>nd</sup> Respondent.
44. Parties are in agreement that the Claimant without doubt provided services to the 2<sup>nd</sup> Respondent on secondment from the 1<sup>st</sup> Respondent. Secondment as I understand it, is not the same thing as outsourcing. When an employee serves an employer on secondment, the employer he/she serves, has just as equal responsibility for the fulfilment of the terms of the contract as the one seconding. In any event, the seconding party is the primary employer.
45. Further, the Claimant having served the 2<sup>nd</sup> Respondent, it is only the 2<sup>nd</sup> Respondent who in my view, could conduct an appraisal/assessment of his work prior to confirmation or otherwise. Moreover, the Respondents' witness' confirmed to this court on cross-examination that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent are one and the same thing and cannot now try to escape liability.
46. For the foregoing reasons, the prayer to strike out the 2<sup>nd</sup> Respondent from this matter therefore fails.



## Whether the Claimant was unfairly terminated

47. The Claimant herein, is aggrieved by the termination of his contract by the Respondents on the premise that although he carried out his obligations diligently and effectively, the Respondents proceeded to terminate him arbitrarily. He argues further that he was never subjected to any performance appraisal or assessment prior to the unlawful termination, nor were valid reason(s) attributed to the termination of his employment provided, and finally that the termination was also procedurally flawed.
48. The Respondents on their part, argue that they gave the Claimant the requisite notice that his employment would not be confirmed. It is their further assertion that unlike the termination procedure provided under Section 41 of the Act, Section 42(1) exempts the requirements for reasons and a hearing during a probation period, and that for this reason the Claimant was not unfairly terminated.
49. It is not disputed that the Claimant was serving on a probationary contract prior to his termination. A probationary contract is a conditional employment contract where the employee's continuation is conditional on his ability to perform the work in accordance with the expectations of the employer.
50. The statutory term of a probationary contract is a maximum of 12 months, and an employer cannot extend the contract beyond the statutory period.
51. The Claimant's contract was for three months and the Respondents' position is that the contract was terminated on the basis that they had no intention to confirm the same. The Claimant was issued with termination notice of 10 days and was paid for the notice period.
52. The Claimant contends that he was entitled to both reasons for the termination and due procedure prior to the termination of his probationary contract contrary to the Respondents' assertion that all they required to do, was issue notice or pay in lieu thereof.
53. The question for this court is whether an employer is compelled to hear and consider any representation of the employee before termination of the probationary contract. In *Monica Munira & 6 Others v. Mount Kenya University* (2021) eKLR, the court declared Section 41(2) of the [Employment Act, 2007](#) unconstitutional in so far as it excludes an employee holding probationary contract from procedural safeguards contained in Section 41 of the same Act.
54. This in effect places an employer under obligation to present an employee with formal charges and hear him in his defense. Further, the provision requiring furnishing of valid and fair reasons for termination is equally not ousted. In the case of *Mary Njoki Karingithi v. Emralo Hotels Resorts & Lodges Limited* (2014) eKLR, the court emphatically ruled that the employees fundamental right not to be unfairly terminated per Section 45(1) & (2) cannot be abrogated even during probation.
55. It then follows that Section 42 of the [Employment Act](#) does not bar a terminated employee from challenging the fairness or validity of the termination of a probationary contract.
56. Although the Respondents' witness mentioned an assessment of the Claimant prior to termination, he told court that he had no evidence of the assessment nor did they have official communication on the assessment.
57. A probationary contract will in my view not serve the purpose, if an employer does not subject an employee to consistent and genuine evaluation based strictly on employee's performance, compatibility and overall conduct. The employer should further in my view, make a decision upon assessment during the probationary period and make the decision before the expiry of the term.



58. In the final analysis, I reach the conclusion that in the absence of valid and fair reasons for the termination and the obvious failure to adhere to procedural fairness, the Claimant's termination is unfair and unlawful.

### **Whether the Claimant is entitled to the reliefs sought**

#### **12 month's pay for compensation for unlawful termination of employment**

59. The finding of an unfair termination entitles the Claimant to an award of compensation.
60. Considering that the Respondents admitted being aware that the Claimant resigned from his job to take up a position at their establishment, and the Claimant's admission that he has since gotten another job, I deem 6 months' salary sufficient compensation for the unfair termination and is hereby awarded.

#### **Notice pay**

61. The Claimant was served notice, served for the entire notice period and was paid for the service. This claim fails and is dismissed.

#### **Pay for accrued leave days**

62. The Claimant had not earned leave in the 3 months that he served.

#### **A Certificate of Service**

63. A certificate of service is a statutory requirement and which the Claimant is entitled to irrespective of how long he served the Respondents.
64. The Claimant be issued with a certificate of service with 14 days of this order.
65. In the final analysis, the Claimant's claim succeeds and orders granted as follows: -
- a. A declaration that the Claimant's termination was unfair and unlawful
  - b. 6 months salary as compensation for the unfair termination at Kshs. 2,190,000/-
  - c. A certificate of service be issued within 14 days of this order.
  - d. The Respondents shall bear the costs of the suit and interest from the date of this judgment until payment in full.

66. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Olembo h/b for Ms. Omoto for the Claimant

Ms. Ogonyo present for the Respondent

Ms. Esther S-C/A

**9JUDGMENT CAUSE NO. E205 OF 2023**

