



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamtix Cleaners Limited v Midira (Appeal E218 of 2024)
[2025] KEELRC 973 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 973 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E218 OF 2024
M MBARÚ, J
MARCH 27, 2025**

BETWEEN

KAMTIX CLEANERS LIMITED APPELLANT

AND

JOHN KENNEDY OTIENO MIDIRA RESPONDENT

*(Being an appeal from the judgment delivered on 27 September 2024 by
Hon. Noelyne Reuben Akee in Mombasa CMELRC No E314 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 27 September 2024 in Mombasa CMELRC No E314 of 2021. The appellant is seeking the judgment to be set aside.
2. The appeal is that the trial court, in the judgment, failed to appreciate that the respondent's employment contract with the appellant was conditioned on the award of annual cleaning tenders from the principal, Kenya Commercial Bank Limited (KCB), hence drawing a wrong conclusion. The trial court failed to appreciate that there was a lawful explanation leading to the termination of employment upon the termination of cleaning services with the client. The awards to the respondent had no justification and should be set aside.
3. The background leading to the appeal is a claim filed by the respondent. His case was that he was employed by the appellant as a supervisor from 1 September 2017 to 24 December 2020 at a monthly wage of Ksh. 12,000. He was placed at the KCB, Mvita branch, where he performed his duties. For 3 years, the appellant deducted NSSF and NHIF dues without remittance. In July 2020, the respondent reported the non-remittance of his statutory dues to KCB, who directed the appellant to address it. The appellant's director, Mohamed, confronted the respondent with threats to terminate his employment.
4. The respondent's case was that on 24 December 2020, the human resource officer, Gladys, called him and informed him that his employment was terminated, and the last day would be 31 December 2020.



Termination was due to reporting the non-remittance of statutory dues to KCB. He claimed that the termination of employment was unlawful and unfair, there was underpayment of wages, no house allowances and notice and claimed the following terminal dues;

- a. Notice pay ksh.13,572.90;
 - b. 63 leave days Ksh. 28,503.09;
 - c. House allowance for 32 months Ksh. 65,150.08;
 - d. Underpayments for 32 months Ksh. 56,252.80;
 - e. 12 months' compensation Ksh.162,874.50;
 - f. Certificate of service;
 - g. Costs.
5. In reply, the appellant made mere denials and stated that the wage paid of Ksh.12, 000 was within the Wage Orders. The respondent's employment depended on the contract between the applicant and the third party, and the contract allowed for the termination of employment.
6. The learned magistrate heard the parties and held that there was unfair termination of employment and that;
- ... Judgment is therefore entered in favour of the claimant as stated on the face of the statement of claim. Costs of the suit from the date of being instituted and interest
7. The appellant submitted that the respondent was employed as a cleaner and assigned duties at a client's site, KBC. The employment was staggered and not continuous. The monthly wage was Ksh. 12,000 under a written term contract. The first contract was from 1 September 2017. Continued employment was dependent on the appellant's contract with the third party, which allowed for the termination of employment.
8. There was a misapplication of the employment contract. Clause 3 of the employment contract placed the respondent on probation for 6 months. This contract ended, and another probationary contract was issued on 1 September 2019 for 12 months. It terminated without need for notice but on its terms. The respondent signed the probationary contract without coercion. The trial court did not analyse the facts and the law as held in *Vice-Chairman & Managing Director v R. Varaprasad & others* [2003] LLR.
9. The reasons leading to the termination of employment were valid and based on the non-renewal of the employment contract, and upon reviewing the respondent's performance. Notice issued on 10 October 2020 with payment of final dues. Section 41 of the *Employment Act* allows termination of employment for poor performance of work. Section 42 of the *Employment Act* allows the employer to terminate a probationary contract without assigning reasons, as held in *Danish Jalang'o v Amicabre Travel Services* [2014] eKLR.
10. The contract held by the appellant with the third party was a term contract for cleaning services. On this third-party contract, the respondent was issued with an employment contract and both were interdependent. A fixed-term contract ends on its terms. The employer is not required to issue notice or reasons. The award of notice pay and compensation is not justified.
11. The appellant submitted that under the fixed-term contract, clause 14.4 provided for annual leave upon application by the employee, which he failed to address. The unutilized leave days each year



- would not be carried over to the next year. Upon termination of the contract in 2020, the respondent had no pending leave days carried forward as these were forfeited.
12. The wage paid was inclusive and consolidated a house allowance. This is noted in the pay slips issued.
 13. The respondent submitted that the trial court fully appreciated the evidence before it and rendered a proper judgment, and should be confirmed with the dismissal of the appeal.
 14. The respondent was employed and is used with a letter of appointment dated 1 September 2017, which is open-ended and terminable upon notice. The employment was not dependent on any third party contract with KCB as alleged by the appellant. The respondent was, however, placed to work at the KCB Mvita Branch and was not privy to the third-party contract.
 15. Section 42 of the *Employment Act* allows for a probationary contract, and unless the probation period is extended by consent, it is unlawful. In the case of *Wanjohi v Kenya Railways Corporation* [2024] eKLR, the court held that upon the end of the probation period, the employer can only extend it with the written approval of the employee. This was not done in this case. The further allocation of 12 12-month probation period to the respondent was unlawful. At the end of 6 months from 1 September 2017, the respondent became the full-time employee of the appellant. Before termination of employment, he was entitled to notice and reasons under Section 41, 43 and 45 of the *Employment Act*. On 24 December 2020, when the appellant terminated the respondent on his employment, he was not on probation. He was not issued with notice or given reasons leading to the unlawful and unfair termination of employment.
 16. The appellant pleaded different reasons leading to termination of employment. That the third party contract ended, the respondent was on probation and that he was of poor performance. In the case of *Winnie Chepkwony v Jamii Bora Bank* [2022] eKLR the court held that termination of employment over alleged poor performance must adhere to the provisions of Section 41 of the *Employment Act*. The employer must issue notice and allow the employee to attend and make his representations. In the absence of any due process, there was unfair termination of employment.
 17. Notice pay and compensation were correctly awarded. The terminal dues owing to the respondent were addressed and are tabulated in the Memorandum of Claim and justified. The appeal should be dismissed with costs.
 18. This is a first appeal. The court is mandated to review the record, re-asses the findings and make its conclusions. However, consider that the trial court had the opportunity to hear the witnesses give evidence and see the demeanor.
 19. It is not contested that through letter of appointment dated 1 September 2017, the appellant appointed the respondent as a supervisor. Clause 3.1 placed the respondent on 6 months' probation. The wage was agreed at Ksh.12, 000 per month.
 20. It is not clarified on what happened after the 6 months' probation period.
 21. The appellant as the employer has not filed any work record after the 1 December 2017,
 22. There is a pay slip for July 2020 indicating that the respondent continued in his employment after the probation period lapsed on 30 November 2017.
 23. The appellant also produced contract dated 1 September 2019. With effect on the same date. It was a probationary contract for 12 months.



24. Through notice dated 1 October 2020, the appellant notified the respondent that his contract ended on 31 September 2020 and after reviewing your performance during the engagement period, we would like to inform you that your contract has not been renewed.
25. As outlined above, the response to the claim made mere denials.
26. In the submissions, the appellant asserts that the respondent was under a fixed term contract under probationary terms. The initial probationary contract for 6 months and the next for 12 months which terminated on the end date. The appellant also asserts that the respondent was of poor performance and under Section 41 of the *Employment Act*, was allowed to terminate employment. That under Section 42 of the Act, a probationary contract can be terminated without notice or reasons.
27. Whereas an employer is allowed to issue the employee with a fixed term contract, to place the employee under probation, the two are not synonymous. A fixed term contract is regulated under Section 10(3) of the *Employment Act* while a probationary contract is regulated under Section 42 of the Act.
28. Each type of contract has its procedures for execution and termination.
29. In this case, the respondent was under a probationary contract, the first for 6 months and the end of it is not explained. The respondent testified that he remained in the continuous service of the appellant. This is evidenced by the Supplementary Record of Appeal and the wage payments from January 2019 after the end of the probation period.
30. Under a probationary contract, at the end of the agreed period, under Section 42 of the *Employment Act*, the employee becomes the full time employee of the employer unless her probation period is mutually extended. Such an extension cannot go beyond 12 consecutive months. Without the consent of the employee, any extension of the probation period, through another contract terms as probationary contract or otherwise, this is unlawful. A probationary contract is not similar to a fixed term contract that can be extended suo motto by the employer.
31. In the case of *Red Lands Roses Ltd v Mugo* [2025] KECA 96 (KLR) the court held that upon the declaration of Section 42 of the *Employment Act* as unconstitutional in the case of *Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another* [2021] eKLR, application of the provisions thereof must be carefully weighed when placing an employee under probation as held in *Kwale International Sugar Company Ltd v Mbaya* [2024] KECA 795 (KLR)
32. Through letter dated 1 October 2020, the appellant notified the respondent that his contract would not be renewed due to poor performance. In the written submissions, the appellant alludes to the fact that it had a third party contract that was not renewed and the respondent's contract was dependent on it. However, the notice that issued related to alleged poor performance.
33. Section 41 of the Employment regulates termination of employment due to poor performance. This is a matter addressed by the court and Court of Appeal. in the case of *Kenya Revenue Authority v Mwongela* [2025] KECA 262 (KLR) and *David Gichana Omuya vs Mombasa Maize Millers Limited* [2014] eKLR where it was pronounced that;

Section 41 of the *Employment Act* requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative. The requirements of section 41 of the



Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.

34. It is not sufficient to cite poor performance or that the employee was on probation. The due process for section 41 of the *Employment Act* is mandatory.
35. The appellant does not claim to have issued the respondent with notice to address the alleged poor performance. There was no hearing or any effort to elaborate on what the particulars of the poor performance entailed in the form of a show cause notice.
36. Turning to the reasons advanced for terminating the respondent's employment, the appellant lacked clarity as to whether this was due to third party contract termination, whether it was due probationary terms or whether it related to the alleged poor performance. This lack of clarity resulted in wrongful termination of employment.
37. The applicable provision is found in section 43 of the *Employment Act* which provides that:
 1. In any claim arising out of the termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
38. The appellant failed to follow its letter of appointment, there is no adherence to the mandatory provisions of Sections 35, 41, 43 and 45 of the *Employment Act* which results in unfair termination of employment.
39. The findings by the trial court to this extent cannot be faulted.
40. Notice pay and compensation are justified. However, in awarding compensation, the court is under Section 45(5) of the *Employment Act* required to justify the reasons for allocating 12 months as the maximum available. The record of the employee and the procedures taken in terminating employment.
41. In view of the procedural lapses, the lack of adherence to the law, the time served from 2017 to 2020, the court finds an award of six (6) months is appropriate.
42. On the due minimum wage under the Wage Orders at Ksh.15, 608.85 per month, the total due is Ksh.93, 653.10 in compensation.
Notice pay Ksh.15, 608.85.
43. On the claim for terminal dues, the wage paid was Ksh.12, 000 per month. Despite the probationary contract being signed by the respondent, parties cannot agree to an illegality. An employment contract cannot be used to pay a wage contrary to the Wage Order which gives the minimum.
44. A general labourer and cleaner in Mombasa in October 2020 had a minimum wage of Ksh.13, 572.90 and house allowance of Ksh.2, 035.95 and gross Ksh.15, 608.85.
45. On the paid wage of Ksh.12, 000, there was an underpayment of Ksh.3, 608.85.
46. Underpayments accrues monthly. This is denied under Section 89 of the *Employment Act* as a continuing injury. It should be addressed within 12 months from the date of cessation. The respondent did not address his underpayment until at the end of his employment and can only go back to 12 months.



47. For the underpayment of minimum wage inclusive of house allowance for 12 months, the respondent is entitled to Ksh.43, 306.02.
48. On claim for 63 leave days, at the end of employment, section 28(4) of the *Employment Act* only allows an employee to accrue leave days for 18 months. In this regard, the basic wage of Ksh.13, 572 for 33 days amounts to Ksh.14, 929.20 in leave pay.
49. A certificate of service is due at the end of employment.
50. On costs, the respondent's claim is justified, costs claimed are justified and this should apply from the date of judgment.
51. The appeal hence addressed, the respondent should have 50% of the due costs.
52. Accordingly, the judgment in Mombasa CMELRC Cause No.E314 of 2021 is hereby reviewed in the following terms;
 - a. Compensation Ksh.93,653.10;
 - b. Notice pay Ksh.15,608.85;
 - c. Underpayments of wage, inclusive of house allowance Ksh.43,306.02;
 - d. Leave pay Ksh.14,929.02;
 - e. Certificate of service;
 - f. Costs of the trial court from the date of the judgment;
 - g. For the appeal, the respondent is awarded 50% of the costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

