



Muchina & another v Lopage Pr Limited (Employment and Labour Relations Cause E377 of 2022) [2025] KEELRC 1129 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E377 OF 2022**

DKN MARETE, J

MARCH 26, 2025

BETWEEN

JOY MUCHINA 1ST CLAIMANT

EVA NGOTHO 2ND CLAIMANT

AND

LOPAGE PR LIMITED RESPONDENT

JUDGMENT

1. The Claimants instituted this suit through an undated Statement of Claim seeking redress for wrongful dismissal, unfair termination, unpaid salaries, payment in lieu of notice, unremitted statutory deductions, and a certificate of service.
2. The 1st Claimant was employed by the Respondent on 2nd August 2021 at a net salary of Kshs.200,000, translating to a gross salary of Kshs.278,341.93 per month. She diligently performed her duties but was not paid for three months and was subjected to a vindictive evaluation process, leading to her constructive dismissal.
3. The 2nd Claimant was employed on 3rd May 2021 at a gross salary of Kshs.115,000, with a six-month probationary period ending in October 2021. She was not paid her salary for June to October and was summarily dismissed for alleged poor performance without notice, a hearing, or an opportunity to improve.
4. The Claimants alleged that the Respondent set up a sham workplace to exploit employees without pay, imposed unattainable deliverables without providing the necessary tools, and denied them their lawful emoluments. They claimed the Respondent unilaterally postponed settling salary arrears and denied them certificates of service.



5. The 1st Claimant sought Kshs.835,025.79 in salary arrears, Kshs.64,946.45 in lieu of notice, and Kshs.3,340,103.16 as compensation for unfair labour practices. The 2nd Claimant sought Kshs.483,000 in salary arrears, Kshs.115,000 in lieu of notice, and Kshs.1,380,000 as compensation for unfair labour practices.
6. They relied on the Constitution of Kenya, 2010, the Employment Act, 2007, and the Evidence Act, Chapter 80. They sought declarations that their dismissal was unlawful, orders for payment of their claims, an order compelling the Respondent to issue certificates of service, and costs with interest at court rates.
7. The 1st Claimant filed an undated witness statement stating that she was offered employment by the Respondent through a contract of service effective 2nd August 2021 for the position of General Manager, with a net salary of Kshs.200,000.00. She accepted the offer and reported to work but never received a signed copy of her contract despite several requests.
8. She asserted that she diligently performed her duties with minimal support from the Respondent's directors, who failed to provide the necessary tools to enable her to meet her key performance indicators. She stated that she was not paid her salary for September, October, and November 2021 and was ultimately forced out of employment through a predetermined disciplinary process designed to justify unfair labour practices.
9. On 17th November 2021, she received a notice to show cause listing various issues, some unrelated to her job portfolio, which she claimed was issued immediately after she became persistent in demanding her unpaid salary. She described the disciplinary process as a sham, citing the absence of key performance indicators, the lack of prior complaints about her performance and the Respondent's failure to provide her with the necessary working tools, such as an active office email and client introductions.
10. She further noted that one of the charges against her, incitement, was baseless since the only employee under her supervision had been dismissed without her knowledge. She stated that the disciplinary meeting was malicious and oppressive, aimed solely at justifying the Respondent's unfair labour practices, which was evident from subsequent email communications.
11. Feeling that her employer had refused to take responsibility, she was forced to resign. She later learned from her colleague, Eva, that she had been summarily dismissed after being denied her salary for three months.
12. The 1st Claimant asserted that it became clear that the employer had undercapitalized the company and was avoiding employer obligations by making unfounded allegations. She prayed for compensation amounting to Kshs.835,025.79 in salary arrears, Kshs.64,946.45 in salary in lieu of notice, Kshs.3,340,103.16 as maximum compensation for unfair labour practices, plus interest and costs.
13. The 2nd Claimant filed an undated witness statement stating that she was offered employment by the Respondent through a contract of service effective 3rd May 2021 for the position of Accounts Manager, with a gross salary of Kshs.115,000.00.
14. She accepted the offer and reported to work but never received a signed copy of her contract due to multiple errors in the document. Despite several requests, the Respondent failed to provide her with a corrected version. She diligently performed her duties as required but was not paid her salary for June, July, August, September, and October 2021, and was eventually summarily dismissed.



15. She stated that although her termination letter cited poor performance, she was never subjected to any performance review or improvement program throughout her employment. Additionally, she discovered that her statutory deductions had not been remitted to the relevant authorities.
16. In the month following her dismissal, she received a letter from the Respondent promising to pay her outstanding salary within 90 working days, a promise that was never fulfilled. She asserted that it became evident that the employer had undercapitalized the company and was avoiding employer obligations by making unfounded allegations to justify unfair labour practices.
17. She prayed for compensation amounting to Kshs.483,000.00 in salary arrears, Kshs.115,000.00 in salary in lieu of notice, Kshs.1,380,000.00 for unfair labour practices, plus interest and costs.

The Claimant's Written Submissions

18. The Claimants filed written submissions dated 20th March 2024, stating that the Respondent's Memorandum of Response dated 7th February 2024 justified the terminations on grounds of poor performance and further raised issues of absenteeism and insubordination against the 1st Claimant. The Respondent also argued that since the Claimants were on probation, they were not entitled to a hearing before termination.
19. The Claimants submitted that the employer must have clearly documented reasons for termination to ensure fairness. Section 41 of the Employment Act mandates an employer, before terminating employment on grounds of misconduct, poor performance, or physical incapacity, to explain the reason in a language the employee understands and allow them to be accompanied by another employee or a union representative.
20. Further, the employer must consider any representations made by the employee before termination. In *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR, the court held that Section 41 applies to all employees, including those on probation, and that Section 42(1) contradicts the provisions of Section 41 and Article 41 of the Constitution, which protects labour rights as part of the Bill of Rights. Article 24 prohibits limiting these rights unless this is reasonable and justifiable.
21. Section 43(1) of the Employment Act requires an employer to provide reasons for termination, failing which the termination is deemed unfair under Section 45. Section 45(1) bars unfair termination, while Section 45(2) provides that a termination is unfair if the employer fails to prove that the reason for termination was valid, fair, related to conduct, capacity, compatibility, or operational requirements, and that fair procedure was followed.
22. The Claimants submitted that fairness in termination depends on adherence to fair procedure and substantive justification. Unlike in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR, where the court clarified that probationary employees are entitled to due process, the Respondent in this case terminated the Claimants after this clarification had been made.
23. On constructive dismissal, the Claimants relied on *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, where the Court of Appeal defined constructive dismissal as occurring when an employee resigns due to the employer's conduct, which must be so intolerable that it forces the employee to leave. The employer's behaviour must show a fundamental breach of the employment contract, indicating that the employer no longer intends to be bound by its terms.



24. The burden of proof in constructive dismissal lies with the employee, who must show that the employer made a unilateral fundamental change to the contract, that the work environment became intolerable, that they would have continued working had the employer not created the intolerable conditions and that they resigned believing the employer would not cease the unacceptable practices.
25. The Claimants further submitted that the Respondent's labour practices were unfair and unlawful. The 1st Claimant was employed on 2nd August 2021 under a written contract but was not paid her salary for three months ending November 2021. She was also not provided with the necessary work tools and was subjected to a predetermined disciplinary process upon demanding her salary arrears.
26. Under Sections 10(7) and 9(2) of the Employment Act, the burden of proving or disproving an employment term lies with the employer. In *Manyinsa v Lavington Security Limited* (Civil Appeal 55 of 2019) [2023] KECA 1376 (KLR), the Court of Appeal emphasized that failure to produce employment records places the burden on the employer.
27. Similarly, in *Kamau v Delta Point Distributors Limited t/a Milele Lounge* (Appeal E045 of 2022) [2023] KEELRC 1161 (KLR), the court reiterated that an employer's failure to keep proper records works against them. This position was also upheld in *Yaa v SGA Security Solutions Limited* (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC 1553 (KLR).
28. The 1st Claimant requested her signed contract via email on 24th November 2021, but the Respondent never provided it. The Notice to Show Cause referenced a contract dated 5th July 2021, yet it was never availed to the court. The failure to produce this crucial document should lead to an adverse inference under Section 112 of the Evidence Act and Section 10(7) of the Employment Act.
29. The Respondent claimed the 1st Claimant's salary was Kshs.250,000, not Kshs.278,341.93 as alleged, but without the contract, the Claimant's assertion remains unchallenged. The Respondent's response also failed to address the salary arrears, with no justification for the non-payment of three months' wages.
30. The Claimant's documents at pages 1, 5, and 6 highlight the salary arrears, and the issue remains unrebutted. The Respondent also alleged poor performance, yet without a contract, there is no standard for assessment. The Notice to Show Cause dated 17th November 2021 referenced key deliverables in the contract, which the Respondent failed to produce.
31. The claim of absenteeism was vague, lacking specific dates or a show-cause letter. The insubordination claim, alleging the 1st Claimant incited subordinates, was baseless as the only subordinate, the 2nd Claimant, was dismissed without her knowledge. Under Section 47(5) of the Employment Act, the Claimants established a prima facie case of unfair termination, which the Respondent failed to rebut.
32. The non-payment of salary constituted a material breach of contract. In *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal adopted the principles in *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK), holding that an employer must have clear policies and provide an employee with an opportunity to respond before termination based on poor performance.
33. The Respondent failed to offer any performance management measures, rendering their claims of poor performance invalid. The case of *Thaiya v Twiga Foods Limited* (Cause 15 of 2020) [2023] KEELRC 1960 (KLR) emphasized that constructive dismissal arises when the work environment becomes unbearable due to the employer's actions.



34. The 1st Claimant's resignation was forced, amounting to constructive dismissal. She was denied procedural fairness in the disciplinary process, was not given an opportunity to review her performance evaluation, and the Respondent failed to produce key performance indicators (KPIs) to justify its claims.
35. The 2nd Claimant was dismissed through a letter dated 6th October 2021, without any disciplinary process. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the court held that procedural fairness requires an employer to inform the employee of charges before termination and allow them to defend themselves.
36. The 2nd Claimant's dismissal lacked notice and a hearing, rendering it procedurally and substantively unfair. The Respondent argued that she was on probation and not entitled to relief, but this amounts to discrimination, as addressed in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR.
37. The Respondent failed to provide any records to justify poor performance. The Claimants sought salary arrears, notice pay, and compensation for unfair labour practices. The 1st Claimant claimed Kshs.835,025.79 for salary arrears, Kshs.64,946 in lieu of notice, Kshs.3,340,103.16 as compensation, plus interest and costs.
38. The 2nd Claimant claimed Kshs.483,000 for salary arrears, Kshs.115,000 in lieu of notice, Kshs.1,380,000 as compensation, plus interest and costs. The Supreme Court in *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR held that Section 49 of the Employment Act provides various remedies for wrongful termination at the court's discretion.
39. Section 35 of the Employment Act entitles an employee to notice pay upon unfair termination, as reaffirmed in *Manyaki v Njuca Consolidated Company Limited (Appeal E031 of 2023)* [2023] KEELRC 2376 (KLR). The Claimants deserve full compensation, having followed legal procedures, while the Respondent repeatedly failed to honour its obligations.
40. The Respondent's failure to remit statutory deductions violates Section 19(1) of the Employment Act, which mandates employers to deduct and remit such amounts. The Claimants faced financial hardship due to non-payment, lack of due process, and denial of certificates of service, hindering future employment prospects. Since the Respondent did not rebut the claims and admitted key shortcomings, it is legally obligated to compensate the Claimants fully.

The Respondent's Case

41. The Respondent filed a Memorandum of Response dated 7th February 2024, denying all allegations in the Claimants' Memorandum of Claim dated 19th May 2022, except for what is expressly admitted. This was in the form of a sham defence which comprises of denials and no more.
42. The Respondent denied the contents of Paragraph 5 and asserted that the 1st Claimant was engaged at a gross monthly salary of Kshs.250,000/- and not Kshs.278,341.93 as alleged. The Respondent further denied the assertions in Paragraph 6 regarding the 1st Claimant's performance, stating that she failed to meet key deliverables, was frequently absent from work, and was insubordinate.
43. The 1st Claimant was subjected to a disciplinary process in compliance with the Employment Act, initiated through a Notice to Show Cause letter dated 17th November 2021, but resigned on 21st November 2021 before its conclusion.
44. The Respondent denied the contents of Paragraphs 6 to 11 and maintained that the 1st Claimant voluntarily resigned and was not dismissed. Regarding the 2nd Claimant, the Respondent stated that



- she was on probation when her contract was terminated due to poor performance and is not entitled to reliefs, including payment in lieu of notice or compensation for unfair labour practices.
45. The Respondent further denied allegations that it refused to clear unpaid dues, asserting that the Claimants have inflated their claims. Consequently, the Respondent sought the dismissal of the claim with costs.
 46. The Respondent, through Paul Muthoka, filed a Witness Statement dated 13th February 2024, stating that he is a director of the Respondent and was privy to the facts of the case, making him competent to testify. He affirmed that he was directly involved with the 1st and 2nd Claimants during their employment.
 47. He asserted that the 1st Claimant was engaged at a gross monthly salary of Kshs.250,000/- and not Kshs.278,341.93 as alleged. However, her performance was poor, characterized by absenteeism and insubordination, which led to the initiation of disciplinary proceedings. Before the process was completed, she resigned without notice on 26th November 2021.
 48. Based on legal advice from the Respondent's advocates, he maintained that the disciplinary process was conducted fairly and in compliance with the law. Regarding the 2nd Claimant, she signed her employment contract on 5th May 2021, which provided for a six-month probation period, but her employment was terminated on 6th October 2021 due to poor performance.
 49. Despite financial difficulties caused by the COVID-19 pandemic, which led to the Respondent ceasing operations, it remains willing to settle the unpaid dues of the Claimants.

Respondent's Written Submissions

50. The Respondent filed written submissions dated 2nd April 2024 in response to the Claimants' suit commenced by a Statement of Claim dated 19th May 2022. The Respondent filed a Response to Claim, as well as a List and Bundle of Documents, both dated 7th February 2024, and relied on these documents and the arguments raised in the submissions.
51. The sole issue for determination is whether the Claimants are entitled to compensation. The 1st Claimant was engaged on a gross monthly salary of Kshs.250,000/- and not Kshs.278,341.93 as alleged. She claimed compensation amounting to Kshs.3,340,103.16, asserting she was unfairly dismissed, whereas she resigned on 26th November 2021 in the middle of a disciplinary process, as evidenced in the Respondent's list and bundle of documents.
52. A Notice to Show Cause was issued to her on 17th November 2021, initiating disciplinary proceedings under Section 41 of the Employment Act. The 2nd Claimant sought Kshs.1,380,000/- in compensation for unfair labour practices but was on probation, as evidenced by her employment contract.
53. The Respondent did not dispute owing unpaid dues but opposed compensation, arguing that the 1st Claimant resigned before the disciplinary process was completed and that the 2nd Claimant, whose employment was terminated for poor performance while on probation, is only entitled to seven days' wages in lieu of notice as provided under Section 42(4) of the Employment Act.
54. Section 45 of the Employment Act states that termination is unfair if the employer fails to prove it was for a valid reason, was fair, and followed due process. In *Kenya Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal outlined the requirements of a fair termination process, including an explanation of the grounds for termination in a language understood by the employee, the presence of a representative, and a fair hearing.



55. The Notice to Show Cause issued to the 1st Claimant on 17th November 2021 met these requirements. The Respondent submitted that the disciplinary process was fair and that the 1st Claimant is not entitled to compensation. Regarding the 2nd Claimant, her employment contract explicitly provided for termination during probation with seven days' notice or pay in lieu of notice.
56. The decision in *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] eKLR supports the position that termination during probation is not subject to the provisions of Section 41 of the Employment Act. Justice Rika emphasized that probationary employees are not entitled to the same procedural and substantive protections under Sections 43 and 45 of the Employment Act, as probation allows an employer to assess an employee's suitability.
57. The court stated that the only valid claim a probationary employee can make is for contractual damages limited to the notice period. The Respondent prays for the dismissal of the claims for compensation for unfair labour practices, affirming its willingness to settle the Claimants' unpaid wages, which is not contested. Given the claims of gross misconduct against the Claimants, the Respondent further prays that each party bears its own costs.
58. From the foregoing, a case of unlawful termination of the employment of the claimant ensues. The conduct of the Respondent, including non-payment of salaries and other misconduct formed a fundamental breach of the claimant contracts of employment. I therefore find a case of unlawful termination of their employment and hold as such.
59. On a finding of unlawful termination of employment, the claimants become entitled to the relief sought.
60. I am therefore inclined to allow the claim and order relief as follows;
1. 1st Claimant
 - i. Salary for three (3) monthsKshs.835,025.79
 - ii. One (1) months salary in lieu of noticeKshs.278,341.93
 - iii. One (1) month salary as compensation for unlawful termination of employment Kshs.278,341.93

Total of claimKshs.1,392,709.65
 2. 2nd Claimant
 - i. Salary for four (4) months Kshs.460,000.00
 - ii. One (1) months salary in lieu of notice Kshs.115,000.00
 - iii. One (1) months salary as compensation for unlawful termination of employment Kshs.115,000.00

Total of claimKshs.690,000.00

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MARCH 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Odhiambo instructed by OG LAW LLP for the claimant



2. Mr. Mwai instructed by Kidenda Onyango Anami & Associate for the Respondent.

