



**Mbugua v New Muthokinju Hardware Ltd (Cause E197 of 2023)
[2025] KEELRC 748 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 748 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E197 OF 2023
CN BAARI, J
MARCH 13, 2025**

BETWEEN

MARTHA NJERI MBUGUA CLAIMANT

AND

NEW MUTHOKINJU HARDWARE LTD RESPONDENT

JUDGMENT

1. Before court is the Claimant's Memorandum of Claim dated 10th March, 2023. Under the claim, the Claimant seeks the following reliefs: -
 - a. One month's pay in lieu of notice
 - b. Prorate leave
 - c. Payment for public holidays worked
 - d. 12 month's pay as compensation for unlawful termination
 - e. Costs of this suit;
 - f. Interest on all the above;
2. The Respondents entered appearance on 28th March, 2023, and subsequently filed a Response to the Statement of Claim dated 26th April, 2023, wholly denying the Claimant's claim.
3. The matter was first heard by Hon. Justice Rika on 12th June, 2024 when the Claimant testified in support of her case, adopted her witness statement and produced documents filed in the matter. The cross examination of the Claimant, and hearing of the Respondent's case proceeded before this court on 29th October, 2024 and 25th November, 2024. The Respondent called a total of three witness who testified in support of its case and produced the Respondent's documents.



4. Submissions were received from both parties.

The Claimant's Case

5. The Claimant's case is that the Respondent offered her employment on 1st June 2022 as a Retail manager following which she resigned her well-paying job with the hope of joining the Respondent as a retail manager in the long term, as that is what she was made to believe and was persuaded by the Management of the Respondent.
6. The Claimant avers that she performed her duties diligently until 19th December 2022, when she was served with a letter of "unsuccessful Probation." That prior to being served with letter of "unsuccessful Probation" she had served for a period of more than six months, hence her employment with the Respondent had been confirmed by operation of law and was thus no longer on probation.
7. That the Claimant was not given a mandatory notice of termination as required by law, before her employment was terminated, nor was she served with a notice to show cause as to why her employment should not be terminated.
8. The Claimant states that she was not invited for a meeting to defend herself of the allegations contained in the letter dated 19th December, 2022 as due process demands. That on this account, her employment was unfairly and unlawfully terminated as procedural fairness and principles of natural justice were not observed.
9. The Claimant told court on cross-examination that she was aware that her probationary contract may or may not be confirmed.
10. The Claimant further confirmed on cross-examination that she worked for her former employer until 14th June, 2022 and that her contract indicates that her start date was 15th June, 2022, and further that it bears her signature.
11. It is the Claimant's case that she was twice appraised and that she received the appraisal feedback through her email. She further confirmed that the appraisal parameters are those she filed, except the first parameter. She states that her performance rating was 33.75% and that she was aware that a performance rating of less than 40% is ground for summary dismissal.
12. On the issue of leave, the Claimant avers that she took 5 days leave to do examinations.
13. She states that she was not given a hearing, but was called for a meeting on appraisal hearing which took place at the Respondent's offices.
14. The Claimant states that she cleared on 15th December, 2022 and was paid final dues, being salary for December, 2022 only. She further avers that she signed a letter indicating that she had no further claims against the Respondent.
15. On the claim for holiday pay, the Claimant avers that she worked on 10/10/2022 12/12/2022, and on 1st July, 2022, which were public holidays.
16. It is her prayer that her claim be allowed.

The Respondent's Case

17. It is the Respondent's case that by a letter dated 11th May, 2022, it offered the Claimant employment for a fixed term of 6 months' on probationary terms, with the proposed commencement date being the 1st June 2022.



18. The Respondent states that the terms of the offer were, amongst others that: -
 - a. That the employment was for a fixed term for a period of 6 months on probationary terms;
 - b. that the Claimant's confirmation of employment was subject to good performance;
 - c. that the probation may be extended or terminated if her performance was deemed unsatisfactory;
 - d. that the Claimant may be required to work for longer hours, sometimes beyond normal working hours;
 - e. that the Respondent's policies and procedures shall apply to the employment; and
 - f. that the employment was terminable by a 7 days' notice or payment of 7 days' wages in lieu of the notice. The said offer further envisaged that the probation period would be terminated by the operation of the law by effluxion of time being a fixed term contract.
19. The Respondent further states that the Claimant on receipt of the offer letter, indicated that she needed more time to clear with her previous employer, Builders Warehouse Kenya Limited, and proposed to report on 15th June 2022, and that the same was noted by the Managing Director on the filed offer Letter.
20. The Respondent states that from its Human Resources records, the Claimant reported on the 16th June, 2022 on which date she signed the employment contract.
21. It is the Respondent's case that the Claimant tendered among other employment documents, a recommendation letter dated 15th June 2022 from one Fredrick Otieno who identified himself as a Branch Manager at Builders Warehouse Kenya Limited and who indicated that the Claimant had worked with him at Builders Warehouse Kenya Limited between the 10th February 2020 and 14th June 2022.
22. The Respondent states that the employment contract as read together with the policies and procedures of the Respondent, explicitly provide that her employment was for a fixed term of 6 months, and it was only after the Claimant's successful performance during the probation period that she would be confirmed.
23. The Respondent states that on 6th October, 2022, it reviewed the performance of the Claimant for the previous 3 months, and highlighted numerous issues and areas where the Claimant was required to address to salvage her performance. It states further that another appraisal of the Claimant was undertaken on 16th November 2022, to determine her suitability for confirmation.
24. The Respondent further states that upon receipt of the appraisal report from their consultant, the Managing Director convened a meeting between him, the Claimant, the Consultant, Agnes Njeru, Hannah Kagiri and the then Head of Human Resources. That the Claimant confirmed the outcome of the appraisal exercise and the parties agreed to attend a further meeting on 13th December 2022 for the Claimant to make her presentations on why the Respondent should not decline to confirm her employment.
25. That on the 13th December 2022, the Managing Director, the Claimant, the Consultant, Agnes Njeru, Hannah Kagiri and the then Head of Human Resources Department met, and the Claimant made her oral presentation on her performance and suitability for confirmation. That the team, including the Claimant herself deliberated on her presentation and concluded that the Claimant's performance was inexcusable and that Respondent would not confirm her employment.



26. The Respondent states the Claimant's employment being a fixed term contract, was terminated by the operation of law by effluxion of time.
27. That pursuant to the Respondent's policies and procedures, the days during which an employee is absent from work during the probation period are not reckoned in computation of the 6 months' probation period. It states that where an employee is absent from work during the probation period with or without leave, the probation period is deemed to have been extended by the number of days such employee was absent.
28. It is the Respondent's position that the Claimant by an email dated 11th November 2022, sought and obtained leave for a period of 5 days between the 28th November 2022 and 2nd December, both days inclusive, ostensibly to undertake examinations at Mount Kenya University. It avers that by virtue of the leave, the Claimant's probation period was scheduled to lapse on 20th December 2022.
29. The Respondent avers that it notified the Claimant that it would not confirm her employment on valid notices on 13th December 2022 and on 19th December 2022, and paid the Claimant the accrued mileage and the salary earned, but not paid less the applicable PAYE and NSSF and NHIF deductions. That the Respondent further issued the Claimant with a Certificate of Service.
30. The Respondent's case is that on 19th December 2022, their Head of Human Resources Department served the Claimant with a letter similarly dated, and which later amended the letter and issued the Claimant with the amended letter including the 7 days wages in lieu of notice.
31. The Respondent states that upon receipt of the amended letter, the Claimant signed it freely and without any protest or contestation and scanned it back on the same day further confirming her acceptance of the Respondent's decision not to confirm her employment. That the Claimant further confirmed that the dues paid to her was in full settlement of her final dues owing from the Respondent, and that she had no other current or future claims against the Respondent.
32. The Respondent states that it paid the Claimant a sum of Kshs. 128,961/= to her nominated bank account on 20th December 2022, being salary for days worked in December, 7 days pay in lieu of notice. and mileage allowance for half the month.
33. Throughout the process, the Claimant did not raise any complaint regarding the decision not to confirm her employment. She equally did not exhaust the appeal mechanisms provided for under the policies and procedures of the Respondent before filing the instant claim, and that the same is therefore premature and incompetent.
34. The Respondent states that it complied with all the required procedural and substantive processes before determining not to confirm the employment of the Claimant.
35. It is the Respondents' prayer that the entire claim be dismissed with costs.

The Claimant's Submissions

36. The Claimant submits that she worked for more than 6 months without any extension of her probation contract effectively making her entitled to full rights under the [Employment Act](#), including a one month notice of termination and procedure before she could be terminated. The Claimant had reliance in the case of Winnie Awuor Ochieng v Shah Lalji Nangpar Academy [2020] KEELRC 1086 (KLR).
37. It is the Claimant's submission that she was invited for a meeting on 12th December, 2022 on the way forward on her appraisal, but that she was not in position to defend her performance without appraisal results from her supervisor. She submits that from RW1's testimony, it is clear that the appraisal form



was filled during the meeting of 13th December 2022, and that she knew of her performance during the meeting that was to discuss her alleged poor performance! and defend herself.

38. It is the Claimant's submission that even if she was on probation which she was not, she was still entitled to a process under section 41 of the *employment Act*. She sought to rely in the case of Monica Munira Kibuchi and 6 Others V Mount Kenya University and A.G for the holding that:-

“Further, in addition to the inconsistencies among Sections 42(1), 42(2) and 41 considered earlier in this judgement, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*.(emphasis own).

To this extent therefore, we find and hold that Section 42(1) insofar as it excludes an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, is inconsistent with Articles 41 and 47 of *the Constitution* hence null and void.

39. The Claimant submits that the process of terminating her employment lacked both substantive and procedural fairness.

The Respondent's Submissions

40. On the dispute in respect of her start date, the Respondent submitted that the Claimant did not lead any evidence that her employment started on the 1st June 2022 as alleged. It submits further that the certificates of service both from the Respondent and the claimant's former employer show the dates when each started and when the next begun, and which the Claimant produced in evidence and did not dispute the dates thereon.
41. The Respondent submits that the Claimant has not claimed salary for the period between 13th December 2022 and 19th December 2022, which confirms that the same was not payable for the sole reason that she had exited the Respondent's employment after the expiry of her contract of employment. It submits further that the Claimant proffered no explanation why she started the clearance process on the 13th December 2022, and urges the court to disagree with the Claimant that her employment with the Respondent ceased on 19th December 2022 and find that the same ceased on 13th December 2022.
42. The Respondent submits that the Claimant was twice appraised and that she was unsuccessful in her probation leading to the termination of her probationary contract.
43. The Respondent submits that the Claimant is not entitled to any of the reliefs sought and prays that the claim be dismissed.

Analysis and Determination

44. The issues that fall for determination are:
- i. Whether the Claimant was still under a probationary contract at termination
 - ii. Whether she was unfairly terminated
 - iii. Whether she deserves the remedies sought



Whether the Claimant was still under a probationary contract at termination

45. To answer this question, the issue is when the Claimant began her probationary contract with the Respondent.
46. The probationary contract entered between the parties herein is dated 11th May, 2022 and was accepted by the Claimant on 16th May, 2022. The Claimant contends that she started working with the Respondent on 1st June, 2022 while the Respondent asserts that she started on 15th June, 2022.
47. On the face of the copy of the contract produced by the Respondent, it is indicated that the Claimant would start duty on 15th June, 2022 based on the agreement of the parties. Further, by a letter of recommendation by the Claimant's former employer, it is indicated that the Claimant served the former employer from 10th February to 14th June, 2022.
48. I am convinced by the evidence on record that the Claimant started her probationary contract with the Respondent on 15th June, 2022, and not 1st June, 2022 like she contends. By simple arithmetic, the Claimant's probationary contract could only have ended on 15th December, 2022, hence the assertion that her employment was confirmed by operation of law is unfounded.
49. I thus find and hold that the Claimant's probationary contract ended on 15th December, 2022 having begun working with the Respondent on 15th June, 2022, and was thus still under a probationary contract at the time of her termination.

Whether she was unfairly terminated

50. It is now settled that an employee under a probationary contract, similar to any other employee, is entitled to the provisions of Section 41 of the [Employment Act](#). 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.
51. This court has already found that the Claimant was serving on a probationary contract prior to her 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.
52. It is not denied that the Claimant was invited for a meeting vide an email dated on 12th December, 2022, which meeting was to take place the following day the 13th December, 2022 on her appraisal.
53. The Claimant's evidence is that she was not in a position to defend her performance on the basis that the appraisal results had not been supplied to her. In my view, even if the Claimant knew her performance appraisal rating which I presume she did having taken part in the appraisal, the time given for the meeting was too short especially that the notice was issued/sent to her on a public holiday.
54. It is also clear that the notice did not explicitly inform the Claimant that termination of her probationary contract was the subject of the meeting. Simply stating that the 'way forward of your appraisal' is the subject of discussion, could not in view have prepared the Claimant enough for the eventual discussion and the resultant termination.



55. This no doubt was trial by ambush contrary to Section 41 of the *Employment Act*, 2007. In the case of Evans Kiage Onchwari V Hotel Ambassadeur Nairobi [2016] eKLR the Court opined thus:-

“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 J in 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.”

56. Further, I do not agree with the Respondent's assertion that the probationary contract was fixed term contract, hence self-terminating. It cannot be; unless the Respondent had no intention to confirm the same. Fixed term contracts cannot at the same time be probationary contracts. A probationary contract is one issued for a definite period, at the end of which it is either confirmed or terminated. The period of a probationary contract is also one that can be extended, while the term of a fixed term contract cannot be extended, as if it is, it ceases to be fixed term.

57. The holding in the case of Monica Munira & 6 Others v. Mount Kenya University (supra) places an employer under obligation to present an employee with formal charges and hear him in his defense before terminating a probationary contract. 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.

58. I thus find and hold that though the Claimant was serving under a probationary contract, she was entitled to both fair procedure and the substantive justification prior to the termination of her probationary contract, which she was clearly not given and which renders her termination unfair and unlawful and so I hold.

Whether the Claimant is entitled to the reliefs sought

59. The Claimant sought payment of one month's pay in lieu of notice, Prorated leave, Payment for public holidays worked, 12 month's pay as compensation for unlawful termination, Costs of this suit and Interests thereon.

One month pay in lieu of notice

60. The Claimant admitted receiving payment on account of pay in lieu of notice, salary for days worked in December, 2022 and a mileage allowance. On this account, this claim fails and is dismissed.



Prorated leave

61. The Claimant admitted taking 5 days of leave during her probation period. Her claim on leave is therefore not merited.

Holiday pay

62. The Respondent did not lead evidence to show that the Claimant did not work on public holidays and the claim succeeds on this account and it is allowed as prayed.

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

63. The finding of an unfair termination entitles the Claimant to an award of compensation. The court notes that the Claimant did not appeal against her appraisal rating and had served to the end of the probation period.

64. For this reason, I deem an award of one months' salary sufficient compensation for the unfair termination.

65. In the end, the Claimant's claim succeeds and orders granted as follows:-

- a. A declaration that the Claimant's termination was unfair and unlawful
- b. 1 month's salary as compensation for the unfair termination at Kshs. 242,000/=
- c. Holiday pay at Kshs. 55,846/-
- d. The Respondent 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 13TH DAY OF MARCH, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Mukaya present for the Claimant

Mr. Simon Wachira present for the Respondent

Ms. Esther S-C/A

