



Otieno v Fairmont Mount Kenya Safari Club (Employment and Labour Relations Cause E017 of 2024) [2025] KEELRC 796 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 796 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E017 OF 2024**

**ON MAKAU, J
MARCH 12, 2025**

BETWEEN

JACKSON OTIENO CLAIMANT

AND

FAIRMONT MOUNT KENYA SAFARI CLUB RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 22nd May 2024, the claimant alleged that the respondent had unfairly terminated his employment and prayed for the following reliefs: -
 - a. Damages for wrongful termination.....Kshs.1,680,000
 - b. Terminal benefits.....Kshs.60,000
 - c. Costs and interest.
2. The Respondent opposed the claim vide its Statement of Response dated 24th July 2024 whereby it averred that the termination was procedurally done during the probation period due to the claimant’s poor performance. Therefore, it prayed for the suit to be dismissed with costs.

Facts of the case

3. The claimant was employed by the respondent vide appointment letter dated 12th October 2023. His position was Chief Steward/Hygiene Manager reporting to the Executive Chef. His monthly salary was Kshs.140,000. He was to serve six months’ probation during which time either party could terminate the contract by serving the other 28 days’ notice or pay salary in lieu of notice. After the probation, the contract was terminable by a notice of two months or payment of salary in lieu of notice.



4. The claimant started working on 15th December 2023, which was a peak season due to the December holidays. He did not impress the employer with his performance and on 25th January 2024 he was called to a meeting with the Operations Manager, acting Executive Chef and the Food and Beverage Manager.
5. There was no prior notice and no agenda was shared. The claimant was then put on a Performance Improvement Plan (PIP) even before completing the probation period of six months. He blamed his predicament on interference with his roles by the Executive Chef and the Food and Beverage Manager who had unfairly targeted him through the PIP.
6. On 15th February 2024, the claimant's employment was terminated on grounds that he had failed to improve in his performance even after being placed on PIP. The claimant alleged that the termination was unlawful because he was put on PIP during his probation period. He contended that there was no valid reason for the termination and he was not accorded any hearing. He further averred that the PIP was not statutory.
7. He admitted that he was paid a total of Kshs.185,821 after the termination and he was later issued with a certificate of service after demand through his lawyer. He contended that the amount payable to him was Kshs.256,666.70.
8. The respondent confirmed that it put the claimant on PIP on 2nd February 2024 and dismissed him on 15th February 2024 after he failed to improve on his performance despite the support given to him. It denied that the dismissal was discriminatory and maintained that it was due to poor performance. However, it admitted that it never served the claimant with any show cause letter.
9. It averred that it paid the claimant his terminal dues and issued him with a certificate of service after clearance.

Submissions

10. It was submitted for the claimant that the termination of his contract was unfair and unjustified. It was contended that the claimant was not accorded a fair hearing before the termination as required under section 41(1) of the *Employment Act* and Article 47 of *the Constitution*. It was argued that the fact that the claimant was on probation and he had been placed under PIP did not disentitle him the right to fair hearing before dismissal from work.
11. For emphasis, reliance was placed on Evans Kiage Onchwari v Hotel Ambassadeur Nairobi (2016) eKLR, Monicah Munira Kibuchi & 6 others v Mount Kenya University, Antony Mkala Chitavi v Malindi Water and Sewerage Company Limited (2013) eKLR and Munyi v Hasbah Kenya Limited (Cause 764 of 2016) (2022) KEELRC 1446 (KLR) (5 August 2022) (Judgment) where the right to fair hearing before termination was upheld.
12. It was further submitted that the employer in the instant case did not discharge its burden of proof of poor performance that was cited as the reason for the separation. It was submitted that the period of three weeks PIP was not sufficient for any meaningful assessment of the claimant's performance. Besides he was a victim of interference from the Food and Beverage Manager and the Executive Chef who kept undermining him. It therefore argued that the alleged poor performance was not proved and no evaluation report was filed in court.
13. For emphasis, several cases were cited including Munyi v Hasbah Kenya Limited, supra.
14. In the end, this court was urged to find that the claimant has proved a case of unfair termination and therefore is entitled to the reliefs sought in his claim plus costs.



15. On the other hand, it was submitted for the respondent that the dismissal of the claimant was substantively fair since he was not adequately performing his duties as the Chief Steward and Hygiene Manager. He failed to provide regular reports and specifically on 9th and 10th January 2024 when requested by the Director of Operations. On 11th January 2024 a food safety incidence occurred at the hotel where a foreign object was found in the food served at dinner, which raised the issue of hygiene and safety.
16. Due to persistent failure by the claimant to complete crucial reports, a meeting was held on 25th January 2024 followed by placement of the claimant to PIP. The claimant failed to improve and he was summarily dismissed under clause 1.4 of his contract of employment and section 44 of the *Employment Act*. Consequently, it was submitted that the dismissal was fair and as such the claimant is not entitled to the reliefs sought. Besides, he was paid his terminal dues including salary in lieu of notice and was also issued with certificate of service.

Issues for Determination

17. Having considered the pleadings, evidence and submissions presented to this court, the issues for determination are: -
 - a. Whether the termination of claimant's contract of service was unfair and unlawful.
 - b. Whether the reliefs sought are merited.

Unfair termination

18. Section 45 (2) of the *Employment Act* provides that: -

- “(2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

19. The question that arises is whether the reasons cited for the termination herein were valid and fair, and whether a fair procedure was followed before the termination was decided.

Reason

20. The termination letter dated 15th February 2024 stated as follows:

“Dear Jackson

RE: Notification-termination Of Employment During Probation

We write to refer to the above subject.



After careful consideration and assessment of your performance during the probation period, it is with regret that we have reached the decision to terminate your employment effective 15th February 2024. We hereby provide you notice as per your contractual agreement in lieu.

...after thorough evaluation, it has become evident that there are certain areas where your performance have not met the expectations outlined for this position...

Upon your separation, the hotel will pay you the following separation package...

28 days' notice period months (sic) effective 15th February 2024. Leave days earned and not taken. Lieu days accrued and not taken..."

21. The reason for the termination was cited as under performance. The claimant was accused of not making regular daily and weekly reports from his docket. An issue of a foreign object came up in one dinner. The claimant was placed on a PIP to help him improve his performance but in the employer's assessment, the claimant did not improve hence the separation.
22. The claimant denied the alleged poor performance and averred that the period of the PIP was too short and no evaluation report was produced. He accused his seniors of interference and undermining him.
23. Probation is a period in employment contracts with statutory underpinning. It is meant for the employer and the employee to assess one another for compatibility before the parties decide to bind themselves for longer period in an employment relationship. It is therefore correct for either party to decide to terminate the contract before the probation period is over.
24. Section 42 of the *Employment Act* provides that: -
 1. "The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.
 2. A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
 3. No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
 4. A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."
25. The import of above provision was to create a pre-contract relationship, sui generis where the tenets of natural justice as codified under section 41 and 45 of the *Employment Act* would not apply. However, that arrangement has been declared unconstitutional for being contrary to the right to fair Labour Practices and right to fair administrative action as guaranteed under Article 41 and 47 of *the Constitution*. (See *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi (2016) eKLR*, *Monicah Munira Kibuchi & 6 others v Mount Kenya University, Supra*).
26. In view of the foregoing development in our jurisprudence, the special nature of the probationary contract has been eroded and therefore the employers are now required to act fairly before terminating probationary contracts. They must demonstrate valid reason and follow fair procedure as contemplated under Article 47 of *the Constitution* and section 41 of the *Employment Act*.
27. In the instant case, I am satisfied that the employer has demonstrated a valid reason for terminating the claimant's probationary contract. He did not perform to the satisfaction of the employer and the



employer was justified to separate from him after noticing that the two were not compatible for long term employment relationship. The claimant failed to make daily and weekly report as required and also failed to prevent a hygiene incidence, where a foreign object was found in customer's dinner food.

28. As regards the procedure followed, I agree with the claimant that he was not accorded any hearing before the abrupt termination. Section 41 provides that: -

“41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

29. The above provision is couched in mandatory terms. An employer intending to dismiss an employee on account of poor performance, must accord the employee a fair hearing. Remember that, the decision to terminate for the reason of poor performance, the employee may have been preceded by a PIP, but that does not distinguish the employee's rights to fair hearing under section 41 above. (see *Jane Wairimu Macharia v Mugo Waweru & Associates (2012) eKLR* and *Kenya Science Research International Technical and Allied Workers Union v Stanley Kinyanjui and Magnet Ventures Ltd, supra*).

30. I have noted from the termination letter that the employer offered to pay the claimant salary in lieu of notice under clause 1.4 of his appointment letter. However, that offer did not disentitle the claimant to his right to hearing before termination for the reason of poor performance. I gather support from *Kenfreight EA Ltd v Benson K.Nguti (2016) eKLR* report where the Court of Appeal held as follows:-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

31. In view of the finding that the respondent terminated the claimant's contract without prior hearing, I hold that the termination was unfair within the meaning of section 45 of the *Employment Act*.

Reliefs

32. The claimant prayed for compensation of 12 months gross salary for unfair termination equaling to Kshs.1,480,000, Kshs.60,000 as terminal benefits and certificate of service. During the hearing, he



admitted that a certificate of service was issued after demand by his lawyer. The said claim is therefore overtaken by events.

33. The claim for terminal benefits of Kshs.60,000 lacks particulars and supporting evidence. Therefore, the same is declined.
34. The claim for compensation for unfair termination is merited and I award the claimant one-month salary considering the short period of services and also the fact that he caused the termination through poor performance.

Conclusion

35. I have found that the claimant has proved on a balance of probability that his contract of service was terminated unfairly by the respondent. Consequently, I enter judgment for him in the sum of Kshs.140,000 as compensation for the unfair termination. The award is subject to statutory deductions. I further award him costs and interest at court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF MARCH, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

