



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Vert Limited (Cause 495 of 2019)
[2025] KEELRC 694 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 495 OF 2019
L NDOLO, J
MARCH 6, 2025**

BETWEEN

JUSTUS MUTUA CLAIMANT

AND

VERT LIMITED RESPONDENT

JUDGMENT

1. The Claimant's case as set out in his Statement of Claim dated 29th July 2019 is that the Respondent unlawfully and unfairly terminated his employment on 30th March 2019. The Respondent denies the Claimant's claim by its Memorandum of Response dated 7th August 2020.
2. The matter went to full trial where the Claimant testified on his own behalf, with the Respondent calling its Managing Director, Jane Wanjiru Ndegwa. Both parties also filed written submissions.

The Claimant's Case

3. By a letter dated 2nd January 2019, the Claimant was employed by the Respondent, in the position of Finance and Administration Manager, at a gross monthly salary of Kshs. 300,000. The Claimant worked for the Respondent until 30th March 2019, when his employment was terminated.
4. The Claimant claims that the termination of his employment was unlawful and unfair for the following reasons:
 - a. The termination was on account of non-performance in the role of General Manager, whereas the Claimant had been employed as Finance and Administration Manager;
 - b. The Claimant was not given a hearing before the termination, contrary to the rules of natural justice and the [Employment Act](#);
 - c. The Respondent failed to follow fair procedure before the termination;



- d. There was no job description or duties against which the Claimant was to be evaluated;
 - e. The Respondent failed to give notice to the Claimant before the termination.
5. The Claimant's claim is as follows:
- a. General damages for unlawful termination of employment;
 - b. 12 months' salary in compensation;
 - c. Housing allowance;
 - d. Certificate of service;
 - e. Costs plus interest.

The Respondent's Case

6. In its Memorandum of Response dated 7th August 2020, the Respondent admits having employed the Claimant in the position of Head of Finance and Administration, effective 11th February 2019, subject to a probation period of three (3) months.
7. According to the Respondent, the Claimant was re-designated as General Manager. It is alleged that the Claimant was made aware of his re-designation through an email dated 15th February 2019.
8. The Claimant is said to have accepted and acquiesced to the re-designation as evidenced by his email dated 7th March 2019, addressed to the entire organisation, in which he described himself as General Manager.
9. The Respondent states that the Claimant proceeded to carry out his duties as General Manager, including meeting various teams, as evidenced in minutes and follow up email communication.
10. The Respondent avers that the Claimant's 3 months' probationary period was to come to an end on 11th May 2019. The Respondent adds that the Claimant's suitability for the job was assessed and he was found not to be a good fit for the organisation.
11. The Claimant's employment was therefore terminated vide a letter dated 30th March 2019, with a notice period of seven (7) days' as required under Clause 7 of his letter of appointment.
12. The Respondent states that the Claimant was paid his terminal dues amounting to Kshs. 99,600 being pay in lieu of notice and accumulated leave days.
13. The Respondent's case is that the Claimant's claim does not disclose a cause of action as per the reading of Section 42 of the *Employment Act*. The Respondent asserts that since the Claimant was still serving probation, he was not entitled to procedural fairness protection.
14. The Respondent further asserts that by his conduct, the Claimant acquiesced to the change in his designation from Head of Finance and Administration to General Manager. In this regard, the Respondent points out that the Claimant did not raise any objection regarding his designation.
15. The Respondent claims to have relied on the Claimant's conduct and thus held him out as General Manager.

Findings and Determination

16. There are two (2) issues for determination in this case:



- a. Whether the Claimant has made out a case of unlawful termination of employment;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

17. The Claimant's employment was terminated by letter dated 30th March 2019 stating thus:

“Dear Mr. Justus Munywoki Mutua

Re: Termination of Employment

I refer to your employment contract dated 02nd January 2019 between yourself and Vert Limited.

Under Clause 7 of your appointment letter I wish to inform you that your employment will be terminated effective 30th March 2019. During the probationary period your suitability and performance in the role of General Manager was assessed. Unfortunately you have not met the overall performance and expectation of the role.

In order to complete the separation process, you should complete the clearance process as per the Company's procedures. Upon returning all Company property in your possession, if any, and ensuring that proper handover has been done to the satisfaction of your immediate supervisor, your final dues will be determined and calculated as follows:-

Seven (7) days' notice salary in lieu of notice (i.e. you are not required to work out your period of notice). Any pending annual leave. Any approved outstanding business expenses.

Please note that you are required to make arrangements to settle any debts you may have with the Company on or before 30th March 2019, if not, any debt will be recovered from your final dues.

On behalf of Management I take this opportunity to thank you for the contribution you made to the Company during your period of service and we wish success in your endeavours.

Yours sincerely

(signed for)

Jane Maina

Managing Director”

18. According to this letter, the Claimant's employment was terminated on account of poor performance. The procedure for dealing with cases of poor performance was established in Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010) as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

19. In the subsequent decision in Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR my sister Mbaru J held that an employer alleging poor performance, on the part of an employee, must demonstrate the existence of an objective performance evaluation system as a benchmark for assessing the performance and providing support for improvement.



20. In the present case, the Claimant was not given any opportunity to improve nor was he subjected to any performance appraisal. Even more curious, while the Claimant was employed as Head of Finance and Administration, his designation appears to have somehow mutated to General Manager.
21. While the Respondent pleaded estoppel on account of the Claimant having acquiesced to the mutation of designation, the Court was not convinced. From the evidence on record, the parties' engagement was evidenced by a written contract and there was no way a major variation of terms, such as change in designation could be effected by implication, without a written variation of the employment contract.
22. The Respondent avers that because at the time of termination the Claimant was serving probation, he could not legitimately bring a claim of unlawful or unfair termination of employment. In pursuing this argument, the Respondent relies on Section 42(1) of the *Employment Act*.
23. In my decision in *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR I stated as follows:

“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* 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...even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”
24. I have no reason to change my position on this matter which has since been affirmed by a three judge bench of this Court in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR.
25. Flowing from the foregoing, I find for the Claimant and declare that the termination of his employment was substantively and procedurally unfair.

Remedies

26. Consequently, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the fact that he did not contribute to the termination. I have further considered the Respondent's failure to observe due process in bringing the employment relationship to an end.
27. The Claimant also claims house allowance. However, according to his employment contract dated 2nd January 2019, the Claimant earned a consolidated salary which would ordinarily be inclusive of house allowance. This claim therefore fails and is disallowed.
28. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 900,000 being three months' salary in compensation for unlawful and unfair termination of employment.
29. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
30. The Claimant is also entitled to a certificate of service plus costs of the case.



31. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MARCH 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Kabaruu for the Claimant

Ms. Konya for the Respondent

