



theuri v Rhombus Construction Company Limited & 2 others (Cause E832 of 2023) [2025] KEELRC 1207 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E832 OF 2023**

**AK NZEI, J
APRIL 25, 2025**

BETWEEN

JOSEPH THEURI CLAIMANT

AND

RHOMBUS CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

FRANK MUCHINA 2ND RESPONDENT

E GITHINJI KINYANJUI 3RD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents herein vide a Statement of Claim dated 13th October, 2023 and filed in Court on 16th October, 2023, and sought the following reliefs:-
 - a. A declaration that the Respondent unfairly terminated the Claimant's employment.
 - b. An order directing the Respondent to pay the Claimant's salary arrears.
 - c. Damages for unfair termination of employment (12 x 100,000/=) = Kshs.1,200,000/=.
 - d. Costs of the suit and interest at court rates from the date of filing suit until payment in full.
 - e. An order directing the Respondent to remit NHIF and NSSF statutory deductions.
 - f. Any further relief that the Court deems fit.
2. The Claimant pleaded:-
 - a. that on 5th March, 2022, the Respondents offered the Claimant employment as a Project and Tender Manager in an acting capacity, which the Claimant accepted.



- b. that upon acceptance of employment, the Claimant was issued with a separate document setting out his job description.
 - c. that the parties signed a 3 years contract that was to expire on 7th March, 2025, renewable by the parties' mutual agreement based on the Claimant's performance.
 - d. that the Claimant's starting gross monthly salary was Kshs.100,000/=, reviewable (upwards) based on performance.
 - e. that the probationary period was 3 months; during which either party could terminate the contract by giving two weeks' notice or two weeks' pay in lieu of notice.
 - f. that on 4th May, 2022, the Claimant received a letter from the 2nd Respondent notifying him of termination of his employment contract; and informing him that he had one week remaining at the company and would not be an employee as of the 11th May, 2022.
 - g. that during the period of employment, the Claimant had salary arrears amounting to Kshs.250,000/= which was still outstanding.
 - h. that the Respondent did not remit NSSF and NHIF contributions.
 - i. that whereas the Claimant was entitled to 2 weeks' notice, the Respondents purported to give him a one week notice, in patent breach of the employment contract.
 - j. that termination of the Claimant's employment was unfair.
3. Documents filed alongside the Claimant's Statement of Claim included the Claimant's affidavit in verification of his claim herein. Other documents filed were the Claimant's written witness statement dated 13th September, 2024 and an evenly dated list of documents listing 4 documents. The listed and filed documents included a duly executed employment letter (contract) dated 5th March, 2022, Employees Terms and Conditions of Service, notice to terminate employment dated 4th May, 2022 and a demand letter dated 14th September, 2023.
 4. The Court's record shows that the Respondents were electronically served with the suit documents herein. There is on record an affidavit of service sworn by Nina Mukuche Advocate on 17th October, 2023, indicating that service was effected on 17th October, 2023. When the matter came up in Court on 29th July, 2024, the Court (Dr. Jacob Gakeri, J) fixed the matter for Formal Proof on 21st November, 2024. The suit came up for formal proof before me on 21st November, 2024.
 5. The Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 3 of this Judgment.
 6. The Claimant further testified:-
 - a. that he was employed (by the Respondents) as a Project Tender Manager in March 2022, and that no reason for termination of his employment was given in the termination notice. That the letter dated 4th May, 2022 just stated that his services were no longer needed.
 - b. that the Claimant was not paid any salary for the 2 months that he worked for the Respondents; and that the contractual (monthly) salary was supposed to be Kshs.100,000/=.
 - c. that termination of the Claimant's employment devastated him (the Claimant), as he had already moved to Nairobi and rented a house, and did not know where to get rent from or how to pay his bills.



7. The employment documents produced in evidence by the Claimant clearly show that his employer was Rhombus Construction Company Limited (the 1st Respondent); and that the 2nd and the 3rd Respondents signed the employment documents as the 1st Respondent's General Manager and Chief Executive Officer respectively. The 2nd Respondent (Frank Muchina) signed the Claimant's Letter of Appointment dated 5th March, 2022, while the 3rd Respondent (E. Githinji Kinyanjui) signed the Notice to Terminate Employment Contract dated 4th May, 2022. The 1st Respondent is a limited liability company, a Persona Juridica with a legal identity that is distinct from that of its directors and/or officials. The 2nd and the 3rd Respondents are wrongly enjoined in the suit herein, and the suit against them is hereby dismissed with no order as to costs. This leaves for determination the Claimant's suit against the 1st Respondent, Rhombus Construction Company Limited.
8. Issues that fall for determination, in my view, are as follows:-
 - a. Whether termination of the Claimant's employment was unfair.
 - b. Whether reliefs sought by the Claimant are deserved.
9. On the first issue, evidence on record shows that the Claimant was on 5th March, 2022 employed by the 1st Respondent, Rhombus Construction Company Limited, on a three-year contract, and that his employment was terminated by the 1st Respondent with effect from 11th May, 2022. The Claimant was given a one-week termination notice, given vide the termination notice letter dated 4th May, 2022. The Claimant thus worked for the 1st Respondent for approximately two months, and his termination fell within the three months' contractual probationary period.
10. It is worthy noting that whereas the Claimant's contract of employment provided that he (the Claimant) would be entitled to two (2) weeks' termination notice or two (2) weeks' pay in lieu of notice if termination occurred during the three (3) months' probationary period, the 1st Respondent gave the Claimant a one-week termination notice; thus breaching the contract of employment and rendering the termination procedurally unfair.
11. The contract of employment dated 5th March, 2022 states in part:-

“. . . you will be on probation for three (3) months during which period either party may terminate this contract by giving each other a two (2) weeks' notice or a two (2) weeks' pay in lieu of notice . . .”
12. Further, the 1st Respondent did not state, in the termination notice dated 4th May, 2022, the reason for which it was terminating the Claimant's employment. The said notice states in part:-

“Pursuant to the employment contract agreement entered between you and Rhombus Construction Company Limited, any party may terminate the contract agreement by giving the other party a one-week notice. This letter therefore serves as our notice to terminate your employment contract with us by giving you a one-week notice effective the date of this letter.

Your last working day with us shall effectively be Wednesday 11th May, 2022 . . .”
13. Section 45 (1) and (2) of the *Employment Act* provides:-
 - “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –



- (a) that the reason for 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 . . .”

14. The term “employee” is defined in Section 2 of the *Employment Act* to mean:-

“A person employed for wages or a salary and includes an apprentice and indentured learner.”

15. The Black’s Law Dictionary (10th Edition) on the other hand defines an employee as:-

“Someone who works in the service of another person (employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”

16. The foregoing definitions of an employee do not exclude an employee serving a probationary period under his or her employment contract. The Claimant’s 3 years’ employment contract dated 5th March, 2022 provided for his salary during the 3 years period, which period included the 3 months’ probationary period. The contract also had a provision on control by the 1st Respondent of the Claimant’s work performance. The contract states in part:-

“We are pleased to offer you employment on contract basis with effect from 7th March, 2022. Your initial position shall be Projects Tender Manager in an acting capacity for Rhombus Construction Company Limited (Rhombus) under the Chief Executive Officer’s office and reporting to the General Manager. This position will be on a gross salary of Kenya Shillings One Hundred Thousand (Kshs.100,000/=) all-inclusive per month.

Please note that this is a THREE-YEAR CONTRACT, expiring on 7th March, 2025, renewable by mutual agreement by the two parties subject to your performance . . .

After a successful completion of probation period, either party may terminate this contract by giving a one (1) month notice or a one (1) month pay in lieu of notice.”

17. The upshot of the foregoing is that failure by the Claimant’s employer (the 1st Respondent) to give a reason and/or a valid reason for terminating the Claimant’s probationary employment rendered the termination substantively unfair.

18. The provisions of Section 45(1) and (2) of the *Employment Act* cannot be abrogated by an employer in terminating an employee’s employment, regardless of whether or not the employee is serving his or her probationary period.

19. An employer terminating an employee’s probationary contract is only exempted from adhering to the procedure set out in Section 41 of the *Employment Act*. Section 42(1) of the *Employment Act* provides as follows:-

“(1) The provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract.”



20. I find and hold that termination of the Claimant's employment by the 1st Respondent was procedurally and substantively unfair, and I so declare.
21. Although Section 45(3) of the *Employment Act* excludes an employee who has not been continuously employed by his employer for a period of not less than thirteen months immediately before the date of termination from the right to plead unfair termination, I am persuaded by the High Court's decision in Samuel G. Momanyi – vs – Attorney General & Another [2012] eKLR (Lenaola, J – as he then was) where Section 45(3) of the *Employment Act* was declared unconstitutional.
22. On the second issue, and having made a finding that that termination of the Claimant's employment was unfair, and taking into consideration the manner in which the Claimant's employment was terminated, I award the Claimant the equivalent of three (3) months' salary, which is Kshs.300,000/=.
23. The Claimant pleaded that during the two (2) months that he worked for the 1st Respondent, he was not paid his salary, and that his salary for the said period was in arrears at the time of termination. This evidence was neither rebutted nor controverted, the 1st Respondent not having defended the suit; though shown to have been served. The Claimant's contractual monthly salary is shown to have been Kshs.100,000/=. I award him Kshs.200,000/= being salary arrears for the two (2) months worked.
24. In sum, and having considered written submissions filed on behalf of the Claimant, Judgment is hereby entered for the Claimant against the 1st Respondent as follows:-
 - a. Compensation for unfair termination of employment..... Kshs.300,000/=
 - b. Salary arrears Kshs.200,000/=Total = Kshs.500,000/=
25. The awarded sum shall be subject to statutory deductions as applicable at the date of termination of the Claimant's employment.
26. The Claimant is also awarded costs of the suit, to be taxed on the lower scale.
27. The Claimant is also awarded interest on the awarded sum, to be computed at Court rates from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS* 25TH DAY OF APRIL 2025

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

Mr. T. Oduor for the Claimant

No appearance for the Respondent

