



**Khagali v Music Copyright Society of Kenya (Cause E1071 of 2023)
[2025] KEELRC 1449 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1071 OF 2023**

CN BAARI, J

MAY 22, 2025

BETWEEN

FELIX MUSHUKHANI KHAGALI CLAIMANT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA RESPONDENT

JUDGMENT

1. Before court is the Claimant's Memorandum of Claim dated 20th December, 2023. Under the claim, the Claimant seeks the following reliefs: -
 - a. A declaration that he was an employee of the Respondent.
 - b. A declaration that the termination of his employment was unlawful, unprocedural and unfair.
 - c. An order for the Respondent to pay Kenya shillings eighty four thousand, four hundred and eighty six thousand (Kshs 84,486/-) to the Claimant being one month salary in lieu of notice.
 - d. An order for the Respondent to pay the Claimant pending allowances and per diems in the sum of Kenya shillings nine hundred and forty nine thousand (Kshs 949,000/-).
 - e. An order for damages calculated in terms of 4 months gross salary at dismissal of Kshs. 113,100.00 per month x four (4) months the total sum being Kshs.452,400/-.
 - f. An order for the Respondent to issue a certificate of service to the Claimant.
 - g. Interest on c, d and e above
2. The Respondents filed a defence dated 27th March, 2023, denying the Claimant's claim.
3. Both the Claimant's and the Respondent's cases were heard on 4th November, 2024. The Claimant testified in support of his case, adopted his witness statement and produced the documents filed in



the matter. The Respondent presented a Mr. Ezekiel Mutua their Chief Executive Officer to testify on its behalf. He adopted his statement and equally produced the documents filed on behalf of the Respondent.

4. Submissions were received from both parties.

The Claimant's Case

5. The Claimant states that at all material times to this suit, he was an employee of the Respondent. He avers that he was a Personal Assistant (PA) to the Chief Executive Officer (CEO) of the Respondent, appointed as such vide a letter of appointment dated 5th May 2022 and served in that capacity until the 30th October 2023, when he was unprocedurally dismissed.
6. It is his case that he discharged his duties diligently, professionally and with loyalty. The Claimant states that he was also appointed to chair the communication committee that reviewed the Respondent's communication policy in 2023.
7. The Claimant avers that his net salary was Kenya shillings eighty four thousand, four hundred and eighty six thousand (Kshs84,486/-) and which is evidenced by the copies of the payslips produced before court.
8. The Claimant further avers that the Respondent deducted and paid on his behalf statutory deductions; namely National Social Security Fund (NSSF) in which he is the holder of NSSF NO.241060915, and National Health Insurance Fund (NHIF) in which he holds NHIF NO.2706793. The Claimant avers further that such deductions were only made on behalf of employee as per Section 20 of the *Employment Act*.
9. The Claimant states that his dismissal on or about the 30th October 2023, was marred with a lot of irregularities since he was not served with a warning letter, notice to show cause, nor subjected to a disciplinary meeting prior to his dismissal.
10. It is his case that even during termination, the Respondent failed to issue him with a one month's notice of termination or a month's pay in lieu of notice as provided in the appointment letter dated 5th May 2022.
11. The Claimant states that he was per the human resources policies and procedures manual, entitled to allowances and per diems. He avers further that being the PA to the Chief executive officer(C.E.O), he was constantly required to accompany the CEO to different functions, and in most instances he used to work overtime and travel from time to time and as a result, the Claimant was entitled to allowances and per diems. It is his case that initially, the Respondent made partial payments, but ultimately stopped making the payments, despite the constant reminders and filling out the requisite forms as provided for under the policy guidelines issued by the Respondent.
12. The Claimant states that the Respondent currently owes him Kenya shillings nine hundred and forty nine thousand (Kshs 949,000-) in terms of unpaid commissions and per diems.
13. It is the Claimant's case that the Respondent's actions amount to unfair termination and unethical practise which is unlawful, unfair and contrary to the basic tenets of fair labour practices as enshrined in the *Employment Act*, and *the Constitution*, and offends the principles of natural justice. He avers further that as a result of the actions of the Respondent he is finding it hard to find any other meaningful employment or be employed elsewhere after his sudden dismissal, and is aggrieved at how his dismissal came about without him being subjected to a fair administrative process.



14. The Claimant avers that the Respondent has deliberately and systematically maligned his character causing him to be ostracized, cajoled and ridiculed by his peers due to the nature of his dismissal and he is finding it hard to find another job.
15. The Claimant contends that since the termination was done devoid of procedures, the termination was untimely, unlawful and unjustified and claims his statutory benefits payable in accordance with statute, both under the [Employment Act](#) and Regulation of wages and conditions of [Employment Act](#).
16. It is his prayer that his claim be allowed.

The Respondent's Case

17. It is the Respondent's case that the Claimant was initially employed as a Personal Assistant to the CEO on or about 5th May, 2023, at a consolidated gross monthly salary of Kshs 113,100/-. It states further that the Claimant was serving on a probationary contract, until he was lawfully terminated.
18. The Respondent denies owing the Claimant any amounts as allowances and states that it always paid any allowances when earned.
19. It is the Respondent's position that it is a stranger to the allegations in the Claimant's claim and reiterates that it lawfully and within its rights terminated the employment as it was within its powers.
20. The Respondent admits that it employed the Claimant, but that his performance was not satisfactory and that the Board resolved that his services be terminated.
21. It is the Respondent's case that since the Claimant was terminated while still on probation, he could not be taken through a disciplinary process.
22. On cross-examination, RW1 told court that though the Respondent's human resources manual requires that an employee be given one month notice, the Claimant was on probation, and that it was the probation that was terminated.
23. RW1 further confirmed that there are instances when employees are entitled to be paid allowances, but that the allowances were not payable to the Claimant since he was on probation.
24. It is the Respondent's prayer that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

25. The Claimant submits that his termination process as conducted by the Respondent was devoid of the procedures encapsulated in the [Employment Act](#) 2007, which provides for mandatory provisions before terminating an employee's employment. It is submitted further that the Claimant like any other employee was to be subjected to due process no matter the circumstances surrounding the termination. He had reliance in *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) to support this position.
26. The Claimant submits that the conduct of the Respondent was demeaning, punitive and in contravention of the constitutional safeguard on the rights of workers to fair labour practices.
27. It is the Claimant's submission that he be awarded compensation in accordance with Sections 50 and 49 of the [Employment Act](#) for wrongfully termination and a declaration to be made that the termination was unlawful, unprocedural and unfair.



28. The Claimant submits that he is entitled to one month's notice or one month's payment in lieu of notice per the provisions of Section 36 of the [Employment Act](#) 2007 and also the contract of employment executed between the parties herein.
29. The Claimant submits further that the conduct of the Respondent in withholding his terminal benefits and failure to issue him with a certificate of service is illegal.

The Respondent's Submissions

30. The Respondent submits that the employment letter produced in evidence clearly stated that the monthly salary was Kshs 78,000/-, House allowance Kshs 23,400/- and extraneous allowances Kshs 11,700/- making a total of Kshs 113,100/- per month. It submits further that the said letter also clearly stated that the Claimant was on a probationary contract of 6 months and further provided for an extension if deemed necessary, which was extended by the letter dated 9th January, 2023, where the reasons for the extension were set out amongst them being his absenteeism and rudeness.
31. It is the Respondent's submission that the letter of employment clearly provides the Claimant's salary and it is not known where his claim for allowances or per diems has come from.
32. It submits that there is no evidence of any unfair or unprocedural termination as the Claimant was on probation, which was never confirmed, and was terminated as per the provisions of his employment letter.
33. The Respondent finally submits that the Claimant has failed to prove his claim and it must fail and be dismissed with costs.

Analysis and Determination

34. The issues that fall for determination are:
 - i. Whether the Claimant was unfairly terminated
 - ii. Whether he deserves the reliefs sought

Whether the Claimant was unfairly terminated

35. The Claimant was employed by the Respondent on 5th May, 2022 and placed on a 6 months' probation, and which probation was extended for a further 3 months for what the Respondent termed as unsatisfactory performance.
36. The Claimant contends that he was subsequently terminated on 30th October, 2023 after an extended probation period without notice, and that the termination violated the procedural dictates of Section 41 of the [Employment Act](#), 2007.
37. On its part, the Respondent asserts that since the Claimant was terminated while still on probation, he could not be taken through a disciplinary process. Further, RW1, on cross-examination told court that though the Respondent's Human Resources Manual requires that an employee is given one month notice, the Claimant was on probation and was in his view, not entitled to termination notice on account of him serving under a probationary contrary.
38. 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. The termination of the Claimant's contract was based on his alleged unsatisfactory performance, even after the probation was extended for a further 3 months.



39. In the case of *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 a probationary contract from procedural safeguards contained in Section 41 of the same Act.
40. Further in *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR the Court opined thus: -
- “.....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.”
41. 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 by reason only that the employee was serving under a probationary contract. 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.
42. The court however notes that although the Respondent contends that what it terminated was the Claimant’s probationary contract, I noted from the Claimant’s evidence that the extension of probation was made vide a letter dated 9th January, 2023, for three months, while the dismissal was made on 30th October, 2023.
43. The probation period by the letter of extension lapsed on 9th April, 2023, which goes to say that immediately the extended probation period ended, and in the absence of a further extension or communication on his confirmation, the Claimant stood confirmed by operation of law.
44. It then follows that what the Respondent terminated was not a probationary contract. The Claimant had by operation of law been confirmed into the permanent and pensionable service of the Respondent.
45. The Claimant should thus have been accorded his rights under Sections 41, 43, 45 and 47 of the *employment Act*, prior to the dismissal, but which he was not.
46. By the foregoing decisions, it is apparent that employees on probation are entitled to both notice and procedural fairness just like any other workers. The Respondent’s own admission that it did not accord the Claimant a hearing on account of him being on probation, outrightly confirms that the Claimant was unfairly terminated, and so I hold.

Whether the Claimant is entitled to the reliefs sought

47. The Claimant sought payment of Kenya shillings eighty four thousand, four hundred and eighty six thousand (Kshs 84,486/-) being one month salary in lieu of notice, an order for payment of his pending allowances and per diems in the sum of Kenya shillings nine hundred and forty nine thousand (Kshs 949,000/-) and an order for damages calculated in terms of 4 months gross salary at dismissal of Kshs. 113,100.00 per month x four (4) months the total sum being Kshs.452,400/-.



One month pay in lieu of notice

48. The Respondent's witness (RW1) confirmed that the Claimant was not issued notice even when the same was a requirement under its HR manual nor paid in lieu of the notice. This claim is therefore admitted and is allowed as prayed.

Pending Allowances

49. Although the Claimant produced letters in evidence indicating that he was appointed to the Respondent's committees, the letters did not attach any payments to the appointment. Further, the payment requests placed before court have no additional evidence showing that the requests were not honoured, the same having been approved for payment close to a year before the Claimant was dismissed.
50. I thus find that the claim for per diem was not proven.

Claim for Damages

51. The Claimant is no doubt entitled to an award of damages his termination having been found unlawful and unfair.
52. The Claimant served for over a year, and his claim on account of damages for the unfair termination is for four months. I therefore deem a 4 months' salary sufficient compensation for the unfair termination, and which is hereby awarded.
53. 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 in lieu of notice at Kshs. 113,100/-
 - c. 4 months' salary as compensation for the unfair termination at Kshs. 452,400/-
 - d. The Respondent shall bear the costs of the suit and interest from the date of this judgment until payment in full.
54. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 22ND DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Kiptunge present for the Claimant

Mr. Rombo present for the Respondent

Ms. Esther S-C/A

