



Omondi & 4 others v Brava Food Industries Ltd (Employment and Labour Relations Cause E1772 of 2017) [2025] KEELRC 1378 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1772 OF 2017**

**JW KELI, J
MAY 9, 2025**

BETWEEN

**BARRACK OMONDI 1ST CLAIMANT
DAVID OWITI 2ND CLAIMANT
ERIC OCHIENG 3RD CLAIMANT
JANE ATIENO 4TH CLAIMANT
MARGARET WANJIRU 5TH CLAIMANT**

AND

BRAVA FOOD INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Claimants, through the law firm of Ongaya & Wambola Advocates filed a Memorandum of claim dated 1/08/2017 and an authority to act (at page 10 of the memorandum of claim); authorizing Barrack Omondi to swear affidavits and take such other necessary actions in the matter on behalf of the other claimants. In the Claimants’ Memorandum of Claim, they sought judgment against the Respondent for:-
 - a. General damages for unfair and unlawful termination of employment.
 - b. The cumulative difference between the earnings of the 3rd & 4th Claimants’ vis a vis what employees with similar job description were earning.
 - c. Uncommuted terminal benefits for the 1st Claimant Ksh.17,956.00.
 - d. 12 months salary for each of the claimants for unlawful and unfair termination of employment.
 - e. Such other or further order as the court may deem just and expedient to grant.



2. The Claimants filed list of documents dated 1st August 2017 together with the bundle in support of the claims received in court with the claim on the 5th September 2017.
3. The Respondent entered appearance on 22nd September 2017 through the law firm of Hassan N. Lakicha & Company Advocates and filed a Reply to the Memorandum of claim dated 22nd March 2022, List of Documents dated 31st January 2024 and the bundle and the Respondent's Witness Statement by Ursula Kevogo dated 31st January 2024.

Hearing and evidence

4. On 27th February 2024, the matter came up for hearing and proceeded with one witness for the Claimants, Barrack Omondi. On this day the court directed that all other Claimants should testify and as such a further hearing date was issued. On 17/12/2024, the matter proceeded for hearing virtually. The Hearing proceeded with 4 witnesses for the Claimants and one witness for the Respondent.
5. After the hearing court issued directions on filing of written submissions. Both parties filed.

Claimants' case in Summary

7. The Claimants were former employees of the Respondent employed in various capacities. The particulars of their employment were as follows:-
 - a) Barrack Omondi was hired on 10/05/2016 as an area sales manager within Nairobi area.
 - b) David Owiti was hired on 8/09/2016 as an area sales manager within Mombasa.
 - c) Eric Ochieng was hired on 3/10/2016 as a sales representative.
 - d) Jane Atieno was hired on 3/10/2016 as a sales representative.
 - e) Margaret Wanjiru was hired on 1/08/2016 as a sales representative.
6. The claimants contended that on diverse dates between 28/12/2016 and 3/01/2017 the Respondent terminated their employment contracts without justification and without an opportunity to be heard in defence.
7. Further, the Claimants asserted that during the Claimants' employment, the Respondent did not provide necessary support to enable the Claimants perform optimally yet it blamed the Claimants for not meeting targets set for them. Additionally, the Respondent violated the principle of equal pay for labour by remunerating employees of the same job description with different salaries. The Respondent upon terminating the Claimant's employment erroneously calculated their dues to their extreme detriment. As a consequence, the Claimants being aggrieved by the conduct of the Respondent instituted this suit.

Respondent's case in summary

8. The Claimants were employed as Sales Representatives and as Area Sales Manager respectively and their duties were specified in the employment contract letters.
9. Barrack Omondi, the 1st Claimant was hired on 10th May 2016 as an Area Sales Manager in Nairobi. The contract was terminated on 29th December, 2016. On 24th November, 2016, the 1st Claimant received a warning letter with regard to his performance requiring him to improve. This did not happen and the contract terminated a month later on December 29, 2016. When he was hired, he had more than 15 years' experience working in similar positions and performance was expected. The



- 1st Claimant was paid all his terminal dues in full which included: accrued unused annual leave days, Medical reimbursement, Parking fees reimbursement and One-month notice pay.
10. David Owiti, the 2nd Claimant was hired on 9th September 2016 as area Sales Manager in Nairobi. His contract was terminated on 28th December,2016. The 2nd Claimant was not confirmed and as per the contract was let go during probation. The Claimant was paid all his terminal dues in full which included: Accrued unused annual leave days, One-month notice pay and Bus fare refund.
 11. Erick Ochieng, the 3rd Claimant was hired on 3rd October 2016 as a Sales Manager in Nairobi. He was terminated on 3rd January,2017. The 3rd Claimant was paid a gross salary of Kenya Shillings Forty Thousand (Kshs.40,000/-) per month and a variable pay of Kenya Shillings Thirty Thousand (Kshs.30,000/-) per month on meeting the targets. He never met the target for the period he was employed and the contract was terminated. The 3rd Claimant was paid his terminal dues in full which included: Accrued unused annual leave days and One-month notice pay.
 12. Jane Atieno , the 4th Claimant was hired on 3rd October 2016 as a Sales Manager in Nairobi. She was terminated on 3rd January, 2017.The 4th Claimant was paid a gross salary of Kenya Shillings Forty Thousand (Kshs.40,000/-) per month and a variable pay of Kenya Shillings Thirty Thousand (Kshs.30,000/-) per month on meeting the targets. She never met the target for the period she was employed. The 4th Claimant was paid her terminal dues in full which included: Accrued unused annual leave days and One-month notice pay.
 13. Margaret Kamau, the 5th Claimant was hired on 1st August 2016 as a Sales Manager in Nairobi. She was terminated on 3rd January, 2017.The 5th Claimant was paid her terminal dues in full which included: Accrued unused annual leave days and One-month notice pay.
 14. The Claimants were served with termination of employment letters, which clearly explained the outcome of weekly meetings held to discuss the Claimants' underperformance. The Respondent has in their custody the Certificate of Service, which the claimants had refused and/or failed to collect from the respondent's offices. The Claimants' underperformance resulted in economic loss to the Respondent. The Claimants were unable to manage the distributors in the areas of their management, which was a key component of the Area Sales Manager's job responsibilities. There was a lack of return on investment and poor management by the Claimants which the Respondent greatly relied on from the Claimants.

Determination

Issues for determination

15. The claimant addressed the following issues in the dispute:-
 - a. Whether the Claimants' termination from employment was unfair and unlawful.
 - b. Whether the Respondent violated the principle of equal pay for labour.
16. The Respondent addressed the following issues in the dispute:-
 - a. Whether the Claimants were terminated during the probation?
 - b. Whether the Claimants were unfairly terminated?
 - c. Whether the Claimants were discriminated?
 - d. Whether the Claimant is entitled to reliefs?



17. The court found the parties were in agreement on the issues for determination in the dispute as follows:-
- a. Whether the Claimants' termination from employment was unfair and unlawful.
 - b. Whether the Respondent violated the principle of equal pay for labour.
 - c. Whether the claimants were entitled to the relief sought.

Whether the Claimants' termination from employment was unfair and unlawful.

18. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit: '45(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 employees 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." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]e KLR).
19. The burden of proof in employment claims is as stated in section 47 (5) of the *Employment Act* to wit:- "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

Substantive fairness.

20. Upon the claimant laying the basis of their employment termination, the burden shifts to the employer to justify the termination. In the instant case, the claimants led evidence that their contracts were terminated on the basis of non-performance without fairness as outlined in summary of facts above. Section 43 of the *Employment Act* places the burden of proof of reasons for termination on the employer, to wit:- '43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." On perusal of the letters of termination of the employment of the claimants, it was indicated that after meeting to discuss their performance, their work output was still below average and the dismissal was as a result of not meeting the core requirements of their jobs. The court concluded non –performance was the reason for the termination of the employment with respect to all the 5 claimants. Was the reason valid?



21. The claimants on the issue submitted it an uncontested fact that the Claimants were under an employment contract with the Respondent. It was also uncontested fact that each of the Claimant was terminated from employment on diverse dates each with specific grievances and proceeded to submit with specificity as follows:-
 - a. Barrack Omondi
22. He was employed by the Respondent on 10/05/2016 as an area sales Manager in Nairobi and his contract terminated on 22/12/2016. The Respondent terminated Barrack from employment on the basis that his performance was below average. Barrack was aggrieved by the Respondent's decision; because the Respondent did not provide Barrack with an assessment record or document or a job description against which he was rated to have poor performance. Additionally, the Respondent did not specify any other wrong committed by Barrack. Instead, the Respondent relied on the supervisor's sentiment, which opined that Barrack did not meet set targets for his job, to conclude that Barrack had poor performance at work. The Respondent did not accord Barrack an opportunity to be heard in his defence on the allegation of poor performance at work, thus violating in toto the provisions of section 41(1) of the *Employment Act*. Additionally, the Respondent had never issued Barrack with previous warnings on his performance at work, thus the Respondent's conduct was in total disregard of section 45(5) (e) of the *Employment Act*. The Respondent's witness, Ursula Kevogo, who was the Respondent's Human Resource Manager, in cross-examination admitted that there were no performance appraisal documents adduced in evidence before the court. Also, Ursula admitted before court that there was no witness statement of the alleged supervisor, Nyota, who rated Barrack's performance. From these set of facts, the Respondent failed to substantiate the ground of poor performance and the targets set for Barrack. On this basis, he urged the court to hold and find that Barrack was unlawfully terminated from employment by the Respondent and award him damages of ksh.2,520,000 for loss suffered. Guided by the holding of the Supreme Court in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 eKLR, he submitted that pursuant section 49 (1) (c) Barrack has a right to claim an equivalent of 12 months' salary of damages from the Respondent thus computing his damages to Ksh. 2,520,000 with consideration that he had a monthly salary of ksh.210,000. Additionally, the Respondent did not pay Barrack overtime pay for Sunday cumulating upto Ksh.15,556 and unreimbursed parking fee of ksh.2400, and the Respondent be directed to pay these dues to Barrack.

David Owiti

23. David Owiti was hired by the Respondent on 8/09/2016 and contract terminated on 28/12/2016. His contract was terminated without notice and the Respondent only communicated to him that an evaluation was done and that he scored poorly. The Respondent neither provided David with the parameters used to rate his performance nor did it ever issue warnings to David about performance at work. Additionally, David was never accorded an opportunity to be defend himself. The Respondent's conduct was in utter violation of sections 41(1) and 45 (5) (e) of the *Employment Act*, which we persuade this court to find and hold that David was unfairly terminated from employment. Also, during his employment, David used his own resources ranging from his personal car, fuel, accommodation, airtime and meals to perform his duties. The Respondent only reimbursed David in his final dues which demonstrates the difficult circumstances under which the Claimant worked and exhibits a deep sense of sacrifice and commitment by David. To cement the Respondent's unfairness, its witness Ursula Kevogo in cross examination, admitted that there was no performance appraisal document for David adduced in evidence. Additionally, record bears us right that there is no witness statement of the supervisor one Mr.Nyota proving David's poor performance. Therefore, there are no targets that can be submitted before this court that were not met by David. David urged the



court to find the Respondent unfairly terminated his contract of employment and award damages of ksh.2,268,000 for the loss suffered. He relied on The decision of Supreme Court in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 eKLR, which being Applied herein gives David a right to claim damages equal to his 12-month salary for unfair termination pursuant section 49(1) (c) of the *Employment Act*. The damages claimed herein are with consideration that he earned a monthly salary of ksh.189,000.

Erick Ochieng

24. Erick was hired by the Respondent on 3/10/2016 and the contract terminated on 3/01/2017 without any evaluation. Further, he was never provided for a performance target that he was rated against. Also, he was not provided for with resources for work such as airtime, bundles or vehicle yet he was required to optimally discharge his duties. To fan the flames, the Respondent did not accord Erick the opportunity to be heard in defence on the allegation of poor performance at work before terminating him from employment. On this basis, the Respondent's conduct amounts to gross violation of the provisions under sections 41(1) and 45(5) (e) of the *Employment Act* which this court ought to chasten. The Respondent has not adduced any scintilla of evidence to justify poor performance and its witness during cross examination admitted that there was no report on Erick's performance that was produced in court or even in existence. It then follows that the Respondent has not substantiated the grounds on poor performance and on this basis, and urged the court to hold and find that Erick was unfairly terminated from employment by the Respondent and award him damages of ksh.840,000 for loss suffered. The claimant relied on the decision of the Supreme Court in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 eKLR, and as such claim for damages equal to 12-month salary with consideration that Erick earned a monthly salary of ksh.70,000 and as such he has a right of damages worth ksh.84,000.

Jane Atieno

25. Jane was hired by the Respondent on 3/10/2016 and contract terminated on 3/1/2017 without any evaluation. Jane was given a termination of contract form and a clearance form. She was then harassed by the Area Sales manager to clear. Further, Jane was not provided for with tools for work. Particularly, in her job she was expected to send reports yet not provided with airtime and bundles; and she was not provided with a vehicle unlike other sales representatives thus being disadvantaged. Further in November 2016, the product distributor closed and Jane was forced to look for products by her own means. The Respondent did not provide any evidence to demonstrate Jane's poor performance. Moreso, the Respondent's witness admitted in cross examination that there was no appraisal report against Jane that showed poor performance. Rubbing salt to Jane's wound the Respondent did not accord her an opportunity to be heard in defence but proceeded to terminate her from employment without evidence that she performed poorly at work and without providing her with a performance rate used to measure her performance at work. The Respondent did not substantially prove poor performance and as such we urge this court to find and hold that Jane was unfairly terminated from employment. The claimant urged the court to award her damages of Ksh.840,000 and rely on the holding by the Supreme Court in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 eKLR and compute Jane's damages to ksh.840,000 with consideration that she earned a monthly salary of ksh.70,000.

Margaret Wanjiru

26. Margaret was hired on 1/08/2016 by the Respondent and contract terminated on 3/1/2017. Margaret was not provided for with resources for work such as airtime or bundles to enable her send reports. In as



much the Respondent alleged poor performance, it did not adduce an appraisal report to demonstrate poor performance by Margaret. Further the Respondent's witness in cross examination admitted that there was no appraisal report showing negative performance by Margaret. The Respondent in twisting the knife into Margaret's wound did not accord her an opportunity to be heard neither did it ever issue Margaret with prior warning on her job performance. As a consequence, the Respondent herein violated provisions in sections 41(1) and 45(5) (e) of the Employment Act. On these grounds we urge this court to bring the Respondent to books for its conduct by awarding damages of ksh.1,308,000 to Margaret for loss suffered. The Respondent failed to demonstrate poor performance as a result. She urged the Honourable court to find and hold that she was unfairly terminated from employment and in awarding damages be bound by the Supreme Court holding in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 eKLR, which being applied herein gives Margaret a claim for damages equal to her 12-month salary. With consideration that she earned a salary of ksh.109,000 she has a right to claim damages worth ksh. 1,308,000. Further, Margaret was entitled to medical cover yet she was not given one thus she had to use her own money to buy medicine which was never refunded, ultimately causing substantial loss and damage to her earnings. In computing her terminal benefits the Respondent deducted ksh.15000 without justification, which we humbly beseech this court to direct the Respondent to pay it back to Margaret.

27. The claimants urged the court to consider that the Respondent has been elsewhere held responsible for unfair termination from employment and refer this court to the judgments in Isdor Rachuonyo v Brava Food Industries Limited (2021)eKLR and Maina v Brava Food Industries Limited (2023) eKLR; in which the Respondent was found to have unfairly terminated the Claimant from employment without justification of the grounds for termination from employment. Flowing from the above, the Claimants submit a prima facie case of unfair termination from employment and on this basis; urge this court to hold and find that the Respondent unfairly terminated the Claimants' from employment and award each of them the general damages claimed for loss of income and injury suffered.

Respondent's submissions.

28. The respondent submitted that before it terminated the employment of the 1st and 5th Claimants it ensured that it met the threshold that is required for procedural fairness as stipulated under sections 41 and 45 of the Employment Act and substantive justification as stipulated under sections 43 and 45 of the Employment Act. That the Respondent carried our weekly review meeting to gauge the performance of all sales managers and sales representatives deployed within the national region. The weekly review meetings were headed by the National Sales Manager, who was the Claimants' supervisor. That the Claimants during Re-examination affirmed that they indeed attended weekly meetings which were held in the Respondent's offices where each Area Sales Manager targets were reviewed and demand for improvements were placed on each individual area sales manager and a warning were issued to the specific area manager who was failing in his work.
29. The Respondent asserted that the termination of Claimants' employment met the requirements set out under section 41 of the Employment Act because the Respondent had a fair and valid reason to terminate the Claimants' employment on account of poor performance and that the proper procedure was followed where the Claimants were pressed to perform and reach his goals during the weekly review meetings and during the meeting which was held on 24th November,2016. That the Claimant (not specified)was accorded an opportunity to improve, to be heard and to air his grievances through communication and meetings with supervisors and department heads but the Claimant had only managed a target of 17% performance which was poor, he demanded that he be supplied with more equipment and that the company to allow him six months which time the Respondent did not have as it had incurred loss as a result of the Claimant's poor performance. That the Claimants during their



interviews produced documents and cover letter indicating their experience and ability to perform the task assigned to them by the Respondent. The Respondent was a start-up company and thus had already started its business a fact which the Claimants acknowledged and thus the Respondent had put great reliance on the claimant's experience to perform and attain its goals.

30. The Respondent relied on the decision in *National Bank of Kenya vs. Pipelastic Samkolit (K) Limited & Another* [2001] eKLR where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded. The respondent further relied on the decision in the case of *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR where the court held that the Court looks into the validity and justifiability of the reasons for termination. In *British Leyland UK Ltd vs Swift* [1981] IRLR 91 where it was held that if a reasonable employer might have reasonably dismissed the employee, then the dismissal was fair. In *Walter Ogal Anuro -v- Teachers Service Commission* [2013] e KLR the Court held that; "... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

Decision

32. The reason of poor performance as a ground of termination of employment was addressed in a decision of the Court cited with approval by the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR of *Jane Samba Mukala v O1 Tukai Lodge Limited Industrial Cause Number 823 of 2010 LLR 255 (ICK)* (September 2013) by Justice M. Mbaru where the court held as follows:-
- a. Where poor performance is shown to be reason for termination, the employer is placed at high level of proofThe employer must show that in arriving at the decision of noting the poor performance as against poor performance, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show that measures are in place to enable them assess the performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to the decision must be established.
 - c. Beyond having such an evaluation measure and before termination on the ground of proper performance, an employee must be called and explanation on their poor performance share where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons of poor performance the employee must be called again and in the presence of an employee of their choice, the reasons or termination shared with the employee". The decision appealed against in Court of appeal was on reason of poor performance advanced by the Bank for terminating the respondent's employment. I have previously upheld the foregoing decision in *Wasike v Nzoia Sugar Company Limited (Cause 90 of 2017)* [2022] KEELRC 61 (KLR) (19 May 2022) (Judgment)
31. Applying the foregoing decision of *Jane Samba Mukala* , on evaluation of the evidence of the respondent as produced by RW, Ursula Kevogo, its Human Resources Manager, there was no evidence placed before the court to prove the validity of the reason of termination of the claimant's contracts on account of poor performance. The only document before the court was a probationary evaluation



form for the 5th Claimant dated 1st August 2016 which had overall performance rating stated as M.E. On the form ME was stated to mean, 'met expectations'. RW admitted she had not produced a negative report on the 5th claimant. There was no evaluations forms produced for the other claimants.

32. RW at cross-examination stated that the respondent had not produced the evaluation forms for the other claimants and admitted to be the custodian of the reports. RW admitted that she had not produced the supervisor appraisal reports nor was there a statement of the supervisor who was alleged to have evaluated the claimants as having performed below par as stated in the letters of termination. There was no evidence of prior warning on performance before the court. The court, having evaluated the evidence, finds the respondent did not prove on a balance of probabilities the reason for termination of the contracts of employment of the claimants on the basis of poor performance. The termination is held to have been unlawful hence unfair for lack of valid reasons.

Procedural fairness

33. The claimants stated that their contracts were terminated without a warning or disciplinary hearing. The respondent's position was that the claimants were all serving under probation. The respondent submitted the Offer of Employment and Contract on Probation and Job Confirmation Clause stated that :

'You will be required to serve a probationary period of Three (3) Months ,from your commencement date .Upon completion of such probationary period ;the Company will at its own discretion :-

- a) Confirm you to your substantive position subject to satisfactory performance.
- b) Extend the probationary period due to unsatisfactory performance; or
- c) Terminate this Contract by rescinding the offer for employment with the Company." That the 2nd,3rd and 4th Claimants were on probation and their employment had not yet crystalized as envisioned in the contract of employment. The Respondent placed reliance in the case of Benjamin Nyambati Ondiba Vs Egerton University (2014)eKLR which gives the meaning and terms of a probationary period and in their view the Claimant's situation fulfilled the criteria set out therein. In view of the definition in the aforesaid case, the Respondent stated that the Claimant had not concluded the probationary period when she opted to resign. The Respondent further submitted that Section 41 of the Employment Act, 2007, shall not apply where a termination of employment terminates a probationary contract. That Section 42 [1] of the Employment Act 2007 states that the provisions of Section 41, which contain the law of fair termination procedure, shall not apply with regard to probationary contracts. Section 42[4] provides for termination through 7 day notice or payment of 7 days' wages by the employer to the employee. That the effect of this is that Employers have no obligation, to hear Employees who are serving probation for any of the reasons stated under Section 41, i.e. poor performance, misconduct or physical incapacity, before arriving at the termination decision. That the termination of the probationary contract is strictly regulated by the terms of the contract. That during termination at the probation period the Respondent paid to the Claimants pay in lieu of notice including all other benefits thus there can be no further demands made on the Employer for substantive justification made



on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. That the law relating to unfair termination does not apply in probationary contracts. In Industrial Court of Kenya Case between Carole Nyambura Thiga v. Oxfam [2013] e-KLR, the Court affirmed that the protection afforded regular Employees under the unfair termination provisions, are not available to Employees whose contracts are terminated while on probation. That Section 43 and 45 of the *Employment Act*, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts. Section 42 would have no meaning, and probation, which is a period granted to the Employer and the Employee to get to know each other before making any firm commitments, would itself be meaningless. An Employee, whose contract is terminated while on probation, has no reason to demand to be shown by the Employer, other reasons for termination, outside the probationary contract. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. The Respondent asserted that the 2nd, 3rd and 4th Claimants are not entitled to the sums claimed since he was not confirmed as an employee and what was due to them was paid accordingly.

Decision

34. The claimant relied on an earlier decision by the court delivered by Justice Ocharo Kebira against the instant employer, where the contracts of employment was also terminated on account of performance in sales, being Isdor Rachuonyo v Brava Food Industries Limited (2021)eKLR and Maina v Brava Food Industries Limited (2023) eKLR; In the decision on whether an employee on probation was entitled to procedural fairness the court observed that the provision of section 41 of the *Employment Act* aligned with the provisions of *the Constitution* of Kenya 2010, regarding the right to fair hearing (Article 41), and those of the Fair Administrative Actions Act thus applicable to all employees.
35. Four elements must thus be discernible for the termination procedure to pass muster of compliance with section 41 of the *Employment Act* namely ;-
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee. (Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] e KLR.)
36. The court has to admit over time there were varied interpretations of the provision of section 42 of the *Employment Act* as to whether the employees on probation were entitled to procedural fairness. The Court of Appeal in Red Lands Roses Ltd v Mugo (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment) took time to explain the history and evolution of interpretation of section 42 of the *Employment Act* by the Court over the years. The Court of Appeal upheld the decision of the Court in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another [2021] eKLR, a decision of a bench of three judges of the ELRC (Mbaru, Abuodha and Ndolo, JJ.). In the case the petitioners challenged the upfront section 42(1) of the *Employment Act* as inconsistent



with Articles 10, 25, 41, 47 and 50 of *the Constitution*. The petitioners' contracts of employment were terminated during probation but they contended, among others that section 42 (1) of the Act was draconian, curtailed their constitutional rights and allowed employers to dismiss employees on probation whimsically. After hearing the matter, the Court (Monica Munira Kibuchi & 6 others), by a judgment dated 30th July 2021 held that, to the extent that section 42(1) of the Act excludes an employee on probation from the provisions of section 41 of the Act, it was inconsistent with Articles 41 and 47 of *the Constitution* and therefore null and void. The Court of Appeal observed: "To the best of our knowledge, that decision of the ELRC has not been challenged in this Court or reversed. It is also not the subject of appeal in the appeal before us. In short, the decision of the ELRC in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another (supra) represents the law, taking into account the jurisdiction and mandate conferred upon ELRC by Article 162(2) (a) of *the Constitution* and section 12 (1) of the Employment & Labour Relations Court Act. Indeed, recently, in Kenya Tea Growers Association & 3 others v the National Social Security Fund Board of Trustees & 13 Others [2024] KESC 3 (KLR) the Supreme Court held that there was nothing in *the Constitution* or the akn/ke/act/2011/19 *Environment and Land Court Act* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC was precluded from declaring the constitutional validity of a statute. We would add, or a provision of a statute."

37. The Court of Appeal (Red Lands Roses Ltd supra) further held in paragraph 39: "Turning to the merits of this appeal, the same is primarily hinged on the argument that the ELRC ignored section 42 of the Act. After filing the appeal, the ELRC declared section 42 of the Act unconstitutional. None of the parties address the fact that section 42 of the Act had been declared unconstitutional. As of now, the provision the appellant wishes enforced is of no legal effect, having been declared null and void. As we have already stated, to the best of our knowledge, that decision of an expanded bench of three judges of the ELRC has neither been appealed nor reversed." I say no more. The law is settled unless overturned by the Supreme Court. The defence of the Respondent that the claimants were not entitled to hearing before termination fails as section 42 of the *Employment Act* was declared unconstitutional in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another [2021] eKLR, a decision of a bench of three judges of the ELRC (Mbaru, Abuodha and Ndolo, JJ.) and the decision has been upheld by the Court of Appeal in Red Lands Roses Ltd v Mugo (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment). The court holds that the termination of the claimants' contracts while on probation was without procedural fairness for lack of compliance with the provisions of section 41 of the *Employment Act*.
38. In the upshot the termination of the employment of the claimants is held to have been both substantively and procedurally unfair.

Whether the Respondent violated the principle of equal pay for labour.

The claimant's submissions

39. The claimants contended that the Respondent violated the principle of equal pay for equal labour by remunerating some of the Claimants differently with other colleagues who had the same job description. That it was common ground that Jane, Erick and Margaret were retained by the Respondent for position of Sales Representatives. Jane and Erick were aggrieved by difference in remuneration between them and Margaret. Whereas Margaret was remunerated ksh.109,000 for the position of sales representative, Jane and Erick were remunerated ksh.70,000 for the same job description. This discrepancy by the Respondent is not justified for the reasons that the terms and conditions in the contract of employment were similar to the three and only the remuneration was different. During cross-examination, the Respondent's witness admitted to there being a grievance



of a lack of pay for equal labour. Further, the witness was referred to the Claimant's contracts of employment and admitted in oral evidence that there was a variation in terms of pay for equal labour and failed to justify the difference in pay. On this basis, the claimants urged the court to award the underpaid salaries for the period which Jane and Erick worked for the Respondent. With precision, Jane worked for the Respondent between 3/10/2016 to 3/1/2017, thus a total of three months of being underpaid with comparison to Margaret. Thus, the sum total for her underpaid salary is Ksh. 117,000. In brevity, Erick worked for the Respondent between 3/10/2016 to 3/1/2017, thus a total of three months being underpaid with comparison to Margaret. As a consequence, the sum total of his underpaid salary is Ksh. 117,000.

The respondent's submissions

40. The Respondent in response submitted that where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. The Respondent submitted that it was observed in *Louw v Golden Arrow Bus Services (Pty) Ltd* that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article *The Anatomy of Disputes about Equal Pay for Equal Work*, "The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on,

"In equal value claims different skills, or at least a different mix of job attributes, are in issue. The employer may therefore legitimately argue that in equal value claims he should be allowed to explain and justify a wage differential by, for example, showing that persons possessing one set of skills or mix of job attributes are commanding higher wage rates in the local market." That in claims of equal pay for equal work or work of substantially equal value, there is always a need on the part of the claimant to establish comparators for purposes of showing unequal pay in comparison to the comparators. That the Claimants had different job descriptions and were deployed in different areas which had different covering. The 1st Claimant was an Area Sales Manager Nairobi and supervising 6 Sales Representatives, he had 15 years' experience at the time of employment. The 2nd Respondent was an Area Sales Manager in Mombasa and had no people to supervise, at the time of his employment he had more than 10 years working experience. The 3rd Claimant was a Sales Representative in Nairobi and was among the 6 Sales Representatives under the 1st Claimant, at the time of his employment he had 2 years work experience. The 4th Claimant was a Sales Representative in Nairobi and was among the 6 Sales Representatives under the 1st Claimant, at the time of her employment she had 3 years work experience. The 5th Claimant was a Sales Representative in Nairobi reporting to a different Area Sales Manager she had over 9 years work experience. The Respondent at the time of hiring being a start up company was employing its employees based on the years of the experience they had. That the Claimants were to play a major role to help the Respondent break into the market by identifying a customer's needs, pitching the Respondent's products, and ensuring they have a positive experience from start to finish. That the Claimants did not prove to the court that the Respondent did discriminate them.

Decision

41. It was common ground that Jane, Erick and Margaret were retained by the Respondent for position of Sales Representatives with same job descriptions as stated in their letters of employment. Margaret,



the 5th claimant was employed on 1st August 2016 with consolidated salary of 109,000 per month. Jane and Erick were employed with same duties on 3rd October 2016 with their salary much lower at Kshs 40000 with the variable of Kshs. 30000 based on targets. Jane and Erick were aggrieved by the difference in remuneration between them and Margaret. Whereas Margaret was remunerated ksh.109,000 for the position of sales representative, Jane and Erick were remunerated Ksh. 70,000 for the same job description. The respondent's defence was based on years of experience with Margaret stated to have had 9 years' experience and the other two were stated to have had 2-3 years' experience. RW told the court, the remuneration was based on prior years of experience and the claimant never complained.

42. The court was persuaded by the decision relied on by the Respondent in *Louw v Golden Arrow Bus Services (Pty) Ltd* that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article *The Anatomy of Disputes about Equal Pay for Equal Work*,

“The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on. “In equal value claims different skills, or at least a different mix of job attributes, are in issue. The employer may therefore legitimately argue that in equal value claims he should be allowed to explain and justify a wage differential by, for example, showing that persons possessing one set of skills or mix of job attributes are commanding higher wage rates in the local market.” Applying the decision, the Court found there was no evidence placed before the court by the Respondent to prove that the claimants, Erick and Jane, who had been issued with letters of employment as area sales representatives, all working in Nairobi, with same duties as Margaret for the same job, had less skills than her or that the skills by Margaret commanded higher wage rates in the local market. They had the same mandate and it was not demonstrated that the difference in the wages was justified by the number of prior years of experience before recruitment. The court found that even a further condition of salary variance was introduced for Erick and Jane while Margaret's wages had no variance. That was unjustified difference in remuneration. The claim for discrimination by Erick and Jane was merited and is allowed as submitted. The parties did not produce payslips on what was actually paid to Erick and Jane and the court finds that the claim of salary Kshs. 70000 was deserved for lack of justification of the variance.

Whether the claimants were entitled to relief sought

43. The claimants sought the following reliefs:-
- a. General damages for unfair and unlawful termination of employment.
 - b. The cumulative difference between the earnings of the 3rd & 4th Claimants' vis a vis what employees with similar job description were earning.
 - c. Uncommuted terminal benefits for the 1st Claimant Ksh.17,956.00.
 - d. 12 months salary for each of the claimants for unlawful and unfair termination of employment.
 - e. Such other or further order as the court may deem just and expedient to grant.
43. The court held the employment termination for all the claimants was unlawful and unfair. The court found evidence that the claimant were dismissed with notice pay which covers procedural unfairness. On finding unfair termination for lack of valid reasons the court is obliged to consider remedies under



section 49 of the *Employment Act* (Supreme Court holding in Kenfreight (EA) Limited v Benson K Nguti (Petition No.37 of 2018) 2019 e KLR; Section 50 of the *Employment Act*). The court noted the claimants worked for less than 6 months. The court is also guided by precedent and the claimants relied on the decision of the court in favour of their former colleague whose employment was terminated by the Respondent on similar grounds while on probation in Isdor Rachuonyo v Brava Food Industries Limited (2021)eKLR where the court awarded the equivalent of 2 months' salary taking into consideration the short period of service from July to November. In the instance case Erick and Jane had been engaged in October 2016 while the other claimants had been engaged earlier. The claimants' contracts were terminated on diverse dates between 28/12/2016 and 3/01/2017. They were all young and testified to be working and were likely to find jobs in the market. The court finds that an award of equivalent of 2 months in comparison with decision in Isdor Rachuonyo v Brava Food Industries Limited (2021)eKLR for 1st, 2nd and 5th Claimant was fair remedy for the unfair termination. Applying the same criteria to the 3rd and 4th claimants employed later in October 2016 an award of equivalent of 1 month salary was fair. The court took into account that notice pay had been paid to the claimants on termination.

44. The court further having found discrimination in wages paid to Erick and Jane compared to Margaret in violation of the principle of equal pay for work of equal value awards the amount as submitted :- With precision, Jane worked for the Respondent between 3/10/2016 to 3/1/2017, thus a total of three months of being underpaid with comparison to Margaret. Thus, the sum total for her underpaid salary is awarded for the sum of Ksh. 117,000. In brevity, Erick worked for the Respondent between 3/10/2016 to 3/1/2017, thus a total of three months being under paid with comparison to Margaret. As a consequence, the sum total of his underpaid salary is awarded for the sum of Ksh.117,000.
45. The overtime claims were not pleaded in the witness statements hence cannot be upheld as submitted.

Conclusion

46. The termination of the employment of the claimants is held to have been unfair for lack of both procedural fairness and substantive fairness. Judgement is entered for the claimants against the respondent as follows:-
 - a. 1st claimant – Barrack Omondi
Compensation of 2 months' salary thus Kshs. 210,000 x 2 total sum of Kshs. 420,000.
 - b. 2nd Claimant – David Awiti
Compensation of 2 months' salary thus Kshs.1890,00 x 2 total sum of Kshs 378,000
 - c. 3rd Claimant – Erick Ochieng
Compensation of 1 month's salary Kshs. 70,000
Award of underpayment of Kshs. 117,000
 - d. 4th Claimant – Jane Atieno
Compensation of 1 month's salary Kshs. 70,000
Award of underpayment of Kshs. 117000
 - e. 5th Claimant – Margaret Wanjiru
Compensation of 2 months' salary thus Kshs.109,000 x 2 total sum of Kshs 218,000



- f. All claimants are awarded Interest at court rates on the awarded amounts from the date of judgment until payment in full.
- g. The claimants are awarded costs of the suit .

It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : - Ongaya

Respondent: Wanjala h/b Wanjiku

Furthr Court Order

Stay of execution granted for 30 days

J.W. KELI,

JUDGE.

09/05/2025

