



Pamba v Kenya Hospital Association for & on behalf of the Nairobi Hospital & another (Cause E614 of 2020) [2025] KEELRC 1776 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E614 OF 2020
NZIOKI WA MAKAU, J
JUNE 19, 2025**

BETWEEN

DR. ALLAN PAMBA CLAIMANT

AND

**THE KENYA HOSPITAL ASSOCIATION FOR & ON BEHALF OF THE
NAIROBI HOSPITAL 1ST RESPONDENT**

DR IRUNGU NDIRANGU 2ND RESPONDENT

JUDGMENT

1. The Claimant filed the Amended Statement of Claim dated 12th November 2020, seeking Judgment against the Respondent for:
 - a. A declaration that the Claimant's termination of his contract of employment was unfair, unjustified, illegal, null and void.
 - b. A declaration that the 2nd Respondent acted in bad faith and with malice while conducting end of probation evaluation of the Claimant and his subsequent recommendation for extension of the probationary period as well as in his role in the termination of the Claimant's service.
 - c. A declaration that the 2nd Respondent grossly violated express provisions of the 1st Respondent's Board Charter and the Human Resource Manual on Probation.
 - d. Reinstatement to his employment in the capacity of the Chief Executive Officer of the 1st Respondent trading in the name and style of The Nairobi Hospital without any loss of benefits.
 - e. An injunction against the Board of Directors of the 1st Respondent restraining it from interfering with and or sabotaging the Claimant's terms of employment in force.



- f. Salary for the entire period the Claimant has been out of employment.
 - g. Damages for wrongful and/or unlawful termination as set out at paragraph 7.
 - h. Costs of this suit be borne by the 2nd Respondent.
 - i. Certificate of Service.
2. The Claimant averred that he was employed by the 1st Respondent on or about 9th March 2020 as the Chief Executive Officer (CEO) and was at all material times based in Nairobi City County. He noted that he completed his six (6) months' probation on 8th September 2020, drawing a salary of Kshs. 3 million per month until 2nd October 2020, when his contract was prematurely ended without any notice or justification. The Claimant's case was that during his probation, he was under the supervision of the 2nd Respondent, who was required to arrange the initial meeting to clarify the Claimant's duties and responsibilities as per his job description. They were also to discuss the expectations on work performance, conduct, attendance, and consequences of failure to comply. The 2nd Respondent was mandated to document the agreed objectives in a form and submit a copy to the HR Director. However, the 2nd Respondent intentionally failed to arrange for the said meeting and comply with the stated requirements contrary to the provisions of the 1st Respondent's HR Manual on Probation.
 3. The Claimant averred that as per policy, the 2nd Respondent was mandated to evaluate his performance after every two months. The first evaluation was to be conducted after two months, the second evaluation after four months and the final evaluation, also known as 'the end of probation evaluation', was to be conducted two weeks before the end of the probationary period. However, the 2nd Respondent failed to undertake the said evaluations as prescribed and purported to evaluate him in his absence and without his input. He further averred that the end-of-probation evaluation was allegedly conducted on 10th September 2020, after his probationary period had already ended on 8th September 2020, which was contrary to the provisions of the HR Manual on Probation. The Claimant asserted that the HR Director addressed the irregularity of the 2nd Respondent's conduct of the end-of-probationary period evaluation in an Inter-office Memo to the 2nd Respondent dated 14th September 2020, which issued guidelines on remedying the irregularity. However, the 2nd Respondent intentionally and maliciously ignored the said guidelines and proceeded to act adversely against the Claimant.
 4. It was the Claimant's averment that whereas he scored above expectation in his first and second evaluations, the 2nd Respondent maliciously scored him below expectation in all attributes in the third evaluation. That in the end-of-probation evaluation, the 2nd Respondent aimed at painting him as a non-performer and to set the stage for his unlawful dismissal. He further averred that he was only informed of the end-of-probation evaluation on 15th September 2020, when he was summoned to the 2nd Respondent's office. That he was not involved in the process, which is evidenced by the unsigned evaluation form. The Claimant further averred that he was issued with a Performance Enhancement Plan based on his alleged unsatisfactory performance during the six (6) months' probation, notwithstanding that he had an overall mean score of 2.04, translating to a meets expectation-scale. He contended that there was no justifiable basis to issue him the purported plan and the purported extension of the probationary period for a further three (3) months. He noted that he did not receive any feedback on his performance from the 2nd Respondent, especially at the end-of-the-probation evaluation. Therefore, no discussions were held concerning his alleged unsatisfactory performance and the plan to extend the probationary period, contrary to provisions of the HR Manual on Probation.



5. The Claimant further contended that the purported six months' overall evaluation was not based on his job description but on extraneous factors instigated by the 2nd Respondent to his disadvantage. It was the Claimant's case that because of the unfair and unjustified end-of-probation evaluation results, he wrote to the 2nd Respondent on 29th September 2020, requesting that his evaluation be based on his job description. However, the 2nd Respondent wrongly interpreted the said request to mean that the Claimant had refused the demands to sign the Performance Enhancement Plan and accept the extension of the probationary period.
6. According to the Claimant, he was automatically confirmed to his position as CEO when his probationary period expired on 8th September 2020 without any adverse report on his performance. He averred that the extension of the probationary period should have been made before expiration of the period, and that the purported extension was an afterthought, a non-starter and void ab initio. He noted that the HR Manual of Probation provides that probation may only be extended if an employee's work performance or conduct, or attendance, does not improve following discussions during the midpoint reviews. He argued that his performance during the midpoint reviews was exemplary and that there was therefore no basis to extend his probation for a further three (3) months.
7. The Claimant averred that through a letter dated 2nd October 2020, the 2nd Respondent informed him of the termination of his employment on account of a unanimous resolution by the Board of Management purportedly passed in a Special Meeting held on the same date. However, he noted that there was no agenda to discuss his performance and/or his termination in the Notice issued to members of the Board, making the allegations false. Without prejudice to the foregoing, the Claimant averred that if the Board passed the said resolution in the Special Meeting, the said resolution is unlawful and without effect. In addition, the termination of his employment on account of a manifestly irregular or unlawful process is legally untenable.
8. It was the Claimant's further case that he was never heard in response to the proceedings of the Board's Special Meeting and the subsequent termination of his employment. That the 1st Respondent neither issued him with any notice to show cause nor asked him to respond to the allegations of unsatisfactory performance, refusal to sign the Performance Enhancement Plan and/or rejection of the extension of the probationary period. He noted he had a detailed CEO Report on his performance during the six months' probation period, and that the 2nd Respondent was displeased by, among other things, the Claimant's acts or omissions as pleaded extensively in the Amended Statement of Claim. The Claimant further averred that, having been automatically confirmed to his position, he had a legitimate expectation to serve the entire term of his three-year contract. That the termination of his contract was therefore a breach of his legitimate expectation that the 1st Respondent would honour the terms of the contract. This is especially because he agreed to leave his previous lucrative employment for the 1st Respondent's employment. He contended that the Respondents' actions have professionally embarrassed him and reduced his standing in the profession. That his chances of employment have significantly diminished because of the 2nd Respondent's false and baseless determination of unsatisfactory performance of his duties. That he has resultantly suffered loss for which the Respondents are held jointly and severally liable.
9. It was the Claimant's averment that the termination of his employment was determined discriminatively, maliciously, unlawfully, and without due regard to his welfare and rights accruing to his employment. He particularised the discrimination to include isolating him for alleged evaluation without any basis, failing to confirm his employment upon completion of his probation, subjecting him to an unlawful termination, and violating his constitutional rights to a fair hearing and a lawful



expectation. He also gave particulars of the Respondents' malice, irregularity and/or illegality, and the special loss and damage he consequently claims totalling Kshs. 218,850,000/-.

Respondents Case

10. The Respondents averred in their Statement of Defence dated 13th September 2021 that the 1st Respondent is the proprietor of the Nairobi Hospital, and that the 2nd Respondent is non-suited as he was not the Claimant's employer, but an agent of the 1st Respondent. The Respondents' case was that the Claimant was engaged in the position of CEO through a contract of appointment dated 4th March 2020, with effect from 9th March 2020. That by dint of the contract, the Claimant's appraisal was to be undertaken by the Chairman of the Respondent's Board of Directors, the 2nd Respondent herein. The appraisal was to be conducted in three stages, that is, at the end of months two, four, and six, before a determination is made on whether to confirm his employment, extend his probation, or terminate his engagement. They denied that parties agreed to the automatic confirmation of the Claimant's employment as alleged. They stated that the 2nd Respondent duly conducted the Claimant's evaluations as per the HR Policy of the 1st Respondent and the Claimant's contract. They contended that neither of the said documents required the Claimant to be present or offer any input to the said evaluation, and that the instructions of the process were as contained in the Probationary Employee Performance Evaluation Form.
11. The Respondents averred that the Chairman of the Board appraised the Claimant's performance on the last day of the six months' probation period, on 9th and 10th October 2020, and determined his performance as unsatisfactory. An extension of his probation was then recommended for a further three months ending 12th December 2020, and he was to be placed on a Performance Enhancement Plan. However, the Claimant declined to execute the said plan and his extended probation, constraining the Respondent to terminate his probationary contract on 2nd October 2020. They further averred that the Claimant was invited and notified of the evaluation meetings on the advice of the HR Director and that he had no right to comment on the probationary assessments. According to the Respondents, the evaluation was done based on the Claimant's job description as CEO, the Probation Evaluation Performance Enhancement, and the HR Manual Policy. They argued that the requirement for the Claimant to sign the Performance Enhancement Plan was provided in the 1st Respondent's policy on probation period for unsatisfactory performance by any employee under probation.
12. It was the Respondents' further averment that the Claimant's performance, his refusal to execute and return the Performance Enhancement Plan, and termination of his employment were discussed during the Special Meeting of the Board of Directors on 2nd October 2020, under the agenda of 'Update from the HR Committee'. The Board assessed the matter, including the substance of the Claimant's letter of 29th September 2020, being a written appeal, and terminated his probationary contract under section 42(4) of the Employment Act. The Respondents argued that under section 42 of the Employment Act, persons under probationary contracts are not eligible for a hearing as provided under section 41 of the Act. As such, the 1st Respondent was neither obligated by law to issue a notice to show cause to the Claimant nor ask him to respond to his unsatisfactory performance evaluation, refusal to sign the Performance Enhancement Plan, and the rejection of extension of the probationary period.
13. The 2nd Respondent denied the assertions made against him by the Claimant. He contested the averments that he had repeatedly coerced and threatened the Claimant to ensure that the tender for security system installations was awarded to a particular company. He stated that the advice he gave the Claimant was only aimed at offering guidance and assistance, which the Claimant was free to



disregard or, if satisfied, make recommendations to the Procurement Department. The 2nd Respondent further denied that he asked the Claimant to prequalify the firm of Diro Advocates LLP to the panel of Advocates, stating that reference to the Claimant was only for record and possible reference to the said procuring entities.

14. It was the Respondents' averment that the assessments considered the conduct of the Claimant throughout the probation period, not just in the formative months. That accordingly, it was an error for the Claimant to assess his competence based on a score issued in part of the probationary period and leave out the score for the remaining part of the probationary period. The Respondents averred that the plea of legitimate expectation is grossly misconceived as it does not arise in a contractual relationship. They argued that the Claimant's purported loss is not attributable to them. They denied the alleged particulars of discrimination, malice, irregularity, illegality, and loss and damage, and averred that the Claimant was paid all dues lawfully owing to him. The Respondents prayed that the Claimant's suit be dismissed with costs to them on indemnity basis.

Evidence

15. The Claimant (CW1) testified that he was no longer seeking reinstatement to the employ of Nairobi Hospital as he had obtained other employment in December 2021. He highlighted the milestones he achieved while at the Hospital, including adding a 7-bed facility and negotiating with the UN for 10 million Dollars. He stated that he was hounded out because of vested interests by the 2nd Respondent, including granting tenders to a certain company. In cross-examination, CW1 stated that his probation was to be assessed and confirmed, subject to satisfactory performance, and that his contract provided for extension of probation. He refuted that the weekly meetings he had were a review of his performance and noted having raised in some of the meetings, his concerns about interference that severely affected his performance. He asserted that he handed over his CEO Report to the Board Chair after his third evaluation, but was not aware if the same was shared with the Board. He clarified that the issue of discrimination revolved around tenders and vendors seeking payments openly at the Hospital. He noted that according to the HR Manual, one can only extend the probationary period during mid-point evaluation at month two or four, and it was therefore too late to do it at month six. He reiterated that he did not attend any meeting with the Hospital Board to discuss his probation, and no meeting was held to discuss his performance evaluation.
16. CW2, Mr. Robert Francis Shaw, relied on his Statement dated 4th July 2023. He served on the Board of Nairobi Hospital at the time the Claimant left its employ. He stated under cross-examination that the Minutes in Court did not truly reflect what happened during the impugned Board Meeting. He affirmed that there was no agenda or resolution to terminate the Claimant from his position. He noted he was a member of the HR subcommittee of the Board, and the issue was never brought before the said committee.
17. CW3, Mr. Charles Wambugu, relied on his Statement dated 25th November 2023. He testified that he served as a member of the 1st Respondent's Board until September 2020 and was also the chairperson of the HR Board during the Claimant's first six (6) months as CEO of the 1st Respondent. He asserted that the Claimant was a performer, a person of integrity, and exhibited the skills needed for the job. He noted that the Claimant's dismissal was ill-advised, misadvised, unjustified, and illegal, and that he had not had any discussions on the Claimant's performance as CEO. CW3 stated in cross-examination that the responsibility of reviewing performance was undertaken by the Chair and the HR Director, Dr. Dorcas Kiai. He noted that he learnt of the Claimant's dismissal from the press. He reiterated in re-examination that the issue of the Claimant's dismissal was neither brought for discussion at the Board



nor before the Human Resource Committee. CW3 opined that the Hospital lost a very competent CEO at the time.

18. CW4, Dr. Dorcas Kiai, confirmed she was the HR Director. She testified that the process followed in the review of probation was flawed and that she offered written guidance on the procedure of probation review through a memo of 17th September 2020. She stated that her guidance was ignored and that the Respondent proceeded to implement a flawed process. Under cross-examination, CW4 noted that there was a possibility to serve probation for nine (9) months if there is an extension of probation, and that if there is poor performance after assessment, the contract could be terminated. She clarified that as per the letter, the performance review was to be done by the Chairman of the Board and not the entire Board. She further noted that there was no consent for the extension of the probation period as provided in the Employment Act, and that the policy provided for extension of probation for up to three months. CW4 asserted in re-examination that she neither received signed evaluation forms nor saw any consent signed by the Claimant. She also confirmed not having received any performance enhancement plan signed by the two.
19. The 2nd Respondent testified in Court as RW1. He stated that he was the Chair for over three years and adopted his Statement as his evidence in chief. Under cross-examination, RW1 denied that the Claimant negotiated with the UN for a grant of \$10 million for the COVID facility, asserting that the same was negotiated by the Board members. He stated in re-examination that the HR Manual provided that the CEO's performance was for discussion with the Chair of the Board and the Board itself. That the unsigned evaluation forms were an oversight on the part of the Claimant. He asserted that he evaluated the Claimant's performance three times as per the policy and his contract. He noted that the Claimant was promising, and although he had shortfalls in the first three months, the same were correctable. RW1 stated that he informed the Claimant that he would recommend an extension of his probation period for him to correct his mistakes. According to him, the Claimant wanted the Board to evaluate him and not the Chairman.
20. The Court, on request by the Respondent's advocates adopted the Witness Statement of RW2, Mr. Gilbert Nyamweya, into the court record. There was no objection to this adduction of evidence by the Claimant. The matter thereafter proceeded to submissions with each side filing written submissions.

Claimant's Submissions

21. It was the Claimant's submission that his probation period duly ended on 8th September 2020 after the lapse of the initial six months, there being no agreement to extend the same and both parties having not communicated their intention to terminate the contract. Any purported extension contravened section 42(2) of the Employment Act, as there was no mutuality between the parties and the decision was made by the 2nd Respondent unilaterally. He argued that the Respondent had not led any evidence to show the existence of any intention to engage with him to discuss the possibility of the purported extension. The Claimant cited the cases of James O. Oloo v Tana and Athi River Development Authority [2016] eKLR, Peris Nyambura Kimani v Dalbit Petroleum Ltd, Petition No. 63 of 2013, and Seth Onchari v Shah Lalii Nangpar Academy [2020] eKLR, in which the Courts affirmed that extension of a probation period has to be with the agreement of the employee.
22. Further, the Claimant submitted that since the purported extension of the probationary period lacked any legal effect and the initial probationary period of six months had lapsed, the extension was void ab initio. He argued that it is trite law that once the probationary period ends, the employment is deemed as automatically confirmed. He urged the Court to find similarly as held in the Seth Onchari case (supra), that the Claimant duly completed his probation period, and because the Respondents failed to



- conduct the final evaluation within the probation period, his employment contract was automatically confirmed.
23. It was the Claimant's submission that under clause 7.4.3.3.1, the end of probation review at the sixth month ought to be conducted two weeks prior to the end of the probationary period, to ensure timely feedback on confirmation of appointment extension of probation period or termination of appointment on performance grounds. In addition, there being no complaints by any person, including the 2nd Respondent, on the Claimant's discharge of his responsibilities meant the Hospital was in safe hands as he was dutifully running all aspects of the management. The Claimant noted that the Respondents had admitted to having conducted his reviews contrary to clause 7.4.3.3, after the end of the probationary period and in his absence.
 24. The Claimant submitted that it is trite law that for a termination of employment to pass the fairness test, substantial justifications must be proved. That under section 41 of the Employment Act, the termination of employment procedure commences with a notification to the employee of the grounds for which termination is being considered. He argued that even with the Respondents' defence that his probationary period was extended, the purported extension would be inconsistent with the Constitution of Kenya on the limitation of labour rights, as decided in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR. The Claimant further submitted that the Respondents did not, before the termination of his employment contract, notify him of the grounds for termination and allow him to be heard on the grounds as envisaged in section 41 of the Act. He relied on the case of *Liz Ayany v Leisure Lodges Limited* [2018] eKLR in which the Court elaborated that the provisions of section 41 of the Act are couched in mandatory terms.
 25. Further, the Claimant submitted that the grounds indicated in the termination notice are invalid and the reasons thereof unfair. That section 45 of the Employment Act defines unfair termination to be where the employer fails to prove that the reason for termination is valid and fair. He cited the case of *Jared Aimba v Fina Bank Limited* [2016] eKLR in which the Court held that under sections 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct should be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard before termination. He further submitted that section 43 of the Act places a legal burden on the Respondents to prove that the reasons for terminating his employment were valid and fair vis-à-vis the sanction meted out. However, the Respondents have not discharged this burden of proof.
 26. The Claimant asserted that his letter of 29th September 2020 was not responded to, and even when the Board of Directors resolved to terminate his employment, the resolution was irregular and unlawful as it contravened the provisions of clause 4.13(q) of the 1st Respondent's Board Charter. The said clause 4.13(q) provides that a special meeting of the Board or Board Committee will not discuss any matter other than that specified in the agenda. According to the Claimant, there was no unanimous decision by the Board of Directors, the HR Committee and the Audit and Risk Committee to terminate his employment. In the end, his termination of employment was wrongful and unfair, as the Respondent did not adhere to any provisions of the Act on fair termination.
 27. The Claimant submitted that he is subsequently entitled to the reliefs sought, having demonstrated a clear case of unfair termination. The Claimant submits that he is entitled to the maximum compensation envisaged under section 49(1)(c) of the Act. That he is further entitled to contractual damages arising from the Respondents' breach of the Policy on Probation, which guided the terms of his probationary period, to which he proposed a reasonable figure of Kshs. 10 million. He urged the Court to adopt the reasoning of Rika J. in the case of *Danish Jalang'o & another v Amicabre*



Travel Services Limited [2014] eKLR where the Learned Judge held that breach of contract, including unlawful extensions of probation, is redressable by contractual damages, not merely statutory compensation.

28. Further, the Claimant submitted that the remuneration under his employment contract was substantial and had the Respondents not breached the terms thereof and wrongfully terminated his employment, he stood to earn approximately Kshs. 350 million during its full term. He thus asked for damages equivalent to the salary and benefits he would have earned had the contract not been wrongfully terminated. Given the defamation and reputational harm amplified by the publication of damaging newspaper articles and posts on the social media platform X (formerly Twitter), and having previously resigned from a high-paying executive role to join the 1st Respondent, damages of Kshs. 350 million is warranted.
29. The Claimant prayed that this Court allow the Amended Statement of Claim based on the cases of *Nkatha Mwongera v Compassion International Kenya* (Cause 1489 of 2018) [2024] KEELRC 1226 (KLR) (22 January 2024) (Judgment), and *Gabriel Linyerera Saka v Absa Bank Kenya PLC* (Cause E383 of 2023) [2024] KEELRC 1089 (KLR) (8 April 2024) (Judgment). The Claimant thus urged the grant of the reliefs sought.

Respondents' Submissions

30. The Respondents maintained that the Claimant's dismissal was lawful and fair, predicated on his failure to sign the PIP and proposed probation extension, which constituted unsatisfactory performance within the meaning of section 42(4) of the Employment Act, 2007. They submitted that the termination complied with the principles of substantive justification and procedural fairness, as elucidated in the case of *Walter Onuro Ogal v Teachers Service Commission* [2013] eKLR and the relevant provisions of the Employment Act. They cited the case of *David Namu Kariuki v Commission for the Implementation of the Constitution* [2015] eKLR, in which Ndolo J. observed as follows:

"17. The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the Employment Act, 2007."
31. The Respondents submitted that further, the law gives the employer the right to retain an employee on probation for 12 months and terminate employment on short notice, as held in the case of *Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited* [2013] eKLR. The Respondents asserted that the facts of the present case are distinguishable from the case of *Seth Onchari* (supra) and that the Claimant's argument was therefore unsustainable. The Respondents further noted that while section 42(2) of the Employment Act provides for extension with the employee's agreement, the initial Employment Contract signed by the Claimant expressly stipulated the possibility of a three-month extension in the event of unsatisfactory performance. The Respondents assert that the pre-existing contractual term was the basis for the lawful extension of the Claimant's probation period, which was therefore not a unilateral imposition.
32. The Respondents submitted that the Claimant's assertion that there was a delay in communicating his termination, resulting in automatic confirmation, is unfounded. The Courts have consistently held that minor delays in administrative decisions do not automatically convert probationary employment into confirmed employment. They cited the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR, in which the Court emphasized that an employer must be given reasonable time to assess an employee's performance before confirmation, and that minor procedural delays



cannot invalidate an otherwise lawful probationary termination where the employer demonstrates good faith. They posited that the 1st Respondent acted within its rights and in good faith, offering the Claimant an opportunity to improve his performance, consistent with the principles outlined in section 43(1) of the Employment Act, which places the burden on the employer to prove the reason for termination.

33. It was the Respondents' submission that the provisions of sections 43 and 45 of the Act do not apply to the Claimant as at the time of his probation and termination of the same. That his demands for substantive justification and remedies associated with unfair termination are legally unsustainable. They further stated that in his case, the Claimant's period of continuous employment from 9th March 2020 to 2nd October 2020 was significantly less than the requisite 13 months, and he therefore does not meet the statutory threshold to pursue a claim for unfair termination.
34. The Respondents further submitted that, having demonstrated that the Claimant's termination was lawful and fair, it follows that he is not entitled to any of the remedies he seeks. They referred to the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, where the Court of Appeal held:
"...that when calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract..."
35. The Respondents thus urged the Court to dismiss the Claimant's suit with costs.

Disposition

36. The issues the Court discerns for determination are:
 - a. Whether the Claimant's contract of employment was automatically confirmed;
 - b. Whether the Claimant was entitled to fair procedure during termination in terms of section 41;
 - c. Whether the Claimant is entitled to compensation for his termination;
 - d. Whether the Claimant is entitled to damages for defamation.
 - e. What reliefs the Claimant is entitled to, if any
 - f. Who is to bear costs.
37. The Claimant was employed on a 3 year contract and earned Kshs. 3,000,000/- a month. The evidence adduced was that the Claimant served the 1st Respondent well until the contract was terminated. It was the evidence of the Claimant that he performed as required even snagging the Hospital a key investment from the UN which was a 10 million hospital wing expansion. The Claimant from accounts of the Claimant's 2nd witness Mr. Shaw, a board member of the 1st Respondent at the material time was that the Claimant performed well and were it not for internal politics and poor leadership, the Claimant would have continued to serve well. It was his position that the Claimant would have been confirmed had the Board been involved in review of his performance.
38. The Claimant asserts he was automatically confirmed. The Respondents on their part assert that the provisions of sections 43 and 45 of the Act do not apply to the Claimant as at the time of his probation and termination they did not. They hold that his demands for substantive justification and remedies associated with unfair termination are legally unsustainable. They further asserted that in his case, the Claimant's period of continuous employment from 9th March 2020 to 2nd October 2020 was



- significantly less than the requisite 13 months, and he therefore does not meet the statutory threshold to pursue a claim for unfair termination.
39. The Claimant cites the case of James O. Oloo v Tana and Athi River Development Authority (supra). In that case, Wasilwa J. held:
38. Section 42(2) of Employment Act states as follows:
- “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”.
39. This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant. There is no indication that immediately after 30th April, the Claimant was informed of any extension of this probationary period and even if this was done, he was to be consulted.
40. There is no indication that this was done. Failure to write to the Claimant to inform him that he was either confirmed on or probation does not change the position of the law and it is therefore this Court’s finding that the Claimant was not on probation at the time of dismissal on 29th June 2012 and the letter stating that he had not been confirmed is actually a disguised dismissal.
40. There was indication by the 3rd witness for the Claimant that the probation was not extended. She testified that as the HR expert of the 1st Respondent, she never was given evaluation forms and when the 2nd Respondent availed the final evaluation forms she guided that these were unprocedural. The 2nd Respondent then proceeded to ignore sound advice from the HR practitioner and led to the termination of the Claimant without adherence to the law.
41. The law is clear that section 42(2) as noted in the above case is couched in mandatory terms. No ifs, buts or. The Claimant did not receive any communication notifying him of the purported extension of his probationary contract. The 1st Respondents HR Manual provides that probation may only be extended if an employee’s work performance or conduct, or attendance, does not improve following discussions during the midpoint reviews. The inescapable conclusion is that the purported extension was inconsistent with the Constitution of Kenya on the limitation of labour rights, as held in the case of Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) (supra). The Court therefore finds that the Claimant was automatically confirmed to his position as CEO when his probationary period expired on 8th September 2020. The purported extension of probation by the 2nd Respondent was an afterthought, a non-starter and void ab initio. The Claimant therefore was entitled to the full benefit of section 41 in any ensuing termination.
42. The Claimant was notified of the dismissal in a callous and offending manner. His flourishing career seemed cut short abruptly and was distressed. He testified that he was jobless and could not obtain references from the Respondents and that it was only after a few years that he finally obtained employment. It is the finding of the Court that had the 2nd Respondent followed the law in the purported extension of probation and if the 1st Respondent had lawfully terminated the Claimant, there would have been no adverse finding against the 2 Respondents. The Respondents almost decimated the Claimant’s ability to find employment and therefore are liable for the damages caused when the Claimant was unlawfully terminated. The Claimant would from accounts have served the 3 years and even, I dare hazard, obtain a new contract. He is therefore to be compensated for the loss, the damage to reputation and the attendant distress.
43. In the final analysis I enter judgment for the Claimant against the Respondents for:



- a. A declaration that the Claimant's termination of his contract of employment was unfair, unjustified, illegal, null and void.
 - b. A declaration that the 2nd Respondent acted in bad faith and with malice in the evaluation of the Claimant and in his role in the termination of the Claimant's service.
 - c. A declaration that the 2nd Respondent grossly violated express provisions of the 1st Respondent's Board Charter and the Human Resource Manual on Probation.
 - d. Payment of salaries for the balance of the contract – Kshs. 117,000,000/-
 - e. Leave dues – Kshs. 11,700,000/-
 - f. 12 months' salary compensation – Kshs. 36,000,000/-
 - g. Kshs. 150,000/- for telephone allowances
 - h. Car allowance – Kshs. 13,500,000/-
 - i. Home security allowance – Kshs. 3,000,000/-
 - j. Medical cover – Kshs. 15,000,000/-
 - k. Damages for defamation – Kshs. 10,000,000/-
 - l. Costs of this suit.
 - m. Interest at court rates on the sums in (d), (e), (f), (g), (h), (i), (j) and (k) above from date of judgment till payment in full.
 - n. Certificate of Service.
- Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

