



**Wanjohi v Kenya Railways Corporation (Cause E398 of 2022)  
[2024] KEELRC 417 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 417 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E398 OF 2022  
JK GAKERI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**FRANCIS KIBUGI WANJOHI ..... CLAIMANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 13<sup>th</sup> June, 2022 alleging unfair/unlawful termination of employment by the Respondent.
2. It is the Claimant’s case that he joined the Respondent on 29<sup>th</sup> November, 2019 as the Real Estate Valuation & Agency Manager at a gross salary of Kshs.256,200/= per month reporting to the General Manager Business and Operations.
3. The employment period was 5 years and a probationary period of 6 months.
4. That he served diligently.
5. It is the Claimant’s case that his performance was never appraised by the Respondent for the duration of employment.
6. The Claimant avers that on 2<sup>nd</sup> June, 2020, he could not log in to his laptop and ICT advised him to consult the supervisor for instructions and received a letter from the Acting General Manager, Human Resources & Administration (Ag GMHR&A) seeking an explanation on various issues including insubordination, disrespect, performance and unauthorized access and 12 days compulsory leave and he responded.
7. That when he returned, his laptop was taken by security and he was guided out of the office and harassed by security.



8. It is the Claimant's case that he was not issued with a notice to show cause or invited for a disciplinary hearing and termination was without notice.
9. The Claimant prays for;
  - i. A declaration that termination of his employment by the Respondent was unfair.
  - ii. One (1) month's salary in lieu of notice Kshs.286,200/=.
  - iii. 12 months compensation Kshs.3,434,400.00.
  - iv. Accrued leave Kshs.76,320/=.
  - v. Aggravated damages Kshs.5,000,000/=
  - vi. Costs of this suit and
  - vii. Any other remedy the court may deem fit to grant.

### **Respondent's case**

10. The Respondent admits that the Claimant was its employee under a 5 year contract effective 29<sup>th</sup> November, 2019 and probation begun on 2<sup>nd</sup> January, 2020.
11. That it terminated the Claimant's employment vide letter dated 12<sup>th</sup> August, 2020 after a review of his performance during the probationary period which was dismal and termination of employment was fair as it was solely based on poor or unsatisfactory performance during probation and was paid one (1) month's salary in lieu of notice.
12. The Respondent prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

13. On cross-examination, the Claimant confirmed that he was scheduled to report to work on 2<sup>nd</sup> January, 2020 and responded to the complaints made against him.
14. He confirmed that no performance review was conducted but admitted that the Respondent had filed a Probationary Performance Review Report dated 18<sup>th</sup> June, 2020 which rated his performance unsatisfactory.
15. On re-examination, the witness testified that probation was to end on 30<sup>th</sup> June, 2020 but no communication was received thereafter leading the Claimant to assume that he had been confirmed and had not participated in any review of his performance.
16. It was his testimony that he had not been notified of the meeting chaired by the Managing Director as employees were working from home owing to the COVID-19 Pandemic restrictions and had been in the office since 7.30 am and was notified of the meeting that morning.
17. The witness admitted having written to the Human Resource for the transfer of a member of staff to Nakuru.
18. The witness testified that he was in and out of Nairobi, for instance, in April he was in Nakuru while in May 2020 he was at Eldoret, Kisumu and Kitale and came back to Nairobi in June 2020.



## Respondents' evidence

19. RWI, Asava Kadima confirmed on cross-examination that the Claimant was serving under a fixed term contract of 5 years and was based at the Respondent's Headquarters in Nairobi, that probation was scheduled to end on 30<sup>th</sup> June, 2020 and no communication came from the Respondent after expiration of the probationary period and the Claimant's employment was terminated on 12<sup>th</sup> August, 2020.
20. The witness admitted that the Respondent had two different reasons for terminating the Claimant's employment, namely poor performance and non-confirmation of appointment.
21. RWI confirmed that the Respondent did not put the Claimant in a Performance Improvement Plan.
22. RWI further confirmed that she was the one who sent the Claimant on compulsory leave on 2<sup>nd</sup> June, 2020 for 12 days as permitted by the Respondent's policy guidelines.
23. That the Claimant was not invited for a hearing and the termination of employment was not unfair.
24. On re-examination, RWI testified that a performance review was conducted in June 2020 and the Respondent's board of directors resolved not to confirm the Claimant and he responded to the allegations in writing.
25. That the board found the Claimant's performance unsatisfactory.

## Claimant's submissions

26. Counsel submitted on whether the Claimant's employment was automatically confirmed, respondent's handling of the Claimant's alleged poor performance/misconduct, whether termination of the Claimant's employment as lawful and the reliefs sought.
27. As regards confirmation, counsel submitted that as the probationary period ended on 29<sup>th</sup> May, 2020 and the Claimant's employment was terminated on 12<sup>th</sup> August, 2020, his employment was automatically confirmed as held in *David Namu Kariuki V Commission for the Implementation of the Constitution* (2015) eKLR and *Patrick Korir Rotich V Unilever Tea Kenya Ltd* (2016) eKLR to urge that the Claimant's employment was confirmed by effluxion of time.
28. On the handling of poor performance/misconduct, counsel submitted that the Claimant was not appraised in accordance with clause 2.25.3 of the Respondent's Human Resource Manual, August 2017, as the Head of Department did not submit a detailed progress report and recommendations on the Claimant's performance.
29. Reliance was made on the sentiments of the court in *Jane Samba Mukala V Ol Tukai Lodge Ltd* (2013) eKLR as well as *Monica Munira Kibuchi & others V Mount Kenya University* (2021) eKLR as well as *Kenya Union of Commercial Food and Allied Workers V Kisii Bottlers Ltd* (2020) eKLR to urge that the Respondent did not follow the proper procedure.
30. As regards termination of the Claimant's employment, counsel cited the sentiments of Lenaola J. (as he then was) in the Momanyi Case where the learned judge declared Section 45(3) of the *Employment Act, 2007* unconstitutional to urge that the Respondent did not invoke the correct procedure.
31. On the reliefs sought, counsel submitted that the Claimant was entitled to the one month's salary in lieu of notice by reason of Sections 35 and 36 of the *Employment Act, 2007*, 12 months compensation and outstanding leave.



32. Counsel did not submit on the prayer for aggravated damages.

### **Respondent's submissions**

33. Counsel isolated two issues, namely; whether termination of the Claimant's employment was unfair and the reliefs sought.
34. On the 1<sup>st</sup> issue, counsel submitted that the termination of employment was fair and lawful as the Claimant was still on probation when the performance review took place as he reported to work on 2<sup>nd</sup> January, 2020 and thus the probationary period lapsed on 2<sup>nd</sup> July, 2020 as confirmed by the Claimant. Reliance was made on the Performance Review on record dated 18<sup>th</sup> June, 2020. Counsel relied on clause 2.25.5 of the Human Resource Manual.
35. Reliance was also made on the decision in *Meru Multi-Purpose Co-operative Society Ltd V Jeremy Kiriimi (2022)* eKLR.
36. Counsel urged that the proper procedure was followed as the Respondent invoked Clause 2.25 of its Human Resource Manual and the Claimant was properly appraised and was not subject to a disciplinary hearing as held in *John Muthomi Mathiu V Mastermind Tobacco (K) Ltd (2018)* eKLR and had been called to improve on the performance of his duties and responded to the complaints.
37. Reliance was also made on *Walter Ogal Anuro V Teachers Service Commission (2013)* eKLR.
38. On the reliefs sought, counsel submitted that the Claimant was paid all his dues as evidenced by the payslip for July 2020 on record.
39. Finally, counsel urged that because the termination of employment was justified, no compensation was due including aggravated damages and the suit ought to be dismissed.

### **Findings and determination**

40. The issues for determination are;
- i. Whether the Claimant was serving the probationary period when his employment was terminated by the Respondent.
  - ii. Whether termination of the Claimant's employment as unfair/unlawful.
  - iii. Whether the Claimant is entitled to the reliefs sought.
41. On the 1<sup>st</sup> issue, the Claimant's counsel urges that as at the date of termination of employment, the Claimant's employment had been confirmed by effluxion of time.
42. Strangely, the Respondent did not submit to this issue.
43. It is common ground that the Claimant's term of 5 years commenced on 29<sup>th</sup> November, 2019 but he reported to work on 2<sup>nd</sup> January, 2020 for the commencement of probation as provided by clause 5 of the Letter of Appointment dated 29<sup>th</sup> November, 2019, a fact the Claimant admitted in evidence. It therefore follows that probation was scheduled to end on 2<sup>nd</sup> July, 2020.
44. It is not in contest that the Claimant's employment was terminated on 12<sup>th</sup> August, 2020 and he was promised payment for the days worked up to 13<sup>th</sup> August, 2020
45. Was the Claimant serving the probationary contract on 12<sup>th</sup> August, 2020?



46. Section 2 of the *Employment Act*, 2005 defines a probationary contract to mean;
- “A contract of employment, which is of not more than twelve months duration or part thereof in writing and expressly states that it is for a probationary period.”
47. Similarly, Section 42(2) of the Act provides that;
- “A probationary period shall not be more than six months but may be extended for a further period of not more than 6 months with the agreement of the employee.”
48. Clause 5 of the Claimant’s Letter of Appointment provided for a 6 months probationary period which the Claimant admitted being aware of.
49. Notably, Clause 5 of the Claimant’s contract of employment provided for no extension of the probationary period.
50. According to the Respondent, since the Claimant’s supervisor completed the Probation Performance Review Report Form dated 18<sup>th</sup> June, 2020 and handed over the same to the Human Resource on 30<sup>th</sup> June, 2020, the Claimant had been appraised and his performance deemed poor for confirmation.
51. What begs the question is why it took almost 2 months to communicate the supervisor’s decision to the Claimant.
52. However, the more salient question is what was the status of the Claimant’s employment after 2<sup>nd</sup> July, 2020?
53. RWI confirmed on cross-examination after the probation period lapsed, no communication was given to the Claimant until the termination letter dated 12<sup>th</sup> August, 2020.
54. If the respondent’s submission is to be sustained, the Claimant was still on probation.
55. The emerging jurisprudence on this issue is that if the probationary period is not extended by consent after 6 months and no communication from the employer is forthcoming to the employee on the fate of his/her probationary employment, such employee is deemed confirmed by operation of law. (See *Peris Nyambura V Dalbit Group Ltd* (2015) eKLR, *Ascrat Gilamichael Woldegabriel V Five Forty Aviation Ltd* (2015) eKLR among others).
56. Significantly, the decisions relied upon by the Claimant’s counsel are spot on and in particular on the timelines as held in *Patrick Korir Rotich V Unilever Tea Kenya Ltd* (Supra) that;
- “The confines of probation are guided and guarded by the law and no one would escape from this. Strict adherence to the procedure and timelines of probation must be had to avoid hurting the interest of the parties.”
57. The best articulation of the law on this issue was given by Ndolo J. in *David Nyamu Kariuki V Commission for the Implementation of the Constitution* (Supra) as follows;
- “... 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 specified period as provided under Section 42(2) of the *Employment Act*, 2007. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time. (See *Jane Wairimu Machira V Mugo Waweru*



& Associates Cause No. 621 of 2012) that said, the court finds that the Claimant was confirmed in his employment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the court.”

58. The court is guided accordingly.
59. In this case, RWI, as adverted to elsewhere in this judgment confirmed that the Respondent did not communicate with the Claimant on expiration of the probationary contract in early July. The witness confirmed that the last communication with the Claimant was the letter dated 24<sup>th</sup> June, 2020 and his employment was terminated about one month and 12 days after probation.
60. In view of the foregoing, it is the finding of the court that the Claimant’s employment was confirmed by operation of law after effluxion of the 6 months period provided by the contract of employment.
61. It therefore follows that by 12<sup>th</sup> August, 2020, the Claimant’s employment had transitioned from probation to permanent.
62. As to whether termination of employment was unfair and unlawful, counsels have adopted opposing positions with the Claimant’s counsel urging that it was unfair.
63. The Respondent’s counsel submitted that it was fair as the provisions of the Human Resource Manual were complied with as the Claimant’s performance during probation was poor according to the handwritten document on record completed by the supervisor.
64. At this juncture, it is essential to ascertain whether the Respondent acted in consonance with its Human Resource Manual, 2017.
65. Paragraph 2.25.3 of the Manual provides that;

“During the period (probation) the Head of Department will submit detailed progress reports and recommendation indicating the employee’s performance. Based on the recommendation, the Head of human resource will advise the MD whether or not the employee should be confirmed, probationary extended or appointment terminated altogether.”
66. The Respondent did not avail copies of any progress report from the Head of Department or record that Human Resource advised the Managing Director on the options available.
67. Significantly, the paragraph does not envisage one progress report but more than one as encapsulated by the words “during the period” and “progress reports”.
68. It is common ground that the probationary period is a trial period and an employee requires support on what he/she requires to do and is evaluated progressively.
69. It cannot be a one off affair and in particular where no specific targets have been agreed upon.
70. The foregoing notwithstanding, since the Claimant’s employment was terminated after confirmation by operation of law, it is essential to determine the nature of termination.
71. The letter of termination dated 12<sup>th</sup> August, 2020 identified the reason for termination of employment as performance.
72. RWI on the other hand admitted on cross-examination that the Respondent had two reasons for termination, namely non-confirmation of employment and poor performance. The letter states that the Claimant’s employment was terminated by a resolution of the Board of Directors.



73. As regards the alleged poor performance, the Respondent tendered no evidence of the same in terms of unfulfilled obligations or unobeyed instructions or any targets that the Claimant did not meet.
74. Other than reference to the Nakuru report which also lacked specificity, the Probation Performance Review Report comprises general views of the Claimant by his supervisor and is not based on any deliverables.
75. It is not in dispute that the Claimant had been in employment for only three months when he was requested to proceed to Nakuru where there was no other manager and later proceeded to Eldoret and Kisumu and only come back to Nairobi in June 2020 at the height of the COVID-19 Pandemic.
76. In determining the issue of performance, the court is guided by the sentiments of the court in decisions such as *Pooroosotum Bheekhoo V Linksoft Group (2015) eKLR* where Mbaru J. held that;
- “ . . . in the event an employee is of poor performance and this is alleged by the employer the duty is upon such an employer to prove such poor record of performance. It is not just enough to cite poor performance.”
77. The court expressed similar sentiments in *Fredrick Odongo Owegi V CFC Life Assurance Ltd (2014) eKLR* as follows;
- “Where the question regard to an employee performance, an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews. It is not just enough to say that an employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the status required by an employer.”
78. In an earlier decision in *Jane Samba Mukala V Ol Tukai Lodge Ltd (Supra)*, the court was emphatic that;
- “This is important to note as where poor performance is shown to be the reason for termination, the employer is placed at a higher level of proof as outlined under Section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy in practice on how to measure good performance. Section 5(8)(c) further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employee get a fair chance when they are of poor performance.
- Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated . . .”
79. The Respondent adduced no evidence that it had institutionalised a performance management system which enabled it distinguish good from poor performance.
80. Evidence of application of the Balance Score Card or other acceptable evaluation matrix would have effortlessly provided that the requisite framework was in place.



81. Similarly, the Respondent adduced no evidence of the targets it had agreed upon with the Claimant cognizant of the fact that he was operating in the midst of the COVID-19 Pandemic in a new employment environment in different parts of Kenya.
82. In addition, the Claimant's uncontroverted evidence is that his induction had not been concluded.
83. Relatedly, the Respondent led no evidence to demonstrate the efforts it expended in an endeavour to have the Claimant improve his performance and what facilitation and support it provided.
84. Finally, the Respondent did not have a sitting with the Claimant to explain to him why it was terminating his employment and afford him an opportunity to respond to the allegations.
85. It is not in contest that the Claimant was working even after effluxion of the probationary period and having been confirmed by operation of law, it was incumbent upon the Respondent to invoke the provisions of Section 41 and 45 of the *Employment Act*, 2007, to ensure that the termination was substantively justifiable and procedurally fair as held in *Walter Ogal Anuro V Teachers Service Commission (Supra)*.
86. In the instant case, since the supervisor was the accuser, it was important to have a hearing to accord the Claimant an opportunity to face the charges levelled against him and cross-examine the supervisor on them and avail evidence including witnesses, if any.
87. The fact that these procedural safeguards were ignored, rendered the termination of the Claimant's employment on 12<sup>th</sup> August, 2020 unfair and unlawful and the court so finds.

### **Whether the Claimant is entitled to the reliefs sought.**

#### **a. Declaration**

88. Having found that the Respondent did not comply with the provisions of the *Employment Act*, 2007 on termination of employment, a declaration that termination of the Claimant's employment was unfair is merited.

#### **b. One (1) month's salary in lieu of notice**

89. The termination letter dated 12<sup>th</sup> August, 2020 promised the Claimant one-month salary in lieu of notice pursuant of clause 26 of the Letter of Appointment.
90. The Claimant has not alleged that the same was not paid.
91. The Claimant is awarded one-month salary in lieu of notice unless already paid.

#### **c. 12 months compensation**

92. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
93. The court has considered that the Claimant was an employee of the Respondent for a fairly short time, about 7 months, did not express his wish to continue in the service of the Respondent or appeal the decision to the Respondent's decision.
94. Finally, the Claimant contributed to the termination of employment.
95. In the circumstances, the court is satisfied that the equivalent of 2 month's salary is fair.



**d. Accrued leave days**

96. The Claimant adduced no evidence of the particulars of the accrued leave. In the absence of the requisite particulars, the claim is unproven and is declined.

**e. Aggravated damages**

97. The Claimant tendered no evidence of entitlement to aggravated damages.  
The claim is unsustainable and is dismissed.

98. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;

- a. Declaration that termination of the Claimant's employment was unfair.
- b. One month's salary in lieu of notice, if unpaid.
- c. Equivalent of 2 months' salary.
- d. Costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

