



**Kamau v Track & Trace Company Limited (Cause E238 of 2022)
[2024] KEELRC 2846 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2846 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E238 OF 2022
DKN MARETE, J
OCTOBER 30, 2024**

BETWEEN

TONNIE MUNENE KAMAU CLAIMANT

AND

TRACK & TRACE COMPANY LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by a Statement of Claim dated 11th April, 2022. It does not disclose any issue in dispute on its face.
2. The Respondent in a Statement of Response dated 16th August, 2022 denies the claim and prays that it be dismissed with costs.
3. The Claimant's case is that on or about 22nd November, 2021 on or about 22nd November 2021 the respondent, and in particular, the Managing Director of the respondent, one Dorah Nambwenya, approached the claimant who at the time was working for Smart Applications International as a Sales Manager earning a monthly salary of Kshs.243,000/- and offered him a position as a Sales General Manager in the respondent's organization. This was concretised vide an employment agreement dated 22nd January 2022 where he became General Manager, Sales.
4. The claimant's further case is that he discharged his duties under the contract of employment without fail and with utmost diligence and faithfulness until the 3rd March, 2022 when the Respondent served him with a letter of summary dismissal. No reasons was issued for such termination of employment. He earned a salary of Ksh.400,000/-.
5. The Claimant faults the summarily dismissal for being without justification and in contravention of the *Employment Act*, 2007, the principles of natural justice and *the constitution* as follows;



- a. The Claimant was never given a fair hearing as encapsulated under section 41 of the [Employment Act](#) and no grounds were ever advanced to the claimant on the reasons for termination nor was the claimant given time to make any presentation thereto.
 - b. The wrong/and or breach committed was never brought to the attention of the claimant prior to the summary dismissal to enable him make the requisite response in form of his defence.
 - c. The claimant was never taken through the mandatory process as outlined under section 41 of the [Employment Act](#) which provides that an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - d. Section 41 of the [Employment Act](#) is couched in mandatory terms and where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing.
 - e. The claimant must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.
6. This was entirely unfair, illegal and malicious and laced with ill motivation.
7. He claims thus;
- a. Salary for 12 months for wrongful/unfair Termination
(Kshs.400,000*12).....4,800,000/=
 - b. Salary for the remainder of the Fixed Term Contract (10 months) which commenced on 3rd January 2022 for a period of 1 year up to 3rd January 2023 (Kshs.400,000/*10)
.....Kshs.400,000,000/-
 - c. Termination Notice, 1 monthKshs.400,000/-
8. The Claimant relies on the following provisions of the law in bringing this claim:
- a. [The Constitution](#) of Kenya, 2010 Articles 23(3) and 41(1).
 - b. The [Employment Act](#), 2007 sections 41, 43, 44(4) and 45 and 25.
 - c. International Labour Organization's Convention on Termination of Employment (No. 158) Article 4 and 5.
9. He prays as follows;
- a. A Declaration that the Respondent's conduct in terminating the Claimant's employment amounted to a violation of the Claimant's constitutional right to fair labour practices under Article 41(1) of [the Constitution](#) of Kenya, 2010.
 - b. A Declaration that the termination of the Claimant's employment was wrongful and unfair.
 - c. General damages for wrongful/unfair termination.



- d. Payment of all the monies as tabulated at paragraph 9 above and other sums as the court shall direct.
 - e. Interest on (c) and (d) above at court rates.
 - f. Costs of this suit.
 - g. Any other relief this Honourable court deems just to grant.
10. The Respondent's case is a denial of the claim.
 11. It is her case that the Claimant's probationary contract was terminated on account of poor performance. This was done in accordance with the provision of the Employment Act, 2007. She in toto denies the claim as set out and puts the claimant in strict proof thereof.
 12. The matter came to court variously until the 27th of July, 2023 when the agreed-on determination by way of written submissions.
 13. The issues for determination therefore are;
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
 14. The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions dated 17th October, 2023 submits and reiterates a case of wrongful, unfair and unlawful termination of employment.
 15. The Claimant again faults the allegation of non-performance as alluded by the Respondent as follows; The Respondent undertook a monthly appraisal on the 25th February, 2022 where he scored 76% and was issued with a verbal warning to be more intentional with learning and enforcing internal processes. Page 24 of the appraisal form strike rule showing the actions the Respondents should undertake in the event of non-performance or below par performance. This indicated summary dismissal for scores below 50% and a 1st strike letter for a score of 75%. Score below 90% called for a verbal warning as was done to the Claimant. Having done the appraisal on 25th February, 2022, (which called for the issuance of verbal warning), he was summarily dismissed the following Thursday, three days later. No reasons were issued on the letter of termination.
 16. The Claimants also denies being issued with a warning letter on 24th January, 2022 as alluded by Respondent's documents at page 12. This was not received and no evidence was adduced that he was served with it. It further discloses the following anomalies;
 - (i) There is no evidence of an appraisal in the month of January by the Respondent.
 - (ii) As of 24th January, 2022, the Claimant had only worked for 15 days.
 - (iii) Was the performance agreement altered to be effectual on a monthly basis?
 - (iv) The appraisal form at page 24 of the Respondent document provides for 3rd trikes that were to be issued prior to termination.



- (v) There is no indication or evidence of other warning letters leading to what the Respondent's document calls the 3rd strikes.
17. The Claimant further submits that the termination of his employment contravened sections 43 and 45 of the Employment Act, 2007 in that no reason was proffered for his termination and in any event such reasons ought to have been fair, valid and related to the employee's conduct, capacity, compatibility with the employers operational requirements.
18. The Claimant sought to rely on the authority of *Okumu v Good Man Agencies Limited* (Cause 1895 of 2017) [2022] KEELRC 13514 (KLR) (December 2022) the court cited with approval the ratio decidendi in the decision by Justice Radido in *Mercy Njoki Karingithi vs Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR where the court held thus:

“I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness. The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period...

- a. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (respondent) and rights of employee (claimant) and vice versa.
 - b. The fundamental rights of employees not to be unfairly terminated and the claimant in this case, as provided for in section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period.
 - c. However, the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable.
 - d. The employees' right not to be unfairly terminated still binds the employer and is applicable during the probationary period.
 - e. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.”
19. Again, the Claimant submits as follows;

Justice Mbaru, Abuodha and Ndolo vide a judgement dated 30/07/21 declared Section 42(1) of the Employment Act, 2007 which excludes employees having probationary contracts from the provisions of Section 41, as inconsistent with articles 24, 41 and 47 of the Constitution In *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)*[2021] eKLR

20. The Claimant further buttresses his case by submitting as follows;
21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.



22. The fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the [Employment Act](#) cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the [Employment Act](#).
23. However, the security of tenure given to ordinary employees by section 45 of the [Employment Act](#) is still applicable. The employees' right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons that the reasons are valid and fair reasons.
21. The Respondent's case and submission is that apart from the probationary contract of the employment, there was no other any engagement inter partes. He had not been head hunted and earned a salary of only Kshs.200,000.00 per month.
22. The Respondent further submits that the Claimant was issued with a warning letter dated 24th January, 2022 that alerted him of his performance short falls in the weekly and quarterly sales projections. His performance of below 80% was unsatisfactory and did not meet the standard expected for job. He was therefore material for termination of employment.
23. The Respondent's further case and submission is that through and through the claimant was still under probation and his contract guided by section 42 of [Employment Act](#), 2007 on termination of probationary contracts. The termination was therefore lawful and within the probation of the law.
24. The Respondent in buttressing her case sought to rely in the authority of Danish Jalang'o & Another v Amicabre Travel Services Limited (2014) eKLR where the court was categorical that sections 43 and 45 of the [Employment Act](#), 2007 are not applicable to cases of probationary contracts.
25. The Respondent's case overwhelms that of the Claimant. She has tendered documentary evidence of the frame of the employment contract in so far as performance targets were concerned. These were strict but necessary bearing in mind the nature of the business in issue.
26. The Claimant at all times was aware of the contractual periods of performance assessment as weekly and quarterly. This was not negotiable and he cannot now be heard to complain of termination for failure to meet his contractual obligations. I therefore find a case of lawful termination of employment and hold as such.
27. The 2nd issued for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to relief sought.
28. I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF OCTOBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Miss Githogori instructed by Githogori & Harrison Associates Advocates for the Claimant.

Mr. Onyango instructed Ng'etich, Chiira & Associates Advocates for the Respondent.

