



**Macharia v Cobra Security Company Limited (Cause 435 of 2020)
[2023] KEELRC 164 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 435 OF 2020
J RIKA, J
JANUARY 31, 2023**

BETWEEN

STEPHEN MACHARIA CLAIMANT

AND

COBRA SECURITY COMPANY LIMITED RESPONDENT

RULING

1. The respondent has raised preliminary objection to the claim.
2. Objection is based on section 45[3] of the *Employment Act*, which states that an employee who has been continuously employed, for a period not less than 13 months, immediately before the date of termination, shall have the right to complain that he has been unfairly terminated.
3. Parties are in concurrence that the claimant was employed on November 1, 2018, and left employment on October 24, 2019. He worked for 11 months and 24 days. The Respondent submits that he does not qualify to claim unfair termination. He is prevented from doing so, by section 45[3] of the *Employment Act*.
4. The claim filed on August 28, 2020, seeking declaration that termination of the claimant's contract was unfair, and seeking compensation, is therefore improperly before the court. The respondent prays for its dismissal with costs.
5. The claimant submits that his claim is firm, relying on articles 27, 28, 41, and 50 of the *Constitution*. He argues that these articles grant him rights of equality before the law, non-discrimination, human dignity, and the right to fair labour practices. He should not be condemned unheard. Due process was not followed leading to termination of his employment. Preliminary objection is not premised on a pure point of law.



6. Parties agreed to have preliminary objection argued and determined on the strength of the submissions. These were confirmed to have been filed and exchanged at the last appearance before the court, on October 13, 2022.

The Court Finds: -

7. Section 45[3] of the *Employment Act* was declared unconstitutional by the High Court, in *Samuel G. Momanyi v. The Attorney-General* [2012] e-KLR.
8. In *Samuel G. Momanyi v. SDV Transami Kenya Limited* [2017] e-KLR, the Court of Appeal restated that section 45 [3] of the *Act* was the law, until otherwise declared by the High Court.
9. The decision of the High Court was delivered on May 18, 2012, and applies to matters filed after this date. Once section 45[3] of the *Act*, was declared unconstitutional by the High Court, it no longer had the force of law.
10. The preliminary objection by the respondent herein, has no merit. it is based on an unconstitutional provision of the *Employment Act*.

It is ordered: -

- a. The preliminary objection is declined.
- b. Costs in the cause.

***DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE JUDICIARY AND MINISTRY OF HEALTH JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.**

**JAMES RIKA
JUDGE**

