



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Kevian Kenya Ltd (Cause 467 of 2019)  
[2023] KEELRC 627 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 627 (KLR)

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

**CAUSE 467 OF 2019**

**BOM MANANI, J**

**MARCH 16, 2023**

**BETWEEN**

**NANCY WANJIKU KAMAU ..... CLAIMANT**

**AND**

**KEVIAN KENYA LTD ..... RESPONDENT**

**Failure by an employer to either confirm or terminate an employee after lapse of the probation period amounts to constructively confirming the employee's employment**

Reported by Kakai Toili

***Labour Law** – employment – contract of employment – probationary contracts – effect of an employer's failure to either confirm or terminate an employee's contract upon expiry of the probationary period – applicable legal consequences.*

***Labour Law** – employment – termination of employment – unsatisfactory performance – factors to be considered in determining whether an employee's performance was unsatisfactory to justify termination—Employment Act (cap 226), sections 41, 43 and 45.*

***Contract Law** – validity of contracts – grounds for challenging the validity of a contract – duress or undue influence – effect of failure to specifically plead duress or undue influence when challenging the validity of a contract – standard of proof applicable when duress or undue influence was alleged as a ground for challenging the validity of a contract.*

**Brief facts**

The claimant was engaged by the respondent under a written contract of employment dated June 7, 2018, which placed her on a six-month probationary period. The contract did not provide for any extension of the probation period. However, by a letter dated January 10, 2019, the respondent unilaterally extended the probation by a further three months, up to March 1, 2019.

The claimant contended that she diligently served in her role until April 12, 2019, when the respondent abruptly terminated her employment. She maintained that at the time of termination, she had not engaged in



any misconduct as contemplated under section 41 of the *Employment Act*, was not guilty of gross misconduct, and had not exhibited poor performance. She therefore sought compensation for wrongful termination.

The respondent's case was that the termination was lawful and occurred at the end of the probationary period, asserting that the claimant had failed to meet her performance targets. According to the respondent, this underperformance justified the decision not to confirm her employment.

### Issues

- i. What was the legal effect of an employer's failure to either confirm or terminate an employee's contract of employment after the expiry of the probationary period?
- ii. What factors should be considered in determining whether an employee's performance was unsatisfactory to justify termination of employment?
- iii. What was the effect of failure to plead duress or undue influence when seeking to challenge the validity of a contract?
- iv. What is the standard of proof applicable where duress or undue influence was alleged as a ground for impeaching a contract?

### Held

1. The letter dated January 10, 2019 demonstrated that the claimant expressly accepted the extension of her probationary period by signing the document. The extension was therefore valid. The extended period was for three months, ending on March 1, 2019. Upon expiry of that period, the respondent was obligated to either confirm or terminate the claimant's contract of service.
2. The probationary period lapsed on March 1, 2019. On that date, the respondent neither confirmed nor terminated the claimant's employment. Instead, the claimant continued working until April 12, 2019, when her services were terminated. The respondent's failure to act at the end of the probationary period had the legal effect of constructively confirming the claimant's employment. She thereby attained the status of a confirmed employee of the respondent.
3. Unsatisfactory performance was a lawful ground for termination of employment. However, before invoking it, an employer must comply with sections 41, 43, and 45 of the Employment Act, specifically:
  - a. the burden fell on the employer to establish unsatisfactory performance as a basis for termination.
  - b. Performance evaluation must be against pre-set goals discussed and agreed upon between the employer and employee.
  - c. An employee could only be deemed to have underperformed if those agreed-upon goals were not met.
  - d. Such goals must be objectively measurable using agreed-upon instruments and must be reasonably attainable.
  - e. The employer must demonstrate that the employee was afforded a reasonable opportunity to improve, without success.
  - f. The employee must be notified of the allegations of poor performance and given an opportunity to respond.
4. Although the respondent alleged poor performance, there was no evidence of mutually agreed-upon performance targets or evaluation instruments. There was further no evidence that any such instruments were developed in consultation with the claimant or applied in assessing her performance. The respondent, therefore, failed to justify poor performance as a ground for termination under sections 43 and 45 of the Employment Act.
5. There was no evidence that the claimant was allowed to respond to the allegations of poor performance, contrary to the procedural requirements of section 41 of the Employment Act. The respondent thus failed to demonstrate that the termination was effected in accordance with fair procedure.
6. In law, a duly executed discharge voucher constituted a binding contract, enforceable unless vitiated by recognized grounds such as fraud, misrepresentation, duress, or undue influence. Unless successfully



- challenged, such a voucher conclusively settled the matters it addressed and could bar further claims on the same subject.
7. The claimant admitted receiving Ksh 543,977 as terminal dues and signing a voucher acknowledging receipt and releasing the respondent from future claims on the same subject. She confirmed that she read and understood the document before signing. Until her oral testimony in court, she had not pleaded or deposed that she signed under coercion or that the respondent induced her by misrepresentation.
  8. The law required that where duress or undue influence was alleged, it must be specifically pleaded and proved. The standard of proof was higher than on a balance of probabilities, though it did not reach the threshold of beyond reasonable doubt. In the instant case, the claimant neither pleaded nor proved duress or undue influence as required by law.
  9. In the absence of evidence of coercion or misrepresentation, the claimant's execution of the discharge voucher was voluntary, and she thereby relinquished any further claims against the respondent. The court was therefore not entitled to reopen the issue of payments already made to her.

*Claim dismissed.*

### **Orders**

- i. *The claimant's contract of service was unlawfully terminated.*
- ii. *Since the claimant voluntarily executed a discharge voucher by which she received payments towards her terminal dues and renounced her right to pursue further compensation, the court shall not grant the claimant monetary compensation for the unlawful termination.*
- iii. *No orders as to costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Coastal Bottlers Limited v Kimathi Mithika* Civil Appeal 21 of 2017; [2018] KECA 523 (KLR) - (Explained)
2. *Mukala, Jane Samba v Ol Tukai Lodge Limited* Cause 823 of 2010; [2013] KEELRC 794 (KLR); [2010] LLR 255 - (Mentioned)
3. *Musyoka & 7 others v CMC Motors Group Limited* Cause 1953 of 2016; [2020] KEELRC 176 (KLR) - (Mentioned)
4. *Muthiga, Pauline Waigumo v Diamond Trust Bank Ltd* Cause 423 of 2017; [2021] KEELRC 1030 (KLR) - (Mentioned)
5. *National Bank of Kenya v Samuel Nguru Mutonya* Civil Appeal 118 of 2017; [2019] KECA 404 (KLR) - (Explained)
6. *Oluoko, Thomas Otieno v Uzuri Foods Limited (Golden Harvest Mills)* Cause 2000 of 2015; [2021] KEELRC 248 (KLR) - (Mentioned)
7. *Ondiba, Benjamin Nyambati v Egerton University* Cause 1099 of 2012; [2014] KEELRC 1161 (KLR) - (Mentioned)
8. *Patel & another v MJC & another (Suing as the guardians of PJP)* Civil Appeal 182 of 2019; [2022] KECA 364 (KLR) - (Mentioned)
9. *Paul, Philomena Kitony v Board of Management Holy Spirit Secondary School* Cause 808 of 2018; [2023] KEELRC 194 (KLR) - (Explained)
10. *Thomas De La Rue (K) Ltd v David Opondo Omutelema* Civil Appeal 65 of 2012; [2013] KECA 492 (KLR) - (Explained)
11. *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* Civil Appeal 147 of 2005; [2015] KECA 793 (KLR) - (Explained)



12. *Were, Christine Juma v Kenafri Industries Ltd* Cause 1822 of 2016; [2021] KEELRC 918 (KLR) - (Mentioned)

#### **Texts**

Ogembo, G., (2016), *Employment Law Guide for Employers* (Nairobi; Law Africa, Revised Edition)

#### **Statutes**

##### ***Kenya***

Employment Act (cap 226) sections 41, 43, 45 – (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

### **Introduction**

1. This dispute relates to alleged unfair termination of employment by the respondent. The claimant, who until April 2019 was an employee of the respondent, alleges that the respondent irregularly brought her employment to an end. She has therefore brought this action seeking various reliefs including a declaration that her contract of service with the respondent was illegitimately terminated.
2. The respondent counters that the claimant's employment was lawfully terminated upon the lapse of the probationary period that was applicable to the contract. It is the respondent's contention that the claimant failed to meet her performance targets forcing the respondent not to confirm her contract once the probation period came to a close.

### **Claimant's Case**

3. The claimant avers that on June 7, 2018, the respondent hired her services as an Export and Local Sales Manager. It is the claimant's contention that the parties executed a contract which obligated her to serve on probation for the first six (6) months. Her gross salary was agreed at Ksh 400,000.
4. The claimant contends that she took up the appointment and worked until April 12, 2019 when the respondent unexpectedly terminated the relation between the parties. It is the claimant's case that at the time of termination of her contract, she had not committed any of the infractions enumerated under section 41 of the *Employment Act* to warrant her being sent away. She was neither guilty of gross misconduct nor poor performance.
5. In the claimant's view, her contract of service was terminated un-procedurally. She thus prays for a declaration that the decision to terminate her employment was unlawful. She also prays for compensation for wrongful termination.

### **Respondent's Case**

6. On its part, the respondent states that after engaging the claimant on June 7, 2018, she failed to perform her duties to the expected standards forcing the respondent to extend the probationary period of her contract for a further three months. That the extension was communicated to the claimant through a letter dated January 10, 2019. That the claimant signed the letter signifying her acceptance of the extension.



7. The respondent states that despite the extended probation, the claimant's performance did not improve. Consequently, a decision was taken not to confirm her contract of service. This decision was communicated to the claimant through the respondent's letter of April 12, 2019.
8. The respondent asserts that after terminating the claimant's contract, the parties worked out the claimant's final dues. That these dues were promptly paid to the claimant and she signed a voucher closing the matter. As a result, the current case is ill advised and ought to be dismissed with costs to the respondent.

### **Issues for Determination**

9. The parties are in agreement that they had an employment relation at the time the cause of action arose. What they dispute are the following:-
  - a. Whether at the time of termination of the relation, the parties were still engaged on probationary terms.
  - b. Whether the contract of employment was lawfully terminated.
  - c. Whether the parties are entitled to the reliefs that they seek in their pleadings.

### **Analysis**

10. The claimant's letter of appointment dated June 7, 2018 anticipated that the parties would work on probationary terms for a period of six months only. There was no provision for extension of the period.
11. However, by the letter January 10, 2019, the respondent proposed to extend the probation for a further three months. The extended period was to run up to March 1, 2019.
12. The letter of January 10, 2019 shows that the claimant signified her acceptance of the extension by signing the document. The extension was therefore valid.
13. As indicated earlier, the extended probationary period was for a period of three months that was to come to an end on March 1, 2019. This means that at the close of this period, the claimant's contract of service was to either be confirmed or terminated.
14. There is no evidence that on March 1, 2019, the respondent communicated its decision either to confirm or terminate the claimant's employment. It was not until April 12, 2019 that the respondent expressed its election on the matter by issuing the claimant with the letter terminating her employment.
15. The question for determination is whether as at April 12, 2019, the claimant was still serving the respondent on probation. George Ogembo in his publication entitled, "[\*Employment Law Guide for Employers\*](#)" Revised Edition, 2019, posits that as an employee's probation period comes to a close, the employer must elect to either confirm or terminate the employee's probationary contract. If the employer does not act either way and the employee continues in service, the law presumes in favour of confirmation of the contract. The confirmation accrues by operation of law, also referred to as constructive confirmation.
16. Once this development takes place, the employer is not entitled to re-open the probation clause in the contract. He has to henceforth deal with the employee as a confirmed employee (see [\*Benjamin Nyambati Ondiba v Egerton University\*](#) [2014] eKLR).



17. In the case before me, the probation period lapsed on March 1, 2019. On this date, the respondent neither confirmed nor terminated the services of the claimant. On the other hand, the claimant continued in service until April 12, 2019 when she was relieved of her employment.
18. The failure by the respondent to either confirm or terminate the claimant's contract of service on March 1, 2019 had the consequence of constructively confirming the claimant's employment. She thereby became a confirmed employee of the respondent.
19. The next question for determination is whether the contract of employment was lawfully terminated. In its letter to the claimant dated April 12, 2019, the respondent cites unsatisfactory performance as the reason for terminating the claimant's employment.
20. Unsatisfactory performance is one of the grounds that an employer may invoke to relieve an employee of his employment. However, before reaching this decision, the employer is obligated to satisfy the requirements of sections 41, 43 and 45 of the *Employment Act*.
21. In ELRC Cause No 808 of 2018 *Philomena Kitony Paul Board of Management Holy Spirit Secondary School* (unreported), this court expressed itself as follows on the issue:-

“.....poor performance denotes the failure by an employee to meet the agreed standard of work at the workplace.

[It] presupposes that the employer agreed with the employee on specific deliverables within a specified period of time which the employee has failed to meet. An employer can only rely on the ground of poor performance to terminate an employee if he is able to demonstrate that the employee was expected to meet some objectively measurable standard of productivity that is reasonably expected of employees in the sector but the employee has failed to do so despite being afforded a chance to improve.”

22. In *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal quoting with approval the decision in *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) expressed itself on the issue as follows:-

“Where poor performance is shown to be [the] reason for termination, the employer is placed at a high level of proof.....The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

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 put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”



23. From the excerpts, I understand the court to be saying the following regarding poor performance as a ground for termination of employment:-
- a. It is the employer who bears the overall obligation of establishing poor performance as a ground for terminating an employee's contract of service.
  - b. Performance evaluation can only be conducted against pre-set goals that were discussed and agreed upon between the employer and the employee.
  - c. The employer is only entitled to hold an employee as having underperformed if the employee has failed to meet the pre-set goals.
  - d. That such goals must be capable of objective evaluation using agreed instruments of measurement and the goals must be reasonably attainable.
  - e. That there must be evidence that before the employer took the decision to terminate the employee, he had allowed the employee the opportunity to improve to no avail.
  - f. That the employee was notified of the accusation of poor performance leveled against him and given an opportunity to respond to it.
24. I have considered the evidence on record against the above parameters. Although the respondent accuses the claimant of poor performance, there was no evidence indicating that performance targets were agreed on between the parties. There was no evidence of the performance measuring instruments agreed on between the parties. If the instruments exist, there was no evidence that they were developed in consultation with the claimant or that they were used to evaluate her.
25. Although the respondent's witness alluded to performance meetings having been conducted between the claimant and her line supervisor, no record of such reviews was produced in court. No minutes of performance review meetings were tendered in evidence. No performance scorecards were produced to demonstrate the claimant's performance.
26. In the absence of this evidence, it is not possible for the court to determine the performance goals that the claimant was expected to meet. It is not possible to conclude that the claimant failed to meet the agreed performance targets. In the premises, the court finds that the respondent has failed to justify poor performance as a ground for terminating the claimant's employment contrary to the requirements of sections 43 and 45 of the *Employment Act*.
27. There is also no evidence that the respondent allowed the claimant the opportunity to respond to the accusations of poor performance leveled against her contrary to the requirements of section 41 of the *Employment Act*. Indeed, the respondent's witness confirmed that the claimant was not served with a notice requiring her to explain why her contract should not be terminated for poor performance. No disciplinary session was shown to have been convened to determine the matter before the claimant was terminated. As a result, the court finds that the respondent has failed to demonstrate that the employment of the claimant was terminated in accordance with fair procedure.
28. The final issue for determination relates to whether the parties are entitled to the reliefs that they seek in their pleadings. Having declared the decision to terminate the claimant's employment unlawful, it is expected that the court would perhaps make some monetary award to the successful party.
29. However, in the evidence that was presented to the court, the respondent alluded to the fact that upon terminating the claimant's contract, the parties agreed on the terminal dues payable to the claimant and that the same were promptly paid. To establish this fact, the respondent produced in evidence a



discharge voucher executed on April 24, 2019 showing that the claimant was paid Ksh 543,977 on account of terminal dues.

30. During the trial, the claimant admitted that she was paid Ksh 543,977 as her final dues. She also conceded that she signed a discharge voucher against this receipt. That she read and understood the contents of the voucher.
31. When asked whether she acted voluntarily in the process her answer was that she was ambushed to sign the voucher. That she needed to collect the cash in order to survive the following month. In her view, the prevailing circumstances left her with little option but to sign the document. In the premises, it was her case that the voucher was forced on her.
32. On further cross examination, the claimant conceded that she had not alluded to the fact of being forced to sign the voucher either in her pleadings or witness statement. The assertion that the claimant felt coerced by circumstances to sign the voucher first came up during her cross examination.
33. I have looked at the payment voucher. It contains the following clause:-

“ I Nancy Kamau acknowledge receipt of Ksh being my final dues on termination of my employment with Kevian Kenya Limited.

I further confirm that no further claim will arise after termination of this contract.

Received with thanks.

Name:

Signature:

Id Number:

Date:”

34. Although the space for the sum received in the above narration appears blank, there is a figure of Ksh 543,977 just above it. It is this figure that the respondent says it paid the claimant and which the claimant admits having received from the respondent.
35. In law, a duly executed discharge voucher is equated to a contract. It has a binding effect on the parties unless it is impugned on the usual grounds of vitiating a contract. Unless successfully assailed, a discharge voucher has the effect of closing the matter it addresses and may constitute a bar to further claims on the issue (see *Thomas Otieno Oluoko v Uzuri Foods Limited (Golden Harvest Mills)* [2021] eKLR, *Christine Juma Were v Kenafic Industries Ltd* [2021] eKLR, *Amos Kioko Musyoka & 7 others v Cmc Motors Group Limited* [2021] eKLR and *Pauline Waigumo Muthiga v Diamond Trust Bank Ltd* [2021] eKLR).
36. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the court expressed itself as follows on the effects of a discharge voucher:-

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”



37. In *Coastal Bottlers Limited v Kimathi Mitbika* [2018] eKLR, the court stated as follows on the issue:-
- “Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties”.
38. In *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR the court had this to say about the same matter:-
- “The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other.”
39. I have considered the matter before me in the context of the above exposition of the law on the import of discharge vouchers. The claimant concedes that she was paid Ksh 543,977 as her terminal dues. She admits signing a voucher acknowledging payment and relieving the employer of future claims on the same subject. She confirms that she read and understood the instrument before signing it.
40. Prior to her evidence in court where she suggested that she signed the document because she had no otherwise, the claimant did not suggest either through her written witness statement or pleadings or affidavits that she was coerced into signing the instrument. Nowhere did she suggest that the respondent induced her into signing the voucher through misrepresentation of material facts.
41. I am cognizant of the legal requirement that where a party pleads duress or undue influence as a ground for assailing the validity of a contract, such party is under duty not just to plead this fact but also to specifically prove it. I am also cognizant of the fact that the burden of proof for these elements is higher than on a balance of probabilities even though it does not get to the standard of beyond reasonable doubt. In this case, the claimant neither pleaded nor established coercion or undue influence in the manner that the law contemplates as a basis for invalidating the discharge voucher that she signed (see *Patel & another v MJC & another (Suing as the guardians of PIP* (Civil Appeal 182 of 2019; [2022] KECA 364 (KLR)).
42. In the absence of evidence that she was coerced or misled into signing the discharge voucher, I hold that the claimant voluntarily relinquished her right to pursue further reliefs from the respondent when she executed the document. In the premises, this court is not entitled to re-open the issue of payments to the claimant.

### **Determination**

43. The court declares that the claimant’s contract of service was unlawfully terminated.
44. However, since the claimant voluntarily executed a discharge voucher by which she received payments towards her terminal dues and renounced her right to pursue further compensation, this court shall not grant the claimant monetary compensation for the unlawful termination.
45. The court makes no orders as to costs

**DATED, SIGNED AND DELIVERED ON THE 16<sup>TH</sup> DAY OF MARCH, 2023**

**B. O. M. MANANI**



## **JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

## **ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

