



REPUBLIC OF KENYA



**Mwangi v Denko Properties Ltd & another (Cause 494 of 2019)  
[2023] KEELRC 2422 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2422 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 494 OF 2019  
DKN MARETE, J  
OCTOBER 3, 2023**

**BETWEEN**

**KELVIN KAMAU MWANGI ..... CLAIMANT**

**AND**

**DENKO PROPERTIES LTD ..... 1<sup>ST</sup> RESPONDENT**

**CAROLINE NYAGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This matter was commenced vide a statement of claim filed on 30th July, 2019. The issues in dispute are herein cited as;
  1. Whether the Respondents followed due process in terminating the Claimant’s employment.
  2. Whether the termination of the Claimant’s employment was unfair and wrongful in the circumstances.
2. The Respondent in a Respondent’s Response to claim dated 20th September, 2019 denies the claim and prays that it be dismissed with costs.
3. The claimant’s case is that at all material times to his suit, he was an employee of the Respondent as to Marketing Manager and attached to the Head Office in Nairobi County.
4. The claimant’s further case is that carried out this wholeheartedly, dutifully and diligently and was not at any time the subject of complaint on his performance save for the innuendo alluded to in the in his letter of termination.
5. His other case is his termination of contract was premised on allegations of unsatisfactory performance. His computer was confiscated and he was ordered to clear after the letter of termination after was issued by the 2nd Respondent.



6. The Claimant's penultimate case is that he was summarily dismissed and/or terminated informally without regard to his rights as an employee and as per the contract and or given any monetary/terminal benefits.

He prays as follows;

- a. A declaration that the 1<sup>st</sup> Respondent's decision and the 2<sup>nd</sup> Respondent's letter to terminate the Claimant's employment was procedurally unfair and substantively unjustified;
  - b. Service pay for all months worked.
  - c. Damages equivalent of 3 month's salary due to unfair termination.
  - d. Costs of the suit; and
  - e. Any other relief that this Honourable may deem fit and just to grant.
7. The Respondent's case is an admission of the employment of the claimant as raised she but however adds that the claimant misconducted himself and was taken through disciplinary process on 21/12/2019 and on being asked to explain himself he walked out of the meeting and chose to resign instantly.
8. The Respondent further case and in response to the contents of paragraph 6 of the Statement of Claim the Respondents state that the Claimant thereafter apologized vide an email dated the 22<sup>nd</sup> day of December 2018 for his misdeeds.
9. Upon the 1<sup>st</sup> Respondent's consideration of the Claimant's apology the Respondent she subsequently employed by the Claimant on the 14<sup>th</sup> day of January 2019. The later contract provided for a probationary period of 6 months where after the 2<sup>nd</sup> Respondent could either confirm or him or not into it's employment.
10. The 2<sup>nd</sup> Respondent who is the Human Resource Officer of a 1<sup>st</sup> Respondent denies liability in that she is not proper party to this suit by virtue of the fact that she is not privy to the contract between the Claimant and the 1<sup>st</sup> Respondent.
11. In further response to the content of paragraph 6 of the statement of claim the 2<sup>nd</sup> respondent adds that she executed the functions, powers or duties in her capacity as the Human Resource Manager administratively as such neither herself nor any other person acting on her directions can be held personally liable to any action, claim or demand whatsoever.
12. The Respondent in denial of the contents of paragraph 8 of the statement of claim and state that the Claimant failed to perform his duties as was expected in his contract during the pendency of probation. The Claimant failed to meet the requisite minimum qualification during his tenure at the 1<sup>st</sup> Respondent's employment.
13. The Respondent in response to paragraph 10 the Respondents reiterates his earlier case and set out above and states that the basis of termination of his probationary contract was due to unsatisfactory performance of the Claimant in the court of his duties.
14. The Respondent list of documents comprising the letter of contract of service dated 16<sup>th</sup> November, 2018 and the other dated 18<sup>th</sup> January, 2019 are all telling on the terms of the respective contract of employment.
15. This is further backed up by the following additional documents;



1. Respondent witness statement 20th September 2019.
  2. A copy of the Claimant's letter of appointment with the 1<sup>st</sup> Respondent dated 16<sup>th</sup> day of November 2018.
  3. A copy of an email from the Claimant dated 22<sup>nd</sup> day of December, 2018.
  4. A copy of email from the Claimant dated 23<sup>rd</sup> day of December, 2018.
  5. A copy of the Claimant's letter of appointment with the 1<sup>st</sup> Respondent dated the 11<sup>th</sup> day of January 2019.
  6. Copies of emails exchanged between the Claimant and the Respondents in the course of the Claimant's employment with the 1<sup>st</sup> Respondent.
16. 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 relief sought.
  3. Who bears the costs of this cause.
17. The first issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant case and submissions is that termination of employment was issue riddled and unlawful.
18. He seeks to buttress his case by relying on in the authority of *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR where the court held as follows in respect to substantive justification in probation contracts' termination 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.
19. This position was further rehashed in the authority of *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR where she elaborated on the import of the right to fair labour practices under Article 41 of *the constitution* of Kenya in the following words;-
- ‘Article 41 of *the Constitution*, 2010 guarantees employment and labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of *the Constitution*. To limit employment of a right by the mere reason of the length of service does not in my view meet the threshold set in Article 24.’
20. Further, it is our considered view that the *Employment Act* depicts the probation contract as a distinct contract from that of an employment contract by ousting the application of section 41 of the *Employment Act*. In this regard, section 42 provides that;-
- ‘Termination of probationary contracts.
1. The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.



2. 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.
3. No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
4. A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.'

Again,

A three-judge bench in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party [2021] EKLR*, in declaring Section 42(1) unconstitutional, explained that an employee under probation was still entitled to fair labour practices and administrative actions in line with Articles 41 and 47 of [the constitution](#) of Kenya. The court held that:-

'Section 41 of the Act provide that an employer shall before dismissing an employee on grounds of misconduct, poor performance and so on, explain to the employee the reason for which the employee is considering termination and that the employer shall before termination the employment of such employee consider any representation such employee and or his representative may make.

53. Under Section 2 of the [Employment Act](#), an employee is defined to mean a person employed for wages or salary and includes an apprentice and indentured learner. Although the Act defines a probation contract in relation to the duration of the contract it does not segregate or isolate a person employed under a probationary contract from the general definition of an employee. Therefore a reading of Section 41 together with the implicit provisions of Section 42(2) renders illogical the provisions of Section 42(1).
54. Further, it does not make sense to accord an apprentice and indentured learner who are included in the definition of an employee under Section 2, the procedural benefits of Section 41 but deny the same to an employee simply because they hold a probationary contract.
55. Labour rights are part of the Bill of Rights by virtue of Article 41 of [the Constitution](#). Article 24 of [the constitution](#) prohibits the limitation of a right or a fundamental freedom in the Bill of Rights except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality an freedom.
56. Apart from life and land ownership, employment ranks among the most emotive issues in a person's life. Failure to secure a job and or loss of one has direct relationship with a person's confidence, dignity and place in society. Prof Ojwang' J (as he then was) in



the case of Menginya Salim Murgani v. Kenya Revenue Authority  
HCCC No. 1139 of 2002 aptly observed as follows:-

“ ...In so far as the employee spends the bulk of his or her time in the service of the employer, there is little other livelihood, in the employee outside the framework of the employment relationship. Of this fact, this court takes judicial notice; and it must then be considered that the status of employment relationship inherently vests in the employee both normal rights and legitimate expectations...”

57. Any legislation therefore which intends to limit or qualify a labour right, ought to be to the extent that the limitation or qualification is reasonable and justifiable in an open and democratic society.
  58. Further, in addition to the inconsistencies among Sections 42(2) and 41 considered earlier in this judgement, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*.
  59. To his extent therefore, we find and hold that Section 42(1) insofar as it excludes an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, is inconsistent with Articles 41 and 47 of *the Constitution* hence null and void.'
21. It is clear from the Claimant's case that the place of a probationary contract is protected and takes special consideration in the law on employment. The probationary contract must be attended to promptly and due consideration of the law so as to afford the probationer due process and regards to the law on fairness in dealing with the contract. However, section 41 and 42(2) of the *Employment Act* are not strictu sensu all applicable to a case of termination in probationary contracts.
  22. The Respondent did not file any written submissions on this cause.
  23. A look at the respective cases of the parties tilts this matter in favour of the Respondent. This is a situation where the parties entered into service contracts at various stages in the course of employment but these were negated by the Claimant's disability to perform his duties to the required standards. And therefore the consequential termination of employment by the Respondent. The sad story of the employment of the Claimant is all narrated and exhibited in the documentation of the Respondent in defence of the claim. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.
  24. On a findings of lawful termination of employment, the Claimant becomes disentitled to the relief sought.
  25. I am there inclined to dismiss the claim with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 3<sup>RD</sup> DAY OF OCTOBER 2023.**

**D. K. Njagi Marete**

**JUDGE**



## **Appearances**

1. Mr. Chimei instructed by Chimei & Co. Advocates for the Claimant.
2. No appearance for the Respondent.

