



**Kibe v Kibo Africa Limited (Cause E107 of 2023)
[2023] KEELRC 3322 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3322 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E107 OF 2023
SC RUTTO, J
DECEMBER 8, 2023**

BETWEEN

MAUREEN WANJIRU KIBE CLAIMANT

AND

KIBO AFRICA LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 14th February 2023, the Claimant avers that she was employed by the Respondent with effect from 2nd June 2022, as a Marketing and Communication Executive. Her appointment was subject to a probation period of 90 days during which the Respondent was to assess her suitability and performance against the set objectives.
2. According to the Claimant, the 90 days probation period ran from 2nd June 2022 and lapsed on 2nd September 2022, during which period she executed her duties with diligence and no complaint was raised regarding her execution of duties. She avers that on 5th October 2022, she was informed by her line manager that her probation was being reviewed and was required to do an Employee Probation Review Report to be handed over the same day for consideration or confirmation of her appointment or extension of her probation.
3. That on 3rd November 2022, she was summoned by the Human Resource Manager who handed her a dismissal letter dated 2nd November 2022, terminating her probationary employment on alleged grounds of poor performance and poor communication.
4. The Claimant has termed her termination wrongful and unfair hence claims the following reliefs against the Respondent:
 - a. A declaration that the Respondent's aforesaid actions to summarily dismiss the Claimant from employment amounted to unlawful and unfair dismissal;



- b. A declaration that the Claimant is entitled to payment of terminal benefits and compensatory damages as pleaded;
 - c. An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totaling to Kshs 1,690,000/=;
 - d. Interest on (c) above from the date of filing the suit till payment in full; and
 - e. Costs of the suit plus interest thereon.
5. The Respondent countered the Claim through its Statement of Defence dated 23rd March 2023, in which it has denied the Claimant's assertions and put her to strict proof. The Respondent further contends that its actions as alleged by the Claimant was caused wholly and substantially by her non-performance. Consequently, the Respondent has asked the court to dismiss the claim with costs.
 6. When the matter came up for mention on 26th September 2023, the Respondent was absent from Court despite the date having been taken by consent. The Claimant through her Advocate applied to have the matter determined by way of documentary evidence. The said application was allowed hence the Court directed that the matter proceed by way of documentary evidence in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Subsequently, the parties were directed to file and exchange written submissions within specified timelines.
 7. The matter was subsequently scheduled for mention on 30th October 2023 to confirm compliance and take a judgment date. Once again, the Respondent's Advocate was absent from Court on the said date. In this regard, the Claimant confirmed service through the Affidavit of Service sworn by Sunday Oloo on 13th October 2023, in which he avers that he effected service of the mention notice together with the Court's erstwhile directions, electronically through the email address disclosed by the Respondent's Advocates.

Claimant's case

8. The Claimant's case is as per her Affidavit which was sworn on 13th October 2023 in which she states that as per the terms of the Contract of Employment, the 90 days probation period ran from the 2nd June 2022 and lapsed on the 2nd September 2022 during which period she executed her duties with diligence.
9. She avers that upon lapse of the 90 days probation period on 2nd September 2022, there was no written or oral notification extending the probation period and she continued to carry out her duties as usual and thus her employment was effectively confirmed by operation of law on 2nd September 2022, when the probation period lapsed and the same was not extended.
10. The Claimant avers that on 5th October 2022, she was informed by her line manager that her purported probation was being reviewed and that she was required to do an Employee Probation Review Report to be handed over the same day for consideration for confirmation of her appointment or extension of her probation period. She complied and handed over the Report on the same day.
11. On 3rd November 2022, she reported to work as usual and thereafter, was summoned by the Human Resource Manager who handed her a termination letter dated 2nd November 2022.
12. The Claimant contended that she was wrongfully and unfairly terminated since at the time of her termination, she was past the probation period and she had been effectively confirmed by operation of the law. According to her, the inquiry and or the probation review was therefore null and void, inconsequential and contrary to the law and the Terms and Conditions of Service.



13. She further averred that no reasons were given relating to unsatisfactory performance and that she had done nothing wrong to warrant her dismissal as her work performance was above board and had no previous record of poor performance.
14. She further stated that the termination letter refers to email correspondences between herself and her line manager on purported complaints of work ethics whereby she had explained the reason why she did not report to work on time as she had visited Captain Motorcycle on invitation in order to carry out a Competitor Market analysis which thereafter, did a report on the same which she handed over to her line manager.
15. That the Respondent's action of reviewing her contract retrospectively after the probation period had lapsed and thereafter terminating her contract in less than a month, connotes acts of malice and ill will camouflaged as poor performance and communication. She contended that the Respondent had a predetermined mind to terminate her employment.
16. The Claimant further stated that the alleged poor communication was based on the email correspondence between herself and her line on 28th October 2022 whereupon giving her explanation, she had requested that they find an amicable way of resolving conflict. Her employment was later terminated a few days later on 2nd November 2022 without the Respondent granting her an opportunity to be heard and explain herself as required by the law.
17. She further averred that the termination was without notice and she was not invited to show cause why she should not be terminated from employment in contravention of Section 41 of the [Employment Act](#) 2007. No hearing ever took place before the alleged decision to summarily dismiss her was reached. Due process was thrown out of the window in the haste to dismiss her.
18. According to the Claimant, the decision to dismiss her was extremely harsh and unwarranted considering she had served the Respondent without blemish.

Respondent's case

19. The Respondent did not file an Affidavit hence its case remained as per its Statement of Defence through which it averred that the Claimant's contract provided for her probation period and the possibility of extension of the said probation period. The Respondent further stated that the Claimant's contract required her to abide by its rules, laws and policies to ensure proper execution of work.
20. The Respondent further cited the Claimant for non-performance and negligence illustrated as follows:
 - a. failure to meet the company's quality standards while at work;
 - b. failure to pay any or sufficient heed in the carrying out of her duties; and
 - c. failure to take proper care and precaution while at work.

Submissions

21. The Claimant submitted that by operation of law and in accordance with Section 42 of the [Employment Act](#), she completed her probation period after 3 months which lapsed on 2nd September 2022. That the same, not having been extended in accordance with the law and the employment contract, she was effectively confirmed by operation of the law. To this end, she referenced the cases of Stephen Were vs Wamuti Distributors Limited (2020) eKLR and Narry Philemons Onaya-Odek vs



Technical University of Africa (Formerly, the Kenya Polytechnic University College) (2017) eKLR to support her argument.

22. It was the Claimant's further submission that the Respondent, not having extended her probation period cannot purport to review the terms retrospectively by inquiry one month after the probation period had expired. That the position of the law is that where there is an extension of the probationary period, the extended period must commence immediately where the initial period ends. In support of this position, the Claimant sought to rely on the determination in the case of Daniel Mutuku Njuguna vs Kenya Institute of Mass Communication (2021) eKLR.
23. The Claimant stated in further submission that the Respondent's action of reviewing her contract retrospectively after the lapse of the probation period and thereafter terminating her in less than a month was therefore null and void, inconsequential and contrary to the law and her Terms and Conditions of Service.
24. Placing reliance on the case of Monica Munira Kibuchi & 6 Others vs Mount Kenya University; Attorney General (Interested Party) (2021) eKLR, the Claimant posited that having established that her employment was confirmed by operation of law upon lapse of the 3 months' probation period, her employment could only be terminated in accordance with Sections 35, 40, 41 or 44 of the Employment Act which entails procedural fairness and substantive justification.
25. The Claimant further submitted that the Respondent has failed to prove that it had put in place an employment policy or practice on how to measure good performance against poor performance.
26. It was the Claimant's view that there is no substantive issue of poor performance that was brought to her attention and that she was not granted an opportunity to remedy the poor performance.
27. In further submission, the Claimant argued that going by the mandatory principle that parties are bound by their pleadings, it is therefore established that there was no hearing at all before dismissal, as the pleadings filed do not make reference to any hearing before termination. That it is therefore her uncontroverted testimony that there was no hearing before termination. She urged the Court to hold as much.
28. The Respondent did not file any submissions as the same were missing from the Court's physical record and were not traceable on the online portal.

Analysis and determination

29. Arising from the pleadings on record, the evidentiary material placed before me as well as the Claimant's submissions, it is apparent that this Court is being called to resolve the following questions:
 - a. Whether the Claimant's appointment was confirmed by operation of the law;
 - b. Whether the Claimant's termination was unfair and unlawful;
 - c. Is the Claimant entitled to the reliefs sought?

Whether the Claimant's appointment was confirmed by operation of the law

30. It is the Claimant's case that upon lapse of the 90 days probation period, there was no written or oral notification extending the said probation period hence she continued to carry on her duties. According to the Claimant, her employment was effectively confirmed by operation of the law on 2nd September 2022, when the probation period lapsed.



31. In its defense, the Respondent avers that the Claimant’s contract included the possibility of an extension of the probation period.
32. It is not in doubt that the Claimant’s contract provided for a probation period of 90 days and the possibility of an extension subject to her performance. Of relevance, is clause 1.5 of the Claimant’s contract of employment which provides for an extension of her probation period as follows:
- “Kibo reserves the right to extend the probation period by an additional three (3) months for better assessment of the Employee’s performance. The employee will be notified in writing if Kibo extends the probation.”
33. With regards to the extension of the Claimant’s probation period, the Respondent stated as follows in her letter of termination:
- “..As per the documentation in your file, your probation was up, and you were due for confirmation on 1st September 2022, but this did not happen as your head of department recommended with your acknowledgment an extension of probation upto 1st December 2022 on grounds of poor performance...”
34. In effect, the Respondent was alluding to the fact that the Claimant’s probationary period had been extended up to 1st December 2022.
35. Extension of an employee’s probationary period is provided for under Section 42 (2) of the [Employment Act](#) (Act) as follows:
- “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.” Emphasis added
36. As can be discerned from the provisions of Section 42(2) of the Act, an extension of the probationary period must be mutually agreed upon by both the employer and the employee.
37. In this case, there is no evidence that there was mutuality to extend the Claimant’s probationary period. This is on account of the fact that despite the Respondent indicating in the Claimant’s letter of termination that her probation had been extended, there was no evidence that she agreed to the said extension in terms of Section 42(2) of the Act.
38. In addressing this issue, the Court in the case of James O Oloo vs Tana and Athi River Development Authority [2016] eKLR reckoned as follows:
- “This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant.”
39. Further, it is not in doubt that the Claimant continued rendering her services to the Respondent up to 2nd November 2022, well past the 3 months probationary period. In the case of Narry Philemons Onaya-Odeck vs Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR, the Court had this to say when confronted with an almost similar issue:
- “In this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did



not take place as agreed. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship... By operation of the law and in accordance with section 42 of the *Employment Act*, the claimant successfully completed his probation period and thus his employment confirmed."

40. Having found that the purported extension of the Claimant's probation by the Respondent was not proved and in following with the above precedent, I find that the Claimant stood confirmed by operation of the law upon lapse of the 3 months probationary period.

Whether the Claimant's termination was unfair and unlawful

41. Section 45(2) of the Act, qualifies a termination of employment by an employer unfair, if the employer fails to prove—
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
42. Fundamentally, an employer ought to prove that an employee's termination was fair substantively and procedurally. Substantive fairness which is also addressed under Section 43 of the Act, relates to the reasons for which the employee's employment was terminated while procedural fairness has to do with the procedure applied in effecting the employee's termination. I will consider the two aspects under separate heads.

i. Substantive fairness

43. In the instant case, the termination of the Claimant's contract of employment was communicated through a letter dated 2nd November 2022. As can be discerned from the said letter, the Claimant's termination was on grounds of poor performance in her deliverables and poor communication.
44. The Claimant exhibited an Employee Probation Review, through which her performance was apparently assessed by her line manager. Notably, the Claimant's line manager did not give a glowing assessment of her performance. Her comments were as follows: There is a lot of expectation at your level of experience which is lacking completely. There is lack of project follow up even on simple tasks and company processes- requesting quotes from agencies, forwarding to be added in the system and getting LPOs for suppliers- a lack of initiative to seek solutions when there is a delay. Lack of initiative to follow through your own projects or pick simple changes that were already highlighted. We should be seeing some sense of leadership to take up projects and completing them with minimal push or follow up instead you have to be pushed through your work.
45. For starters, there is no evidence that at the beginning of the Claimant's appointment and ahead of her evaluation, she was issued with targets she was to achieve within a specified timeline. Further, it is not clear whether the Claimant was aware of any deliverables against such targets.



46. Indeed, it is not clear how the Respondent arrived at the targets against which the Claimant was assessed. Without any set targets, the measure of the Claimant's performance in that regard cannot be said to have been objective.
47. Besides, it is notable that the assessment by the Claimant's line manager was too general and failed to address any particular aspect of her performance.
48. What's more, the Respondent did not adduce evidence to prove that indeed, the Claimant had underperformed as alleged. In this regard, the evaluation by the Claimant's line manager was not backed by evidence. The evaluation on its own, cannot prove and confirm that the Claimant was underperforming.
49. Further, in the event the Claimant had underperformed, the Respondent did not state what measures it had taken to address her poor performance.
50. Based on the foregoing reasons, I arrive at the inescapable conclusion that the Respondent has failed to prove that it had a justified reason to terminate the Claimant's employment on account of her poor performance.
51. Turning to the allegation of poor communication, it is evident that the same was not substantiated in whatever form or manner by the Respondent. As a matter of fact, the said allegation was too general and lacking in particulars. In this regard, I cannot help but question the manner in which the Claimant was poor in her communication.
52. In total sum, the Respondent failed to satisfy its evidentiary burden under Sections 43 and 45(2) (a) and (b) of the Act hence the Claimant's termination was not substantively fair.

ii. Procedural fairness

53. As stated herein, beyond proving the reasons for an employee's termination from employment, an employer is required to prove that it complied with the requirements of a fair process. Section 41 of the Act provides in an elaborate fashion what entails fair procedure. In this regard, an employer is required to notify an employee of the intended termination in a language he or she understands and in the presence of another employee or a shop floor union representative.
54. From the record before me, there is no evidence that the Claimant was granted an opportunity to make her representations to the allegations levelled against her. By law, it was incumbent upon the Respondent to notify the Claimant of the intended termination, the reasons thereof and accord her an opportunity to defend herself against the allegations of poor performance and poor communication.
55. On this issue, I will follow the determination of the Court in the case of Jane Samba Mukala vs Ol Tukai Lodge Limited (2013) eKLR thus:

“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.”
56. I fully adopt and reiterate the finding in the above case and hold that the Respondent was bound to comply with the provisions of the law. In this case, there being no evidence of such compliance, it is this Court's finding that the Claimant's termination was procedurally unfair hence unlawful.



57. In view of the foregoing, I cannot help but find that the termination of the Claimant was neither fair nor lawful for want of compliance with Sections 41, 43 and 45 of the Act.

Reliefs

58. As the Court has found that the Claimant's termination was substantively and procedurally unfair, she is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to three (3) months of her gross salary. This award also takes into consideration the length of the employment relationship, the remainder period of the Claimant's contract of service, as well as the circumstances surrounding her termination from employment.

Orders

59. It is against this background that I enter Judgment in favour of the Claimant against the Respondent in the following manner: -

- a. A declaration that the Claimant's summary dismissal from employment was unfair and unlawful.
- b. The Claimant is awarded the sum of Kshs 130,000.00 being one (1) month's salary in lieu of notice.
- c. The Claimant is awarded compensatory damages in the sum of Kshs 390,000.00 being equivalent to three (3) months of her gross salary.
- d. The total award is Kshs 520,000.00.
- e. Interest shall apply to the amount in (d) at court rates from the date of Judgment until payment in full.
- f. The Claimant shall also have the costs of the suit.

60. The Claimant shall also be entitled to a certificate of service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wafula

For the Respondent Ms. Musangi instructed by Mr. Faraji

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

