



**Omudeck v Oshwal Education and Relief Board (Cause 1958 of 2017)
[2022] KEELRC 1415 (KLR) (16 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1958 OF 2017**

JK GAKERI, J

MAY 16, 2022

BETWEEN

EUGENE EKAZI OMUDECK CLAIMANT

AND

OSHWAL EDUCATION AND RELIEF BOARD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a memorandum of claim dated 21st September 2017 and filed on 29th September 2017 alleging that his contract of employment was terminated without a justifiable cause.
2. The Claimant prays for –
 - a. Unconditional issuance of certificate of service
 - b. Compensation for the 22 months of service Kshs.1,829,209.36
 - c. One month's salary in lieu of notice Kshs.83,145.88
 - d. General and exemplary damages for discrimination on account of race
 - e. 12 months' compensation Kshs.999,750.56
Total Kshs.2,912,105.80
 - f. Interest on (a) to (e) above
 - g. Costs of this suit.
3. The Claimant states that following an advertisement by the Respondent sometime in 2017, he applied for the job, was shortlisted, interviewed and offered the same by a letter dated 27th April 2017. He was



required to report on 29th May 2017. He gave a one month's notice to the previous employer and left on 28th May 2017 to report for the new assignment on 29th May 2017. That he served the Respondent diligently, observed the terms of the contract and staff policy and met targets.

4. It is the Claimant's case that he served three months' probation from 29th May 2017 to 29th August 2017. His gross salary was Kshs.100,000/=.
5. The Claimant avers that the contract was terminable for justifiable cause and either party could/was required to give the other a one (1) month's notice or payment in lieu of notice.
6. It is further avered that the Human Resource Manager of the Respondent one Joyce Kanuri Mwangi summoned the Claimant to her office on 1st August 2017 and issued her with a letter of termination of employment which he received and his last day of employment was 2nd August 2017. That his employment was terminated without justifiable cause occasioning serious financial prejudice since he was servicing a loan secured while at the previous employer.
7. That the Respondent's conduct is illegal in that no notice was given, was malicious and noncompliant with the principles of natural justice and fair hearing, inhumane and a violation of the provisions of the *Employment Act, 2007*.
8. It is the Claimant's case that after termination of employment, he learnt that the Respondent engaged one Mr. Punit Shah as Fleet Manager. That the Respondent's decision was discriminatory and contrary to *the Constitution*.

Respondent's Case

9. The Respondent's statement of response dated 13th November 2017 was filed on the same day. The Respondent denies all the averments of the Claimant in the memorandum of claim but avers that it employed the Claimant as a Fleet Manager on 29th May 2017 by a contract dated 27th April 2017 and he was to serve a three months' probation from 29th May 2017 to 28th August 2017 and the contract was terminated on 2nd August 2017 while the Claimant was on probation, on grounds of failure to discharge his duties. That he was defensive, abusive and confrontational whenever corrected.
10. It is the Respondent's case that the contract provided for termination during probation by a seven (7) days' notice or pay in lieu of notice and the Respondent paid for the seven (7) days but the Claimant refused to collect the cheque and certificate of service.
11. The Respondent further states that by letter dated 29th September 2017, it reiterated that the final dues and certificate of service are available for collection. That it was not mandated by law to give reasons for termination during probation.
12. The Respondent denies having discriminated the Claimant and avers that it is an equal opportunity employer and had employees of different nationalities and Mr. Punit Shah was employed on the basis of qualifications not race as alleged.
13. That the Respondent complied with the law as regard termination of employment. That termination was effected during probation and Section 42(1) of the *Employment Act, 2007* is clear that Section 41 does not apply to probationary contracts and Section 42(4) prescribes the notice period for probationary contracts and thus owed the Claimant nothing.



Claimant's Evidence

14. The Claimant adopted the written statement which rehashes the contents of the memorandum of claim. The witness testified that he worked for about two months and was on probation. That the letter of termination gave no reason(s) and no hearing took place before termination of employment.
15. On cross examination, the witness confirmed that the advertisement for the position had no specification for race or colour and he had no evidence that the Respondent preferred any race. That he left employment while serving the probationary period.
16. Further, the witness confirmed that he had no evidence that Punit Shah was hired after he had left the Respondent or was still in employment. The witness further confirmed that he had no evidence that the Respondent had a discriminatory agenda.
17. The witness also confirmed that the letter of termination of employment stated that the Respondent would pay for the seven days' notice. The witness insisted that the Respondent violated the provision of the [Employment Act](#) relating to the right to be heard.

Respondent's Evidence

18. The witness adopted the statement and testified that he was the Human Resource Manager at the Respondent's Nairobi Campus and custodian of employees' documents and had worked for one (1) year. That the Claimant was on probation and Section 42 of the [Employment Act](#) gave the employer right to terminate an employee on probation by a notice of seven days or pay in lieu of notice and Section 41 of the Act did not apply.
19. The witness testified that it had a clear recruitment policy based on competitiveness and about 80% of all employees at the Nairobi Campus were Kenyans of African origin.
20. On cross examination, the witness confirmed that he had all employees' files including those who had exited the Respondent. That the Claimant provided copies of the identity card, NSSF, NHIF and certificates and had no disciplinary issue either from the supervisor or anyone. That the Respondent had a non-discriminatory policy though he had not provided a copy.

Claimant's Submissions

21. The Claimant identifies three main issues for determination as follows: -
 - i. Whether termination of the Claimant's employment during probation was unfair;
 - ii. Whether termination of the Claimant's employment during probation by the Respondent was in pursuit of a racial discrimination policy to replace him with a fleet manager of Indian origin;
 - iii. What reliefs are available to the Claimant.
22. As to whether termination of employment during probation was unfair, it is submitted that the Respondent gave no reason for the termination and the Claimant had no disciplinary issues for the two months he served. It is further submitted that Section 42 of the [Employment Act](#) relied upon by the Respondent is unconstitutional.
23. The decision in [Caroline Nyokabi Mwangi v Achellis Kenya Limited](#) [2021] eKLR is relied upon to urge that Section 42(1) would be unconstitutional for being inconsistent with Article 41 of [the Constitution](#) which guarantees the right to fair labour practices.



24. Sections 43 and 45(2) of the *Employment Act* are also relied upon to urge that the employer is required to prove the reasons for termination failing which the termination is deemed unfair.
25. The Court is urged to rely on the decision in *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR for the proposition that since the employment relationship exists during the probation period, both parties have rights and obligations and the right not to be unfairly terminated encapsulated in Section 45 of the *Employment Act* ought not to be abrogated during probation.
26. As to whether the Respondent had a discriminatory policy, it is submitted that Section 5(3) of the *Employment Act*, prohibited discrimination on grounds of race among others and the employer is bound to prove that discrimination did not take place as alleged.
27. It is submitted that since the Claimant was replaced by a person of Indian origin, there was discrimination based on race. That the replacement was instantaneous. That the Claimant's allegation of discrimination is undisputed. The decision in *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR is relied upon to urge that where the ground for termination is poor performance, the employee ought to be required to explain the poor performance or be accorded an opportunity to address his/her weaknesses.
28. That the Claimant had the requisite experience having worked elsewhere for about eight years.
29. As regards the reliefs sought, it is submitted that the Claimant is entitled to compensation for the remainder of the contract, a total of 22 months certificate of service, one month's salary in lieu of notice, general damages for discrimination and 12 months' salary for unlawful termination of employment, a total of Kshs.2,912,105.80/=.
30. That the sum of Kshs.1,500,000/= was sufficient as general damages for the discrimination. That he be awarded costs.

Respondent's Submissions

31. According to the Respondent, the issues for determination are whether:
 - i. The Claimant was lawfully terminated from employment;
 - ii. The Claimant was discriminated;
 - iii. The Claimant is entitled to reliefs sought.
32. As regards termination, Counsel relies on the decisions in *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] eKLR as well as *Carole Nyambura Thiga v Oxfam* [2013] eKLR to urge that Sections 43 and 45 of the *Employment Act* do not apply to probationary contract.
33. Reliance is also made on the Court of Appeal decision in *Nation Media Group Limited v Onesmus Kilonzo* [2017] eKLR for the proposition that the Employment and Labour Relations Court is competent to determine the constitutionality of provisions of law. It is submitted that the Claimant was only entitled to seven days' notice or pay in lieu.
34. It is submitted that since the Respondent relied on Sections 42 and 41 of the *Employment Act*, 2007 it cannot be faulted.
35. As regards discrimination by the Respondent, it is submitted that the Claimant adduced no evidence that Mr Punit Shah replaced him. That the Claimant confirmed on cross examination that the advertisement for the position he had applied for was open to persons of all races. The decision in



Reeves v Sanderson Plumbing Products Inc. 530 US. 138, 141 (June 12th 2000) is relied upon to explain the evidentiary threshold.

36. Finally, it is submitted that the Respondent confirmed in evidence that about 80% of its employees at the NAIROBI Campus were Kenyans of African origin.
37. As to whether the Claimant is entitled to the reliefs sought, it is submitted that he is not as he was still on probation and the law permitted the Respondent to terminate his employment in the manner it did. The Claimant was not entitled to the remainder of contractual period and payment in lieu of notice was made.
38. That the certificate of service was ready for collection by the Claimant and the Claimant be condemned to pay costs.

Analysis and Determination

39. The issues for determination are whether: -
 - a. The Claimant was unlawfully terminated from employment;
 - b. The Claimant is entitled to the reliefs sought.
40. Before delving into the issues, it is important to note that it is not in dispute that the Respondent employed the Claimant on 29th May 2017 by a written contract of service dated 27th April 2017 as a fleet manager for a period of two years effective 29th May 2017 and his employment was terminated on 2nd August 2017, about two months later.
41. Similarly, it is common ground that the Claimant's employment was terminated during probation and the Respondent's termination letter dated 1st August 2017 acknowledges that fact and promised to pay the seven (7) days probation notice.
42. As regards the first issue, the Claimant submits that termination of employment during probation was unfair in that the Respondent did not give any reason for the termination and RW1 confirmed as much.
43. The pith and substance is whether the substantive and procedural safeguards provided by Sections 41, 43 and 45 of the *Employment Act*, 2007 apply to employees whose termination of employment comes into consideration during probation.
44. Before the three Judge bench decision in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR declared Section 42(1) of the *Employment Act* null and void to the extent that it excluded employees on probation from the provisions of Section 41(1) of the Act, the Court's jurisprudence on this issue crystalised into two schools of thought.
45. While the decisions in *Danish Jalang'o & another v Amicabre Travel Services Limited* (supra), *Christopher Kisia Kivango v Amicabre Travel Services Limited* [2014] eKLR, *John Muthomi Mathiu v Mastermind Tobacco (K) Limited* [2018] eKLR and others represent one school, which upholds the provisions of Section 41 of the *Employment Act* as envisioned by the legislature.
46. This school is underpinned on the reasoning that there is need to give employers and employees time to learn each other. That employers require time to ascertain whether an employee is fit for the job through evaluation on suitability and should be free to dismiss if the employee is found unsuitable.
47. On the other hand, the decisions in *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* (supra), *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR, *Caroline Nyokabi Mwangi v Achellis Kenya Limited* (supra), *Zeddy Cheronoh Sambu v National Oil Corporation of*



Kenya [2022] eKLR and others represent the other school of thought. This school generally posits that the fact that an employee is on probation does not render the person a lesser employee. In other words, whether an employee is on a probationary contract or not, an employment relationship exists between the parties and the employee should enjoy the rights accorded to an employee by law.

48. Be that as it may, in making a determination on this issue, the Court is guided by the decision in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* (supra) where the Judges held inter alia that:

“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).

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.

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 and freedom.

To this 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.”

49. Ndolo J. expressed a similar view in *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* (supra) where the Judge was unequivocal that:

“I hold a different view. 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 enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold set in Article 24.

To this extent I agree with the holding by Lenaola J in *Samuel G. Momanyi v the Attorney General & Another* [2012] eKLR that Section 45(3) of the *Employment Act* is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”

50. The Court is in agreement with and is guided by these sentiments.
51. Having demonstrated that Section 42(1) of the *Employment Act*, 2007 is now null and void to the extent it denies employees on probation, the procedural safeguards guaranteed by Section 42 of the *Employment Act*, 2007 and Article 41 of *the Constitution*, the next issue is whether the Respondent acted in consonance with the law.



52. From the evidence on record, the Respondent acted in breach of the provisions of Section 42(1) of the Employment Act. Apart from the letter of “Termination of Probation Period” dated 1st August 2017, the Respondent did not:
- i. Conduct a performance evaluation of the Claimant to ascertain his suitability.
 - ii. Explain to the Claimant the reason why it was considering termination of employment.
 - iii. Invite the Claimant for a hearing.
 - iv. Give the Claimant an opportunity to make representations and be accompanied by another employee of his choice.
 - v. Consider any representations before terminating the Claimant’s employment.
53. Thus, although the Respondent promised to pay for the seven days’ probation notice as provided by Section 42(4) of the Employment Act, termination of the Claimant’s probationary contract was procedurally flawed and consequently unfair.
54. Having found that the termination of the Claimant’s probationary contract on 2nd August 2017 was unfair for want of procedural propriety, I will now proceed to assess the reliefs available.

a. Unconditional issuance of certificate of service

55. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act.

b. Compensation for the remainder of the contract 22 months Kshs.1,829,209.36

56. It is unclear under what law this prayer is made since the Employment Act has no provision for a remedy other than those in Section 49 of the Act. Relatedly, this is a claim for anticipatory earnings which are not anchored in law as explained by the Court of Appeal in D. K. Njagi Marete v Teachers Service Commission [2019] eKLR.
57. More significantly, the contract dated 27th April 2017 was terminable by either party giving the other a seven days’ notice or pay in lieu of notice during probation and subsequently by the employer in certain circumstances.
58. The decision in Donas Lombom & 7 Others v Civicon Limited [2016] eKLR where Nzioki Wa Makau J. awarded compensation for the unexpired contractual period is distinguishable in that the outstanding duration of the contracts was less than 12 months and thus within the provisions of Section 49(1)(c) of the Employment Act. In this case, the duration is 22 months.
59. Puzzlingly, the Claimant is still claiming compensation under Section 49(1)(c) for unfair termination of employment. The two reliefs relate to the same loss and are in the Court’s view exclusionary.

c. One month’s salary in lieu of notice Kshs.83,145.88

60. Granted that the Claimant’s employment was terminated during probation and the Respondent promised to pay for the seven days in lieu of notice as provided by Section 42(4) of the Employment Act coupled with provisions.



61. Clause (n) which provides that during the probation period, the contract may be terminated by either party giving seven days' notice or seven days' pay in lieu of notice and the Claimant declined the payment offered by the Respondent, the prayer is unmerited and is declined.

d.General and exemplary damages for discrimination on account of race

62. While the Claimant submits that his employment was terminated because the Respondent had a discriminatory policy, the Respondent submits it has no such policy, stating that the Claimant tendered no evidence to establish the alleged discrimination.

63. The Claimant's contention is that he was discriminated because after his employment was terminated, the Respondent hired a Fleet Manager of Indian origin or decent, one Punit Shah. The Claimant led no evidence on when Mr. Punit Shah was hired and the circumstances in which he was hired including his qualifications and whether or not he had applied when the position was advertised. These are relevant factors.

64. Section 5(3) of the *Employment Act*, 2007 provides that:

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(4) ...

(5) ...

(6) ...

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

65. Article 27 of *the Constitution* of Kenya, 2010 guarantees the right to equality and freedom from discrimination by any person. The Article provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

66. In its endeavour to discharge the burden of proof under Section 5(7) of the *Employment Act*, the Respondent's witness testified that the Respondent's employment policy was not discriminatory. The witness testified that about 50% of the employees at the Nairobi Campus were Kenyans of African origin.

67. In a similar vein, on cross examination, the Claimant confirmed that the advertisement issued by the Respondent for the position he secured had no specification on race or colour and he had no evidence that the Respondent had any preference. Relatedly, the Claimant confirmed that he had no evidence of when the Mr. Punit Shah was employed.

68. An allegation of discrimination on any grounds needless to emphasise very serious and must be supported by sufficient evidence and particulars for the Respondent to rebut. The Claimant tendered no particulars of the alleged discriminatory policy allegedly perpetrated by the Respondent in employment.

69. For the foregoing reason, the Court is satisfied and finds that the Respondent has on a balance of probability discharged the burden of proof under Section 5(7) of the *Employment Act*.



70. The claim for general and aggravated damages for discrimination on the ground of race is declined.

e. 12 months' salary compensation for unlawful termination Kshs.999,750.56

71. Having found that the termination of the Claimant's employment was unfair for want of procedural fairness, the Claimant is eligible for the discretionary remedies provided by Section 49(1) of the Employment Act subject to observance of the provisions of Section 49(4) of the Act which prescribe the parameters to be taken into account in the determination of the quantum of compensation.

72. The Court has taken the following circumstances into consideration:

- i. The Claimant was an employee of the Respondent for about two months which is a relatively short period.
- ii. The Claimant was serving the probationary period of three (3) months.
- iii. The Claimant had no record of misconduct or misbehaviour.
- iv. The claim had contemplated serving the Respondent for the entire duration of the contract.

73. In the circumstances, the Court is satisfied that the equivalent of two (2) months' salary is fair.

74. In conclusion, judgment is entered for the Claimant against the Respondent as follows:

- a. The equivalent of two (2) months' gross salary.
- b. Seven (7) days' notice pay.
- c. Costs of this suit.
- d. Interest at court rates from the date of judgment till payment in full.

75. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF MAY 2022.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

