



REPUBLIC OF KENYA



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**Kemunto v Leo Investments Limited t/a The Concord Hotels (Cause  
539 of 2017) [2022] KEELRC 13513 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13513 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 539 OF 2017  
JK GAKERI, J  
DECEMBER 13, 2022**

**BETWEEN**

**CONEX KEMUNTO ..... CLAIMANT**

**AND**

**LEO INVESTMENTS LIMITED T/A THE CONCORD HOTELS RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a Statement of Claim filed on March 20, 2017 alleging unlawful termination of employment and refusal by the employer to pay her terminal dues.
2. The Claimant avers that he was employed by the Respondent on May 2, 2016 as a CCTV Controller at a basic salary of Kshs.20,000/= per month and worked diligently and faithfully until 30<sup>th</sup> September, 2016 when the Respondent's Manager, Mr. Timothy Kagambi orally terminated her employment on allegations of having stolen 2 bottles of whisky worth Kshs. 2,800. That by letter dated October 3, 2016, the Claimant demanded the unpaid salary for September 2016 and other dues.
3. It is the Claimant's case that on October 7, 2016, the Respondent's General Manager suspended the Claimant by a letter dated September 30, 2016 and asked her to collect final dues.
4. That on October 11, 2016, the General Manager called the Claimant to clear for purposes of processing terminal dues.
5. That the Claimant cleared with all departments on October 17, 2016. The Claimant avers that the Respondent caused her arrest and incarceration at the Parklands Police Station for the disappearance of two bottles of whisky valued at Kshs.2,800/=.
6. That her termination from employment was not preceded by a notice or notice to show cause and her salary for September and terminal dues were not paid.



7. That prior to termination, she had worked as the Security Manager for 2 months and was not paid housing allowance agreed at 30% of the Security Manager's salary.
8. The Claimant further avers that her employment was terminated for no valid reason and was draconian.
9. The Claimant prays for:
  - (i) A declaration that termination of the Claimant's employment was unfair, wrongful and devoid of procedure.
  - (ii) Salary for September 2016, Kshs.20,000.00
  - (iii) Housing allowance for 5 months x 2,000 Kshs.10,000.00
  - (iv) NSSF and NHIF unremitted deductions Kshs.4,750.00
  - (v) Overtime extra 4 hours x 6 days x4x5 = Kshs.46,176.00
  - (vi) Acting allowance Kshs.72,000
  - (vii) Refund of Kshs.5,800
  - (viii) Compensation for unfair termination Kshs.264,000  
Total Kshs.422,726
  - (ix) Certificate of service
  - (x) Costs of this claim
  - (xi) Interest at court rates.

### **Respondent's case**

10. The Respondent filed a Memorandum of Response on April 25, 2017 admitting that it engaged the Claimant on May 19, 2016 under a written contract of service under which the Claimant was to serve on a probationary contract for 6 months.
11. The Respondent avers that on September 30, 2016 while on probation, the Claimant was suspected of having been involved in the loss of 2 bottles of whisky valued at Kshs.2,800/= and the matter was investigated and as the investigations were underway, the Claimant tendered her resignation letter on October 3, 2016.
12. That after preliminary investigations and review of CCTV footage, the Claimant was placed on suspension and the matter handed over to the police for further action.
13. The Respondent denies owing the Claimant any monies.

### **Claimant's evidence**

14. The Claimant adopted the written witness statement which rehashes the contents of the statement of claim.
15. In her oral testimony, the Claimant admitted that she carried shoes in the brown paper bag.
16. That she was neither given a notice to show cause nor subjected to a disciplinary hearing.



17. On cross-examination, the witness confirmed that she was employed on May 2, 2016 and signed the contract on May 21, 2016 and was on probation at the date of termination of employment and no requirement for notice.
18. It was her testimony that she worked for 8 hours daily and would clock-in and out.
19. That she was suspected of having stolen 2 bottles of whisky but was carrying shoes.
20. It was her testimony that there was no specific place for shoes in the office. The Claimant admitted that she was the one caught on CCTV carrying a paper bag.
21. The witness testified that she tendered her resignation on September 30, 2016 by email dated October 3, 2016 and was suspended on the same day by letter dated September 30, 2016. That she was dismissed first and then resigned but had no dismissal letter. The dismissal letter on record dated January 23, 2017 was sent to the lawyer.
22. The witness further testified that the employment contract had no provision for house allowance and was not given a letter to act as the Security Manager. It was the Claimant's testimony that annexure 17 showed the extra hours worked, a total of 75 hours 15 minutes for August 2016.
23. On re-examination, CWI testified that she was not given a letter of appointment but was on a permanent contract.
24. That the summary dismissal was effective September 30, 2016.
25. That overtime records were maintained by Human Resource and none of her payslips reflected pay for overtime.

#### **Respondent's evidence**

26. RWI, Mr. Martin Maina Mwangi adopted the witness statement and testified that he could not recall the date of employment and was a CCTV Controller working with the Claimant.
27. That during the months of August and September, the hotel was hit by a spate of theft of property including crockery and alcoholic drinks and a review of CCTV footage was done. The footage showed inter alia the Claimant holding a paper bag which she placed next to the door of the CCTV room.
28. On cross-examination RWII confirmed that he had been the General Manager of the Hotel for 4 years but did not know the Claimant as he was not an employee in 2016. He testified that he relied on the records he found.
29. The witness confirmed that there was no investigation report. That the letter of dismissal was dated October 3, 2016. The witness confirmed that there was no notice to show cause of evidence of a disciplinary hearing.
30. It was his testimony that the Claimant's salary had no provision for house allowance.
31. On re-examination, the witness testified that the Claimant was employed by the Respondent on May 19, 2016 and was on a 6 months probation and his employment was terminated when she was on probation.
32. Finally, the witness testified that the Claimant was suspended from September 30, 2016 to resume on October 6, 2016 for purposes of investigation.



### Claimant's submissions

33. The Claimant identified four issues for determination, whether;
- (i) The Claimant was on probation or her terms were converted.
  - (ii) The Respondent had a valid reason to terminate the Claimant's employment.
  - (iii) The procedure was followed.
  - (iv) The Claimant is entitled to the reliefs sought.
34. As regards the 1<sup>st</sup> issue, the Claimant's counsel submitted that the clearance form stamped on October 17, 2016 and the copy of the Claimant's clock-in record from August 1, 2016 to August 31, 2016 with the latter containing, the words 'permanent contract' was sufficient evidence that the Claimant's contract of employment was permanent.
35. The court was urged to hold that the Claimant's terms of employment had impliedly converted to permanent.
36. It was further urged that should the court hold otherwise, it should be guided by the decisions in *Njoki Mercy Karingithi v Emerald Hotel Resorts and Lodges Ltd* (2014) and *Hapiness Nyabonyi Maingo v Shreeji Chemicals Ltd* (2020) where the court imported the provisions of section 41, 43, 45 and 47 (5) of the *Employment Act* to probationary contracts.
37. The decision in *Monica Munira Kibuchi & 6 others v Mount Kenya University and another* [2021] was also relied upon.
38. On validity of the reason for termination, it was submitted that on September 30, 2016, Mr. Timothy Kagambi, the Respondent's General Manager informed the Claimant that her services had been terminated with immediate effect. That her attempt to resign was declined.
39. It was submitted that the Respondent's witness was not at the place of work on the date the Claimant was alleged to have taken out 2 bottles of whisky from the hotel and the Khaki bag were not disclosed and the Claimant was cleared by all departments, an indication that she had no pending issue.
40. As regards procedure, it was submitted that the Claimant was not notified of her transgressions by way of a notice to show cause and was not notified that her services stood terminated on September 30, 2016. It was contended that the Claimant was not invited for a disciplinary hearing.
41. As regards the reliefs sought, it was submitted that since the Claimant was not paid anything she was entitled to the unpaid salary for September 2016, one month in lieu of notice, house allowance for 5 months, overtime, acting allowance, refund of Kshs.5,800/=, compensation and certificate of service.

### Respondent's submissions

42. The Respondent submitted that, based on the evidence on record the Claimant's employment was terminated within the probationary period and had not been confirmed as a permanent employee as submitted by the Claimant. The court was urged to ignore the submission.
43. Reliance was made on the provisions of section 42 of the *Employment Act* and the sentiments of Rika J. in *Danish Jarang'o and another v Amicabre Travel Services Ltd* [2013] on the inapplicability of the provisions of section 41, 43 and 45 to probationary contracts.



44. Further, reliance was made on the sentiments of Nzioki Wa Makau in *John Muthomi Matbu v Mastermind Tobacco (K) Ltd.*
45. As regards the reliefs, it was submitted that Claimant's salary for September 2016 and overtime was available. However, it was the Respondent's submission that the Claimant was not entitled to housing allowance as her salary was consolidated.
46. The Respondent argued that the Claimant had not adduced evidence of the refund of Kshs.5,800/=.
47. On the 12 month's salary compensation, it was urged that the Claimant's services were terminated regularly and lawfully within the probationary period and in accordance with the probationary contract.
48. It was further submitted that since the Claimant's probationary contract was for 6 months, the claim for 12 months compensation could not arise.
49. The Respondent contended that section 45 (3) of the *Employment Act* applied to this contract.
50. That the Claimant served for 3 months 11 days and was thus ineligible to initiate a claim for unfair termination.
51. The court was urged to dismiss the suit on the premise that the Claimant had failed to prove her claim against the Respondent.

### **Determination**

52. The issues for determination are:
  - (i) Whether the Claimant's employment was terminated during probation.
  - (ii) Whether termination of the Claimant's employment was unfair.
  - (iii) Whether the Claimant is entitled to the reliefs sought.
53. As to whether the Claimant was serving a probationary contract or had been confirmed, the opportune starting point is the evidence on record. However, before delving into the issue, it is essential to determine the closely related and pertinent question of when and how the parties entered into the contract of employment.
54. Although the Claimant testified that she was employed on May 2, 2016, she provided no documentary evidence in support of the averment. In addition, the Claimant admitted that she signed a written contract on May 21, 2016.
55. The Respondent on the other hand availed a copy of the Employment Appointment Letter which the Claimant signed on May 21, 2016. The document is explicit that the Claimant was employed by the Respondent on May 19, 2016.
56. Finally, the Claimant admitted that the written agreement was the basis of their relationship.
57. From the foregoing, it is the finding of the court that the Employment Appointment Letter signed by the Claimant on May 21, 2016 was the foundation of the contract of service between the Claimant and the Respondent.
58. Having found that the parties had a written contract of service, I will now delve into the question whether the Claimant was serving a probationary contract or not.



59. Section 2 of the *Employment Act*, 2007 provides as follows:  
Probationary Contract means a contract of employment which is of not more than 12 months duration or part thereof is in writing and expressly states it is for a probationary period.
60. Similarly, section 42 of the Act provides that;
- (1) . . .
  - (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).
61. In the instant case, it is common ground that the parties had a written contract of employment as admitted by the witnesses. The document enumerated the terms and conditions of employment which the Claimant acknowledged understanding on May 21, 2016.
62. Clause 2 of the contract provided as follows;
- “ You will be on probation for a period of six (6) months. At the end of your probation period, your performance will be reviewed and salary adjusted at management’s sole discretion. During your probation, either party may terminate the services with or without cause with a one week (7 days) written notice.”
63. Since the Claimant was engaged on May 19, 2016, the probationary period would have ended on November 19, 2016 but the parties separated earlier.
64. However, the Claimant submitted that the clearance form on page 16 and the Claimant’s clock-in record for August 2016 demonstrated that the Claimant’s employment contract transitioned from probationary to permanent. The basis of the submission was that the Claimant cleared with all departments on October 17, 2016 but more importantly, the clock-in record have the Claimant’s name and the words ‘permanent contract’ and the Respondent did not disown the documents.
65. Significantly, the Claimant led no evidence to demonstrate that her performance had been reviewed or salary adjusted as provided by Clause 2 of the contract of employment which was the primary evidence of the contract of employment between the Claimant and the Respondent. Neither the clearance form nor the clock-in and clock-out record appear to have modified the terms of the Claimant’s employment which was based on a written document.
66. To the question whether the Claimant’s employment was terminated during probation, the simple answer is that it was. The Claimant had neither served the duration she had contracted to be on probation nor had the Respondent waived the probationary period or in any other way modified the terms of employment.
67. As regards termination of the Claimant’s employment, it is common ground that the Respondent terminated the Claimant’s employment by letter dated October 3, 2016. Prior to the letter of termination, the Claimant had been suspended for about 4 days and was due to report on October 6, 2016. The purported resignation by the Claimant on October 3, 2016 was rejected by the Respondent and purportedly took place after termination of employment had already taken place on September 30, 2016.



68. On cross-examination, the Claimant testified that she was dismissed from employment and resigned thereafter, testimony the Respondent's witness did not controvert.
69. The summary dismissal letter dated October 3, 2016 stated *inter alia*,
- “We refer to the incidence on September 8, 2016 where you were involved in taking away two (2) bottles of spirit from the hotel without authority or Gate Pass which led to your suspension on September 30, 2016.
- We have since received additional information from CCTV and statements from other employees involved which confirm without doubt that you facilitated the removal of the bottles . . .
- We hereby have no other alternative than to summarily dismiss you from employment as at September 30, 2016, your last day of work.
- . . . please return all company property issued to you and report to the Human Resource for clearance before payment of your final dues . . .”
70. Undated print out of still CCTV footage show the Claimant carrying a khaki bag and walking behind another employee towards the gate. The Claimant testified that the khaki bag contained her shoes and she was the one carrying it.
71. The pictures depict the following;
- (i) Two employees of the Respondent standing at a door close to the entry to the store.
  - (ii) Two employees are leaving the room next to the entrance to the main store and one is holding a khaki bag. It is unclear who placed the khaki bag next to the gas cylinder.
  - (iii) Two employees watch as another opens the door to the main store.
  - (iv) Another employee is seen standing next to the khaki bag now on the floor next to the gas cylinder and appears to be viewing the contents of the bag and appears exited.
  - (v) Another employee is seen admiring the contents of the bag.
  - (vi) A lady identified as internal security pick up the bag and is seen moving towards the staff gate.
  - (vii) The last picture shows the Claimant holding the bag and walking towards the staff gate behind the internal security guard who previously held the bag.
72. The pictures appear to tell an interesting story with six actors all working in cohort. It would appear that the empty khaki bag was introduced into the store from the security office by one Susan but was retrieved from the store by one Kuria who appear to have placed it at a strategic location outside the security office and it remained in the same spot until it was removed by the internal security one, Susan who appear to have handed it over to the Claimant inside the security office.
73. Although none of the Respondent's witness testified having seen the contents of the khaki bag, the contents were not shoes as the Claimant would sought the court to believe. The bag contained



something else and whatever it was, it was taken out from the main store by a lady employee and did not belong to the Claimant.

74. The Claimant admitted that she was the one carrying the bag and walking towards the staff gate and is the last person seen with the khaki bag.
75. A panoramic view of the still pictures reveal a conspiracy by employees to pilferage items from their employers business. If indeed the bag contained the Claimant's shoes, it was incumbent upon her to demonstrate that she had a similar bag when she accessed the premises that morning and often left them next to the gas cylinders as there was no defined place for shoes.
76. For the foregoing reasons, the court is satisfied that the Respondent has on a preponderance of probabilities shown that it had a valid and fair reason to terminate the Claimant's employment as ordained by the provisions of sections 43 and 45 of the Employment Act, 2007.
77. Before the three-judge bench decision in Monica Munira Kibuchi & 6 others v Mount Kenya University & another (*supra*), there were two schools of thought as exemplified by the decisions in Danish Jalang'o & another v Amicabre Travel Services Ltd (*supra*) and John Muthomi Mathu v Mastermind Tobacco (K) Ltd (*supra*) on the one hand and Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd (*supra*) and Hapiness Nyabonyi Maingo v Shreeji Chemicals Ltd (*supra*) among others in relation to termination of employment during probation.
78. While the former held that sections 41, 43 and 45 of the Employment Act had no application in probationary contracts, the latter held that the provisions applied to all contracts of employment to protect the employee from arbitrary or whimsical termination of employment by employers.
79. In Monica Munira Kibuchi & 6 others v Mount Kenya University & another, the three learned judges held as follows;
- “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, is inconsistent with Articles 41 and 47 of the Constitution hence null and void.”
80. The court is guided by these sentiments of the court.
81. Implicit in these sentiments is that section 41 of the Employment Act applies to probationary contracts.
82. In the instant suit, it is evident that the Claimant was not issued with a notice to show cause nor taken through any disciplinary hearing.
83. Although she was suspended for 5 days effective September 30, 2016, she was not invited for a hearing before termination, effective on the same day.
84. In a nutshell, the provisions of section 41 of the Employment Act were not complied with.
85. For these reasons, it is the finding of the court that termination of the Claimant's employment on September 30, 2016 was unfair for want of procedural propriety.
86. Having found that termination of the Claimant's probationary contract was unfair, I will now proceed to assess the appropriate remedy as follows;
- (i) A declaration that the Claimant's termination from employment was unfair and devoid of procedure is hereby issued.



- (ii) Salary for the month of September 2016, Kshs.20,000/= since the Claimant had worked for the month of September 2016, she is entitled one month's salary.
- (iii) House allowance for the duration worked 15% of Kshs.20,000/=, Kshs.10,000/= under section 31 of the Employment Act, it is the duty of the employer to provide accommodation or pay a housing allowance or pay a consolidated salary. If no accommodation is provided and the employee's salary is consolidated, housing allowance is payable as a statutory right.

87. The contract of employment on record had no provision for housing allowance. Although the sum of Kshs.20,000/= is described as gross payable monthly, the amount paid as housing allowance is not articulated and the pay slip describes the sum of Kshs.20,000/= as basic pay as opposed to consolidated pay.

88. The Claimant is thus entitled to a housing allowance of 15% of the basic pay.

**iv. NSSF and NHIF deductions Kshs.4,750/=**

89. The Claimant led no evidence to demonstrate how the amount claimed arose.

The prayer is declined.

**v. Overtime**

90. Documentary evidence on record, which the Respondent neither denied nor controverted reveal that the Claimant had indeed worked overtime in the month of August 2016 and is entitled to payment for the hours worked.

The prayer is awarded.

**vi. Acting allowance**

91. The Claimant adduced no evidence to demonstrate that she indeed acted as the Head of Security. The Claimant placed no material before the court for the court to find that she acted in any position during her short sojourn at the Respondent.

The prayer is declined.

**vii. Refund of Kshs.5,800/= for spoilt weighing scale.**

92. The Claimant did not prove this prayer by credible documentary evidence.

The prayer is declined.

**viii. Compensation for unfair loss of employment**

93. In determining the level of compensation, the court has taken into consideration the fact that;

- (i) The Claimant was an employee of the Respondent for a very short period of 3 months 11 days.
- (ii) The Claimant substantially contributed to the termination of her employment.



- (iii) The Claimant did not appeal the decision of the Respondent or in any other way manifest an intention to continue in employment.

94. In the circumstances, the court is satisfied that the equivalent of one (1) month salary is fair.
95. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;
- (a) Declaration that termination of the Claimant's employment was unfair.
  - (b) Salary for the month of September 2016.
  - (c) Housing allowance at the rate of 15% of basic salary for the duration of employment.
  - (d) Overtime for August 2016.
  - (e) Equivalent of one month's salary.
  - (f) Certificate of service.
  - (g) Costs of this suit.
  - (h) Interest at court rates from the date hereof till payment in full.
96. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF DECEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

