



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jalango v Hungama Bar and Restaurant Ltd Club Hynotica (Cause 2278 of 2017) [2022] KEELRC 13485 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13485 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2278 OF 2017**  
**AN MWAURE, J**  
**DECEMBER 7, 2022**

**BETWEEN**

**DENNIS JALANGO ..... CLAIMANT**

**AND**

**HUNGAMA BAR AND RESTAURANT LTD CLUB  
HYNOTICA ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant filed a statement of claim dated November 14, 2017 and prays for a declaration that his termination of employment by the Respondent was unfair and unlawful. The Respondent put a response dated December 18, 2017.

**Claimant's Case**

2. The Claimant was employed as a unit manager at a fixed contract from June 1, 2017 to November 30, 2017 and his salary was Kshs 136,825/- in addition to bonus from net profit made.
3. He says he was on a fixed contract and nowhere was it provided he was on probation. He was on a temporary contract and at the end of six months he would cease to be employed by the Respondent.
4. He says on or about July 24, 2017 the Respondent was terminated by the Claimant without any notice hearing and was not paid his terminal dues. In the termination letter he was purported to have been terminated from a probationary contract which he says was misapplied since the probationary service was not provided in the said termination letter. He says the employment contract was to a probationary contract.
5. He says he then demanded his terminal dues through his advocate Messrs Muthaura Mugambi Ayugi & Njonjo Advocates seeking payment of the withheld salary and terminal dues.



6. He says the way the Respondent affected the termination of his employment was in breach of contract of employment. He says his termination was unfair and wrongful and contrary to rules of natural justice.

### **Respondent's case**

7. The Respondent says the Claimant was employed as a unit manager from June 1, 2017 but his services were not satisfactory as he used to delegate his duties to his junior staff and failed to comply with reporting requirement of the company and so company opted to terminate his engagement. He says his final dues for July 2017 were worked as 107,396/- but he declined to receive it.
8. The Respondent denies this was a fixed contract and says claimant was entitled to 7 days' notice not 30 days. He says the Claimant was terminated from employment and he was under probationary service under section 42(4) of the [Employment Act](#).
9. In essence the Respondent says the Claimant was in full compliance with the [Employment Act](#) and had no right to complain he was unfairly terminated. He says the claim therefore discloses no cause of action and should be dismissed with costs.

### **Claimant's evidence in Court**

10. The Claimant just states in his evidence in chief that he was on a six months contract but he was terminated after only 1<sup>1</sup>/<sub>2</sub> months. He says he was not paid any dues.

### **Respondent's Evidence**

11. Collins Mutua Muriungi is the Respondents Human Resource consultant. He says he had issued Claimant with a contract of six months but terminated him before the six months as they were not satisfied with his performance. He says they offered him his terminal dues but he declined to take it.

### **Claimant submissions**

12. The Claimant in his Submissions relied on section 2 of [Employment Act, 2007](#) where probation is defined as a contract of engagement of not more than 12 months and as in writing and expressly states it is a probationary period. She also relies on section 35(1), section 36 and 41(1) of [Employment Act](#). The Claimant submits that the respondent did not give any reason for termination of Claimant's employment. The Claimant was also not given a chance to defend himself prior to the termination of his employment.
13. In fact the Respondent alleged that the termination was effected pursuant to section 42(4) of the [Employment Act](#). But the Claimant says the Claimant's contract was not probationary as it was not expressly stated that it was a probationary contract. The Claimant therefore says he was not on probation and so his termination was unfair and wrongful.

### **Respondent's submissions**

14. The Respondent submits that he had employed the Claimant under probationary contract commencing June 1, 2017 and each party could terminate the contract by giving 7 days' notice or salary in lieu of notice. He submits that the Claimant's term did not run to the full term as his work was not satisfactory and so was offered terminal dues but he declined the same. The Respondent says that a probationary employment can commence for 6 months and so was terminated in accordance to the



law since his contract was for six months. He says the notice period for a probationary employment is 7 days' notice or 7 days payment in lieu of notice.

15. The Respondent also relied on section 45(3) which provide that the aforesaid section apply only where an employee has been in employment for a period of not less than 13 months immediately before the termination. They aver that the Claimant only worked from June 1, 2017 to July 24, 2017 and so cannot claim unfair termination. He therefore submits that the Claimant has not proved his case and so the same should be dismissed with costs.

### **Determination**

16. The Claimant had been employed as manager on a contract commencing June 1, 2017 to November 30, 2017. This was a temporary contract for 6 months after which the Claimant would cease to be employed by the Respondent.
17. The Respondent on July 24, 2017 terminated the Claimant's employment. He was not given the reason for the said termination before the expiry of the contract period. In fact he was told it was a probationary contract and was offered 7 days' notice period which he rejected.
18. In fact the contract of employment of the Claimant states clearly it is a temporary employment from 1<sup>st</sup> Jan 2017 and provides in paragraph 3 that each party can terminate the employment by giving 7 days' notice or salary in lieu of notice. But again in paragraph 4 there is provision of one month notice to terminate the contract or one month salary in lieu of notice. There is clear confusion as to the period to give notice. The Respondent prepared this contract so he should have been clear what exactly he meant.
19. If he wanted to provide a probationary period he should have made it clear and if he meant a short fixed contract he should have made it clear. As it is the contract on record is clearly referred to as a temporary contract commencing 1/6/2017 to November 30, 2017. The Court is persuaded it is not a probationary employment as it would have been expressly stated if it was. Section 2 of the [Employment Act](#) states as follows:-

“probationary contract means a contract of employment which is of not more than twelve months duration or part thereof is in writing and expressly states it is for a probationary period.

20. This particular contract expressly referred to as temporary 6 months contract and not a probationary period. In any event even if it was a probationary agreement there is the authority of [Monica Munira Kibuchi & 6 others v Mount Kenya University & AG Interested Party](#) [2021] eKLR which provided as follows:-

To the extent that section 42(1) of [Employment Act, 2007](#) excludes employees having probationary contracts from provisions of section 41 it is inconsistent with articles 24, 41, and 47 of the [Constitution](#). Even if an employee is serving a probationary period he should still be protected by the provisions of [Employment Act](#).

21. The Respondent has therefore not given a reason for termination of his employment as provided in section 45(1) of the [Employment Act](#) even if the claimant was on a temporary contract.
22. He was also not accorded a chance to explain himself in the presence of a fellow worker of his choice or a shop floor union representative of his choice. In this case the Respondent failed the fairness test provided in numerous authorities including the case of [Idris Omar Abdi v a Water & Sewerage](#)



Company Limited [2021] eKLR who in return relied on the case of Walter Ogal Anuro v Teachers Service Commission (2011) eKLR where Court held:

“for a termination to pass the fairness test there must be both substantial justification and procedural fairness. Substantial justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedures adopted by the employer to effect the termination.”

23. The Court is persuaded the Respondent did not give a reason to terminate the Claimants and he completely failed to follow the required procedure to give the Claimant a chance to defend himself. The Respondent therefore failed the fairness test required in law and so is held to have terminated the Claimant unfairly and unlawfully.
24. The Court having declared that the Claimant was unlawfully terminated from his employment he is awarded the following remedies:-
- a. One month gross salary equivalent being compensation for wrongful termination Kshs 136,825/-
  - b. Claimant’s unpaid salary to July 24, 2017 126,300/-
  - c. On month salary in lieu of notice 136,825/-
  - d. 4 days leave 21,050/- . The Claimant total award is Ksh 421,000/- Less
    1. statutory deductions
    2. Any advance loans paid to him.
  - e. He is awarded costs also and interest at Court rates form date of judgment till full payment.
  - f. He is to be given his certificate of service within 14 days from date of judgment.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7<sup>TH</sup> DECEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**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 March 15, 2020 and subsequent directions of April 21, 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

