



**Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)
(Petition 94 of 2016) [2021] KEELRC 2310 (KLR) (30 July 2021) (Judgment)**

*Monica Munira Kibuchi & 6 others v Mount Kenya
University; Attorney General (Interested Party) [2021] eKLR*

Neutral citation: [2021] KEELRC 2310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 94 OF 2016**

M MBARŪ, NJ ABUODHA & L NDOLO, JJ

JULY 30, 2021

BETWEEN

**MONICA MUNIRA KIBUCHI 1ST PETITIONER
JANIS MAKENA MUGAMBI 2ND PETITIONER
MILKA KIURA MURIGI 3RD PETITIONER
FRANKLINE KIOGORA GITONGA 4TH PETITIONER
PIUS MUNANDI MUTSOLI 5TH PETITIONER
LORRAINE WAMBITA ONYANGO 6TH PETITIONER
IRENE OKENG'AYA 7TH PETITIONER**

AND

MOUNT KENYA UNIVERSITY RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

Section 42(1) of the Employment Act that provides that persons under probationary contracts are not privy to notification and hearing before termination on grounds of misconduct under section 41 is unconstitutional.

A petition was filed by seven individuals against Mount Kenya University and the Attorney General, challenging the constitutionality of section 42(1) of the Employment Act, 2007. The petitioners argued that the section, which exempted probationary employees from the procedural fairness requirements of section 41 of the Act, was inconsistent with their fundamental rights to fair labour practices and fair administrative action. They sought declarations that their termination was unconstitutional and compensation. The Employment and Labour



Relations Court declared that section 42(1) of the Employment Act, 2007, was inconsistent with articles 24, 41, and 47 of the Constitution to the extent that it excluded employees on probationary contracts from the provisions of section 41. However, the court declined to declare that the respondent violated the petitioners' constitutional rights or section 41, as the respondent had relied on the existing provisions of section 42(1) as enacted by Parliament. Consequently, no order for compensation was made, and each party was directed to bear their own costs as the petition was partially successful and raising an important question of law.

Reported by John Ribia

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine constitutional questions - whether the Employment and Labour Relations Court had the jurisdiction to determining constitutional questions arising within its special jurisdiction.

Employment Law – probation – definition of person employed under a probationary contract vis-à-vis the definition of an employee under the Employment Act - status of a person privy to a probationary contract - whether the Employment Act segregated or isolated a person employed under a probationary contract from the general definition of an employee – Employment Act, sections 41 and 42(1).

Employment Law – probation – rights of a person employed under a probationary contract – right to be heard - whether a probationary employee ought to be heard before the contract was terminated – Employment Act sections 41 and 42(1).

Statues – constitutionality of statutes – Employment Act – constitutionality of section 42(1) of the Employment Act - whether section 42(1) of the Employment Act that provided that persons under probationary contracts were not privy to notification and hearing before termination on grounds of misconduct under section 41 was unconstitutional – Constitution of Kenya, 2010, articles 24, 41 and 47; Employment Act sections 41 and 42(1).

Legal Systems – retroactive application of the law – retroactive application of judicial pronouncements – where a party had applied a law that was later pronounced to be unconstitutional - whether a person that applied a law that was later declared unconstitutional could be held liable for applying the law as it was prior to the pronouncement of unconstitutionality.

Brief facts

The petitioners were interviewed and appointed on various dates in January 2016 by the 1st respondent. The petitioners were employed under a probationary contract. On or about April 2016, the respondent embarked on a process of investigating how the petitioners were recruited without disclosing the same to the respondents. Consequently, on the date the probation period was to end, the respondent terminated the employment of the petitioners.

Aggrieved the petitioners filed the instant petition and sought for section 42(1) of the Employment Act that provided that persons under probationary contracts were not privy to notification and hearing before termination on grounds of misconduct under section 41 was unconstitutional and they sought to be compensated for unfair termination of unemployment.

Issues

- i. Whether the Employment and Labour Relations Court had the jurisdiction to determining constitutional questions arising within its special jurisdiction.
- ii. Whether a probationary employee ought to be heard before the contract was terminated.
- iii. Whether the Employment Act segregated or isolated a person employed under a probationary contract from the general definition of an employee.
- iv. Whether section 42(1) of the Employment Act that provided that persons under probationary contracts were not privy to notification and hearing before termination on grounds of misconduct under section 41 was unconstitutional.



- v. Whether a person that applied a law that was later declared unconstitutional could be held liable for applying the law as it was prior to the pronouncement of unconstitutionality.

Relevant provisions of the Law

Employment Act: sections 41 and 42

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

42. 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.

Held

1. The Employment and Labour Relations Court, just like the High Court and Environment and Land Court had jurisdiction to determine constitutional questions arising within the context of their respective jurisdictions as delimited under article 165(5) of the Constitution.
2. A probationary employee ought to be heard before the contract was terminated. The Canadian position seemed to be that unless the contract provided for it, an employer could terminate a probationary contract without a hearing or assigning a reason. Kenya and Canada were former British colonies where the Common Law position for a long time was that there was no obligation on an employer to assign any reason for termination of employment, including contracts which had been confirmed after successful probation. All an employer needed to do was to invoke the termination clause and issue a notice as stipulated in the contract or offer payment *in lieu* of notice. Perhaps and it was more probable than not, that the Common Law principle played heavily in the minds of the drafters of the Employment Act while drafting section 42(1) of the Act and its eventual legislation.
3. Article 47 of the Constitution conferred on every person the right to administrative action that was among other things, reasonable and procedurally fair. Further, if a fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for the action. Proponents of termination of probationary contracts without subjecting employees to hearing had not only relied on the exclusionary provisions of section 42(1) of the Employment Act but had also justified the exclusion on the grounds that during probation period, an employee was under trial to match the skill-sets represented during the interview with the actual job performance. That position was implicit under section 42(2) which provided that 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.



4. Practice showed that in a majority of cases, an employee on probation was usually engaged with the management on issues of performance and other issues contained in the probationary employment contract. Therefore, the stipulation that for the period of probation to be extended, the concurrence of the employee had to be sought, implied some consultation had to take place and issues of concerning warranting extension, discussed.
5. Section 41 of the Employment Act provided that before dismissing an employee on grounds of misconduct, poor performance and so on, an employer was to explain to the employee the reason for which the employer was considering termination and that the employer would before terminating the employment of such employee consider any representation such employee and or his representative could make. Under section 2 of the Employment Act, an employee was defined to mean a person employed for wages or salary and included an apprentice and indentured learner. Although the Act defined a probation contract in relation to the duration of the contract it did 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) rendered illogical the provisions of section 42(1).
6. It did not make sense to accord an apprentice and indentured learner who were 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 held a probationary contract.
7. Labour rights were part of the Bill of Rights by virtue of article 41 of the Constitution. Article 24 of the Constitution prohibited 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 was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
8. 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 had a direct relationship with a person's confidence, dignity and place in society. Any legislation therefore which intended to limit or qualify a labour right, ought to be to the extent that the limitation or qualification was reasonable and justifiable in an open and democratic society. There was 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.
9. Section 42(1) insofar as it excluded an employee holding a probationary contract from the provisions of section 41 of the Employment Act, was inconsistent with articles 41 and 47 of the Constitution hence null and void.
10. The respondent was not liable for terminating the services of the petitioners, without according them a hearing as stipulated under section 41 of the Act. The respondent honestly believed and applied the law as it was prior to the pronouncements contained in the instant judgment. It would be unjust to condemn the respondent for applying the law that was enacted by Parliament even if that law was inconsistent with the Constitution. The respondent could not be faulted for applying the impugned law enacted. The court would not declare that in terminating the petitioners' probationary contracts, the respondent violated their constitutional rights and section 41 of the Employment Act since the respondent relied on the provisions of section 42(1) of the Act as enacted by Parliament, which expressly excluded persons holding probationary contracts from the provisions of section 41. As such, no order for compensation could be made.
11. **[Obiter]** Courts of the Commonwealth have the inherent power to issue common law declarations of unconstitutionality when Parliament legislates against constitutional norms. While it is conceded that declaration of incompatibility against an Act of Parliament does not impugn its legal validity until it is repealed or amended by Parliament, it is necessary to emphasize the need for the Attorney General to review and where in concurrence, initiate necessary legislative repeal or amendment of the statute or sections thereof declared unconstitutional. The Court is aware that several statutes or sections thereof



have been declared unconstitutional by the Courts in our judicial hierarchy yet no corresponding legislative amendment or repeal has followed. They therefore remain booby traps to citizens who may not be aware that the Courts have pronounced them invalid.

Petition partly allowed.

Orders

- i. *To the extent that section 42(1) of the Employment Act, 2007 excluded employees having probationary contracts from the provisions of section 41, it was inconsistent with articles 24, 41 and 47 of the Constitution.*
- ii. *No order was made regarding costs.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Employment Act
3. Judicature Act
4. Labour Relations Act

Advocates

Mr. Achiando

Mr. Kioko

JUDGMENT

1. Through a petition dated 23rd June, 2016 the Petitioners sought orders among others:
 - (a) A declaration that Section 41(2) of the *Employment Act*, 2007 is inconsistent with Articles 10, 25, 41, 47 and 50 of *the Constitution* thus unconstitutional, null and void to the extent of the inconsistency.
 - (b) Upon declaration of the unconstitutionality of Section 41(2) of the *Employment Act*, 2007, a declaration that the Petitioners are entitled to the payment of the balance of their contractual periods.
 - (c) A declaration that the decision to terminate/dismiss the petitioners by the Respondent was opaque, egregious, capricious whimsical and contrary to Articles 10, 25, 41, 47 and 50 (1) of *the Constitution* of Kenya, 2010 hence unconstitutional and consequently null and void.
 - (d) Payment of Kshs.1 million to each of the 7 Petitioners for failure by the Respondent to accord the Petitioners a fair hearing thereby causing them loss of employment.
2. The petition was supported by the facts inter alia:
 - (a) That on or about Wednesday 30th September, 2015, the Respondent advertised in the Daily Nation and Standard Newspapers various positions including but not limited to:
 - i) Head, Occupational Health Safety and Environment.
 - ii) Senior Human Resource Officers.
 - iii) Head, Human Resource Organization Design and Development.



- (b) That in October, 2015 pursuant to the aforesaid advertisement of various positions by the Respondent the Petitioners herein applied for the said positions through recruitment@mku.ac.ke.
- (c) That in or about December, 2015 the Petitioners received telephone calls and emails (sgatonga@mku.ac.ke) from the Respondent inviting the Petitioners to attend interviews on various dates in December,2015 at the Respondents Thika Campus at the Library Board Room at 9.00 a.m.
- (d) That on various dates in or about December, 2015 the Petitioners attended the interviews of the advertised positions aforestated and were each interviewed by a panel of about 5 (five) officers of the Respondent.
- (e) That it is the further averment of the Petitioners that on various dates in January, 2016 the Petitioners were called by the Director Human Resource to collect their letters of appointment from the offices of the Respondent.
- (f) It is further averred by the Petitioners that the Petitioners were required, in terms of the appointment letters, to report on duty on 1st of February, 2016, a requirement the Petitioners complied with.
- (g) It is further stated by the Petitioners that the Petitioners resigned from their former employment as it was a condition precedent to their employment by the Respondent. The Petitioners indeed tendered their resignation on various dates before reporting on duty on 1st of February,2016.
- (h) The Petitioners further state that on or about 14th April, 2016, a memo was sent by the Respondent to the Petitioners, save for the 6th Petitioner, requiring the Petitioners to submit employment data such as but not limited to pay slips and certificates of service from the Petitioners' former employers.
- i) That the Petitioners later learnt that the Respondent by its memo aforestated had embarked on a process of investigating on how the Petitioners were recruited without disclosing the nature of the memo to the Petitioners thus the Respondent withheld material facts from the Petitioners therefore it suffers from material non-disclosure.
- j) That on or about 29th April, 2016, the Petitioners received letters of termination of their contracts.
 - (i) The last date of employment was 30th day of April, 2016.
 - (ii) The Petitioners to be paid 14 day's salaries in lieu of notice upon clearance with the University in terms of clause C of the employment contracts signed between the Petitioners and the Respondent.
- k) The Petitioners state that before joining the Respondent, they were formerly in the employment of various organizations with good salaries. The 5th and 6th Petitioners who used to work in Nairobi were posted by the Respondent to Eldoret and Nakuru respectively and re-located thus causing them inconvenience of great proportion to them and their families whilst the rest of the Petitioners were posted to Thika Main Campus of the Respondent.



- l) That the termination of employment of the Petitioners was done during the probationary period and was to take effect on 30th of April, 2016, the date the probationary period was to end.
- m) The object and reasons for the enactment of the Employment Act 2007 (hereinafter referred to as the “Act”) is inter alia” an Act of Parliament to repeal the Employment Act, declare and define the fundamental rights of employees, to provide basic conditions for employment of employees and to provide for matters connected with the foregoing,
- n) That section 41(1) of the Act provides that:
 - (i) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- o) It is further averred section 42(1) of the Act provides that:-Termination of probationary contracts,
 - (1) The provisions of Section 41(1) shall not apply where a termination of employment terminates a probationary contract.
- p) The effects of Section 42(1) of the above Act is that it excludes the principle of audi alteram from its purview and is thus draconian in its application in that the employer can dismiss any employee from employment at his/her whim during the probationary period. The application of Section 42(1) of the Act is therefore constitutionally impermissible, null and void.
- q) That though Parliament is permitted to enact legislation to give effect to the Constitution such enactment should be done without undermining or ousting the provisions of the Constitution, denial of redress or violation or infringement of or threat to a right or fundamental freedom in the Bill of rights. Therefore the fact that an employer can dismiss/terminate the employment of an employee without according the employee a fair hearing is an act that contravenes Articles 47 and 50 of the Constitution thus null and void
- r) It is further averred by the Petitioners that for reasons set out in the Petition Section 42(1) of the Act as enacted violates the myriad provisions of the Constitution and other statutes. Therefore, it is in the interest of justice that the provisions of Section 42(1) of the impugned Act as contained therein be declared unconstitutional, null and void.

3. The Legal foundation of the Petition was stated to include: -

- (a) Article 2(1) of the Constitution of Kenya 2010 which provides that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of Government.
- (b) Article 2(4) which provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.
- (c) Article 2(6) which provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.



- (d) Article 10(1) which provides that the national values and principles of governance in the Article bind all State organs, State Officers, Public Officers and all persons whenever any of them: -
- i) Applies or interprets *the Constitution*.
 - ii) Enacts, applies or interprets any law; or
 - iii) Makes or implements public policy decisions.
- (e) The National values and principles of governance include:
- i) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.
 - ii) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
 - iii) good governance, integrity, transparency and accountability, and
 - iv) sustainable development.
 - v) Article 25 provides that despite any other provisions in this Constitution, the fundamental right and freedom in respect to right to a fair trial shall not be limited.
 - vi) Article 27 provides for equality and freedom from discrimination and particularly, Article 27(1) states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Under Article 27(2) equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - vii) Article 41 of *the Constitution* of Kenya 2010 protects the right to fair labour practices, fair remuneration and reasonable working conditions.
 - viii) Article 47 protects the right to fair administrative action and provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - ix) Article 50 protects the right to fair hearing of any dispute that can be resolved by application of law to be decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.
4. On the issue of jurisdiction, Counsel for the Petitioner Mr. Achiando submitted that the issue was determined by the Court of Appeal in *The Matter of the Interim Electoral Commission V Constitutional Application No.2 of 2011* and emphasized by the Supreme Court in the case of *Samuel Kamau Macharia and Another V Kenya Commercial Bank and 2 Others (2012) eKLR*.
5. Regarding Section 42(1) of the *Employment Act*, which is the crux of this Petition, Mr. Achiando submitted that it was important to note that the object and reasons for the enactment of the *Employment Act*, 2007 was to repeal the previous *Employment Act*, declare and define fundamental rights of an employee and provide basic conditions of employment. According to Counsel, the effect of Section 42(1) of the *Employment Act* was that it excluded the principle of audi alteram from its purview and was thus draconian in its application in that an employer can dismiss an employee on probationary contract at their whim during probationary period.



6. Counsel further submits that the Section is therefore unconscionably impermissible, null and void and inconsistent with the provisions of Articles 47 and 50 of *the Constitution*. In support of the submission Counsel relied on the case of *Evans Kiage Onchwari v Hotel Ambassadeur, Nairobi* [2016] eKLR per Ndolo J.
7. Mr. Achiando further submitted that, though Parliament was permitted to enact legislation to give effect to *the Constitution*, such enactment should be done without undermining or ousting the provisions of *the Constitution*. Such that denial of redress to pursue an employer for violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights allowing an employer to dismiss or terminate the employment of a probationary employee without according them a fair hearing, is an act that contravenes Articles 47 and 50 of *the Constitution* thus null and void.
8. Concerning the process of termination of employment, Counsel submitted that in adjudicating disputes between employers and employees, the Employment and Labour Relations Court is advised to respect the decisions made by an employer as far as they comply with the law and internal policies. However, where the employer's action fails to comply with the relevant legal and policy parameters, the Court is obliged to intervene. This according to Counsel was the position in *Jane Achieng and Another V University of Nairobi* [2015] eKLR. Mr. Achiando further relied on Article 50 of *the Constitution* on the right to have any dispute resolved in a fair, and public hearing before a Court or independent and impartial tribunal or body.
9. According to Counsel, whereas Article 50(2) which provides for the right to fair trial of an accused person in criminal trials is not applicable to disciplinary proceedings which are neither criminal proceedings nor quasi criminal, the Petitioners were however entitled to a fair hearing as was established by the Court of Appeal in *Judicial Service Commission V Gladys Boss Shollei and another* [2014] eKLR. 10. Mr. Achiando restated that on or about 14th April, 2016, a memo was sent by the Respondent to the Petitioners requiring them to submit employment data such as but not limited to pay slips and certificates of service from the Petitioners' former employers. The Petitioners later learnt that the Respondent, by the said memo, had embarked on a process of investigating on how the Petitioners were recruited without disclosing this to the Petitioners. For this reason, the Respondent withheld material facts from the Petitioners. Counsel thus submitted that the Petitioners were not aware that they were being investigated and further that such investigations did not request for the Petitioners' feedback or testimony concerning the allegations which formed the basis of the termination of the Petitioners' probationary contracts.
10. Concerning the law on termination of probationary contracts, Counsel submitted that this was the same as other employees contemplated under section 2 of the Act such that an employee on probationary contract should only be terminated where there are reasons, which reasons, the employer at the time of terminating such contract genuinely believed to exist. Hence the termination without reasons which was the case before us should not be permitted.
11. Mr. Achiando further contended that to date the Petitioners had not been given any report or brief at all on the preliminary investigations which were purportedly conducted by the Respondent. In support of the submission Counsel relied on the case of *CMC Aviation Ltd V Mohammed Noor* [2015] eKLR where the Court of Appeal held that unfair termination involved breach of statutory law and where there is fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, it still amounted to unfair termination.
12. On the question whether there was breach of the Petitioners' fundamental rights and freedoms under *the Constitution*, Mr. Achiando submitted that the violations were captured from paragraph 34-41 of



the Petition and that the terminations were in breach of fundamental rights and freedom enshrined in Articles 10,20,27,41,47 and 50 of *the Constitution*.

- a) According to Counsel, Article 10 on national values and principles of governance was breached in that the Respondent's decision to terminate the Petitioners' services was not in tandem with this Article and was prejudicial to human rights, social justice, accountability and transparency in discharge of national duty. Counsel added that Article 20 on the application of the Bill of Rights was violated in the sense that the Respondent's decision to terminate infringed and inhibited the Petitioners' ability to enjoy the fundamental right to be productive employees. Further, Article 27 on equality and protection from discrimination, was breached in the sense that the Petitioners were singled out and failing to terminate other employees who were similarly circumstanced as the Petitioners.
 - b) Counsel went on to state that Article 47 was contravened in the sense that the Respondent failed to accord the Petitioners a fair hearing before terminating their services and finally that Article 47 was breached in the sense that the Respondent terminated the employment of the Petitioners at the end of their probationary period and gave them two days' termination notice. This according to Counsel was failure to comply with Section 41 of the *Employment Act*.
13. Regarding entitlement to remedies sought Counsel submitted that the Petitioners' rights had been violated in that their employment record had been sullied and that they had been exposed to mental and psychological torture and suffered severe loss and damage in their careers. It was therefore quite proper and appropriate that the Respondent be condemned to pay the Petitioners aggravated, general, punitive and exemplary damages.
 14. Mr. Kioko for the Interested Party filed brief submissions whose essence was that probationary contracts could be terminated without ascribing reasons. Counsel relied on the cases of Geoffrey Biseca V Mutsimoto Motor Corp. Ltd [2019] eKLR, Lawrence Musyimi Ngao V Liquid Telcom Kenya Ltd [2019] eKLR and Lee Mwanga Kioko V DAC Avition (EA) Ltd [2018] eKLR.
 15. Further, the learned State Counsel submitted that the essence of a probationary period was for an employer to assess an employee's suitability and allow termination if the employee was found wanting. On this account, Counsel relied on the case of Rustus Odhiambo Otieno v Style Industries Limited [2019] eKLR.
 16. Having reviewed the Petition, the grounds upon which it was brought and submissions by the Petitioners' Counsel and Counsel for the Interested Party, the Court flags three issues for determination namely, first whether this Court has jurisdiction to determine Constitutional petitions, second whether Section 42(1) of the *Employment Act* is inconsistent with *the Constitution* hence null and void to that extent. Thirdly, whether in terminating the services of the Petitioners the Respondent was bound but failed to abide by the provisions of Section 41 of the *Employment Act* and as a corollary, whether the Petitioners are entitled to the remedies sought in Petition.
 17. On the first issue concerning the jurisdiction of the Court to adjudicate and make pronouncements on constitutional petitions, the Court will not dwell much on this issue for the reason that it is now more or less settled that this Court, just like the High Court and Environment and Land Court (ELC) have jurisdiction to determine constitutional questions arising within the context of their respective jurisdictions as delimited under Article 165(5) of *the Constitution*. To demonstrate, we will rely on the



dictum of Majanja J in the case of United States International University V The Attorney General & 2 others [2012] eKLR where the learned Judge succinctly stated as follows:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret *the Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.

This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.

Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya’s democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under Article 41 is reiterated in the *Employment Act*, 2007 and *Labour Relations Act*, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court...The reiteration of these rights is merely a consequence of Article 19 and recognition of their universality and indivisibility in application in all spheres of labour and employment law.”

18. Which brings us to the second issue and which in our view is the crux of the Petition. That is whether Section 42(1) of the *Employment Act* is inconsistent with *the Constitution* hence this Court should declare the same null and void to the extent that it is inconsistent with *the Constitution*.
19. Section 42(1) of the *Employment Act* provides:
42(1) the provisions of section 41 shall not apply where a termination of employment terminates a probationary contract
20. Section 41 referred to above provides: -
Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
21. In support of the contention that this Section is unconstitutional, Mr. Achiando for the Petitioners submitted among other things, that the effect of Section 42(1) of the *Employment Act* is that it excludes the principle of audi alteram partem from its purview, that is, as regards termination of probationary contracts. This according to Counsel was draconian in its application in that it implied that an employer could dismiss from employment at will during probationary period. The Section was therefore constitutionally impermissible as it was inconsistent with the provisions of Articles 47 and 50 of *the Constitution*. In support of this submission Counsel relied on the decision of this Court (Ndolo J) in the case of Evans Kiage Onchwari v Hotel Ambassadeur Nairobi [2016] eKLR.



22. Article 47 of *the Constitution* is concerned with the right to fair administrative action and decrees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, and further that where an administrative action is likely to adversely affect a person, such person is entitled to be given written reasons for the action.
23. Article 50 of *the Constitution* is concerned with the right to fair hearing and provides that every person has the right to have any dispute that can be resolved by the application of the law, to be decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
24. In relation to the petition before us, Mr. Achiando submitted that on 14th April, 2015, a memo was sent to the Petitioners by the Respondent requiring them to submit employment data including their pay slips and certificates of service from their previous employers. The Petitioners later learnt that the Respondent, by the said memo, had embarked on a process of investigating how the Petitioners were recruited, without disclosing this fact to them. For this reason, Counsel told us, the Respondent withheld material facts from the Petitioners. Further, during the alleged investigations the Respondent never asked the Petitioners for any feedback nor were they given copies of the investigation report to respond to before their services were terminated.
25. It is important to note at this stage that the Respondent, though duly served, never participated in these proceedings. The factual allegations by the Petitioners therefore remained largely uncontroverted.
26. The jurisprudence from this Court on the constitutionality or otherwise of Section 42(1) of the *Employment Act* seems divided. Rika J in the case of Danish Jalang'o v Amicabre Travel Services [2014] eKLR held in material part as follows:

“There is no obligation under sections 43 and 45 for employers to give valid and fair reasons for termination of probationary contracts, or to hear such employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of probationary contracts is strictly regulated by the terms of the contract. The only question the court should ask is whether the appropriate notice was given or if not given, whether the employee received pay in lieu of notice; and whether the employee during the probationary period, was treated in accordance with the terms and conditions of the probationary contracts. The employee has no expectation of substantive justification, or fairness of procedure outside what the probation clause and section 42 of the *Employment Act* grants ... the law relating to unfair termination does not apply in probationary contracts.”

27. Nzioki wa Makau J in the case of John Muthomi Mathiu V Mastermind Tobacco (K) Ltd [2018] eKLR while agreeing with Rika J in the Danish Jalang'o Case (supra) stated further as follows: -

“the probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/her like for an employee already confirmed to the position.”

28. Ndolo J on the other hand in the case of Evans Kiage Onchwari V Hotel Ambassadeur Nairobi [2016] eKLR observed as follows: -

“I however find it necessary to comment on the constitutionality of Section 42(1) of the *Employment Act* which ousts the procedural fairness requirements under Section 41 as far as probationary contracts are concerned ... the Court was referred to decisions of Rika J in Danish Jalang'o & another v Amicabre Travel Service Ltd and Dixon Andama v Amani Tiwi



Beach Resort where my brother Judge held that in terminating probationary contracts, the substantive justification and procedural fairness requirements under Sections 43 and 45 are not obligatory. I hold a different view. Article 41 of *the Constitution* 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 of Article 24. To this extent I agree with the holding of Lenaola J in *Samwel G. Momanyi v The Attorney General & Another* 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.”

29. Lenaola J (as he then was) in the Momanyi Case relied on by Ndolo J observed in material part as follows concerning Sections 45 and 46 of the *Employment Act*.

“Reading the two sections together with articles 27 and 48 of *the Constitution*, there is obvious discrimination and the applicant and those in his situation have been denied equal protection and equal benefit of the law and they have also been denied the full and equal enjoyment of all rights and fundamental freedoms to the extent expected by *the Constitution*. They have been denied access to justice. I have held as above because I am in agreement with the petitioner that there is no explanation offered by either the 2nd Respondent and the AG why a person who has worked for one year and one month is the only one who can claim that his employment has been unfairly terminated ...”

30. From the authorities considered above, the following issues are discernible. First Rika J was of the view that unless the probationary contract provides to the contrary or differently, the provisions of Section 41 remain validly excluded by Section 42(1) of the Act with the consequence that a person holding a probationary contract does not enjoy the protection provided under Section 41. Second, the issue of constitutionality of Section 42(1) of the *Employment Act* though never submitted before Ndolo J as a substantive issue for determination, her comments though obiter dicta, are fundamental to the issue before us. Thirdly whether the decision of Lenaola J (as he then was) in the Momanyi Case relied on by Ndolo J concerning the constitutionality of Section 45(3) of the *Employment Act* which was not one of the substantive questions submitted before the learned Judge for determination, applies with equal measure to section 42(1) of the *Employment Act*.
31. Going forward, the issue of applicability of procedural fairness encapsulated under Section 41 of the *Employment Act* to probationary contracts, not appearing settled by local jurisprudence, it would be useful to sample some jurisprudence on the matter from comparative jurisdictions abiding by the provisions of the *Judicature Act*.
32. Under the Code of Good Practice which is incorporated into the South African *Labour Relations Act* 66 of 1995, schedule 8 thereof, section 8 makes elaborate provisions concerning probationary employees. For instance, it states that the purpose of probation is to give the employer an opportunity to evaluate the employee’s performance before confirming the appointment. The section further provides that during the probationary period, the employee’s performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training guidance or counselling in order to allow the employee to render a satisfactory service. If the employer determines that the employee’s performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards.



33. The Code further provides that if an employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her right to refer the matter to a council having jurisdiction, or to the Commission on Mediation, Conciliation and Arbitration (CMCA).
34. In the case of *Palace Engineering (Pty) Ltd V. Ngcobo & Others (CLAC) (2014) ZALAC 7*, The Labour Appeals Court of South Africa observed as follows:
- “ the acceptance of less compelling reasons for dismissal in respect of a probationary employee as contemplated in item 8(1)
- (j) of the Code does not detract from the principle that the dismissal must be for a fair reason. Even though less onerous reasons can be accepted for dismissing a probationary employee, the fairness of such reasons still needs to be tested against stipulations of item 8(1) (a) –(h) of the Code of Good Practice. At the end of the day the onus rested on the employer to prove that the dismissal was substantively fair.”
35. In the Canadian case of *Van Wyngaarden V Thumper Massager Inc. 2008 ONSC 6622*, Superior Court of Justice of Ontario held that despite differing accounts of the parties on the Appellant’s hiring and performance the trial Judge was able to make a fair and just determination of the merits of the Motion for summary judgement.
- After a detailed review of the emails that set out the pre-contract communication, he found that the Appellant was bound by the probation clause in the one page offer as signed back by him. Further following *Nagribianko V Select Wine Merchants Ltd 2016 ONSC 490*, the Motion Judge held that the probationary period was inconsistent with any inducement or promise of long term employment as alleged by the claimant. The Court further held that the Motion Judge was right in holding that unless the dismissal was in bad faith, an employer was entitled to dismiss an employee during the probationary period without cause and without notice.
36. In the *Nagribianko Case (supra)* the Court of Appeal held that:
- “ the word probation in an employment contract has a clear and unambiguous meaning and the status of a probationary employee has acquired a clear meaning at Common Law. Unless the employment agreement specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes good faith determination that the employee is unsuitable for permanent employment.”
37. A review of the South African and Canadian jurisprudence above while displaying distinctively different approaches to probationary contracts just as was noted of the Judges of this Court, have some sort of confluence that a probationary employee ought to be heard before the contract is terminated. Whereas the South African jurisprudence is more elaborate and direct on the procedural fairness over probationary employees, the Canadian position seems to be that unless the contract provides for it, an employer can terminate a probationary contract without a hearing or assigning a reason.
38. While the above appears to be the position in Canada the practice seems different in majority of cases reviewed including those cited in this judgement; the probationary employees were heard before their contracts were terminated.
39. Kenya and Canada are former British colonies where the Common Law position for a long time was that there was no obligation on an employer to assign any reason for termination of employment,



including contracts which had been confirmed after successful probation. All an employer needed to do was to invoke the termination clause and issue a notice as stipulated in the contract or offer payment in lieu of notice. Perhaps and it is indeed more probable than not, that this Common Law principle played heavily in the minds of the drafters of the *Employment Act* while drafting Section 42(1) of the Act and its eventual legislation.

40. This invites the next question which is whether the foregoing, being the most probable operating legislative circumstances of our Parliament, does Section 42(1) of the *Employment Act* offend the tenets of procedural fairness provided for under Article 47 of *the Constitution* hence ought to be declared unconstitutional?
41. In support of the declaration of unconstitutionality of Section 42(1) of the Act, it was submitted by Mr. Achiando that the object and reasons for enactment of the *Employment Act* was to among others declare and define fundamental rights of an employee. The effect of Section 42(1) of the *Employment Act* therefore was that it excluded the principle of audi alteram partem from probationary employees who could be dismissed at will during probation. This according Counsel was impermissible, null and void.
42. While conceding that Parliament was permitted to enact legislation to give effect to *the Constitution*, such enactment should be done without undermining or ousting the provisions of *the Constitution*. Denial of redress or violation or infringement of a right or fundamental freedom in the Bill of Rights was therefore contrary to *the Constitution* hence null and void.
43. Mr. Kioko for the Interested Party on the other hand denied Section 42(1) was unconstitutional. According to him, the probationary period was for an employer to assess an employee's suitability and allow termination if the employee is found wanting.
44. Article 47 of *the Constitution* confers on every person the right to administrative action that is among others, reasonable and procedurally fair. Further, if a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
45. The spirit of Article 47 has been incorporated in the *Employment Act* more particularly in Section 41 which stipulates that: -
 - 41(1) subject to section 42(1) an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor representative of his choice present during this explanation.
 - 2), Notwithstanding any other provision of this part, an employer shall before dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub-section (1) make.
46. By dint of Section 42(1) a probationary employee has been excluded from the substantive and procedural processes provided for under Section 41 of the Act. Is this therefore unconstitutional?
47. Article 24(1) of *the Constitution* provides thus:
 - 24(1) A right or fundamental freedom in the Bill of Rights shall not be limited 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, taking into account all relevant factors

48. With regard to employment, Article 2 of the ILO Convention on Termination Employment of 1982 (NO 158) stipulates as follows:
2. A member may exclude the following categories of employed persons from all or some of the provisions of this convention
 - (a) workers engaged under contract of employment for a specific period of time or a specified task.
 - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable durations.
 - (c) workers engaged on a casual basis for a short period.
49. Most of the provisions of this Convention especially Articles 4,5, 6 and 7 have been incorporated into the *Employment Act* hence form part of Kenyan law on employment.
50. Proponents of termination of probationary contracts without subjecting employees to hearing have not only relied on the exclusionary provisions of Section 42(1) but have also justified the exclusion on the grounds that during probation period, an employee is under trial to match the skill-sets represented during the interview with the actual job performance. This position is implicit under Section 42(2) which provides that 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.
51. Practice shows that in the majority of cases, an employee on probation is usually engaged with the management on issues of performance and other issues contained in the probationary employment contract. Therefore, the stipulation that for the period of probation to be extended, the concurrence of the employee must be sought, implies some consultation must take place and issues of concern warranting extension, discussed.
52. 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 terminating 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 and 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 a 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(1), 42(2) and 41 considered earlier in this judgment, 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 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.

60. Having so found, the next question is whether the Respondent is liable for terminating the services of the Petitioners, without according them a hearing as stipulated under Section 41 of the Act. The answer to this question would be in the negative. The Respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgment. It would therefore be unjust to condemn the Respondent for applying the Law as enacted by Parliament even if that Law is, as we have found it be, inconsistent with *the Constitution*.

61. Further, it naturally flows from the finding that the respondent could not be faulted for applying the impugned law enacted, that no order for compensation as sought in the Petition can be made.

62. Having so found as above, this Court would add as obiter that Courts of the Commonwealth have the inherent power to issue common law declarations of unconstitutionality when Parliament legislates against constitutional norms. While it is conceded that declaration of incompatibility against an Act of Parliament does not impugn its legal validity until it is repealed or amended by Parliament, it is necessary to emphasize the need for the Attorney General to review and where in concurrence, initiate necessary legislative repeal or amendment of the statute or sections thereof declared unconstitutional. The Court is aware that several statutes or sections thereof have been declared unconstitutional by the Courts in our judicial hierarchy yet no corresponding legislative amendment or repeal has followed. They therefore remain booby traps to citizens who may not be aware that the Courts have pronounced them invalid.

63. The Court is encouraged that Mr. Kioko from the Attorney General's office participated in these proceedings and is hopeful that the sentiments expressed by this Court in obiter will receive the required attention by the Office of the Attorney General.

64. In conclusion the Court disposes of the Petition as follows: -

- a) To the extent that Section 42(1) of the *Employment Act*, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with articles 24, 41 and 47 of *the Constitution*.



- b) The Court will not declare that in terminating the Petitioners' probationary contracts, the Respondent violated their constitutional rights and Section 41 of the Employment Act since the Respondent relied on the provisions of Section 42(1) of the Act as enacted by Parliament, which expressly excluded persons holding probationary contracts from the provisions of Section 41.
- c) Flowing from (b) above, there will be no order on compensation as prayed by the Petitioners.
- d) The Petition being partially successful and involving an important question in the development of our Employment Law, no order will be made regarding costs.

65. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021

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MONICA MBARU
JUDGE

.....
JORUM ABUODHA
JUDGE

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LINNET NDOLO
JUDGE

Appearance:

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