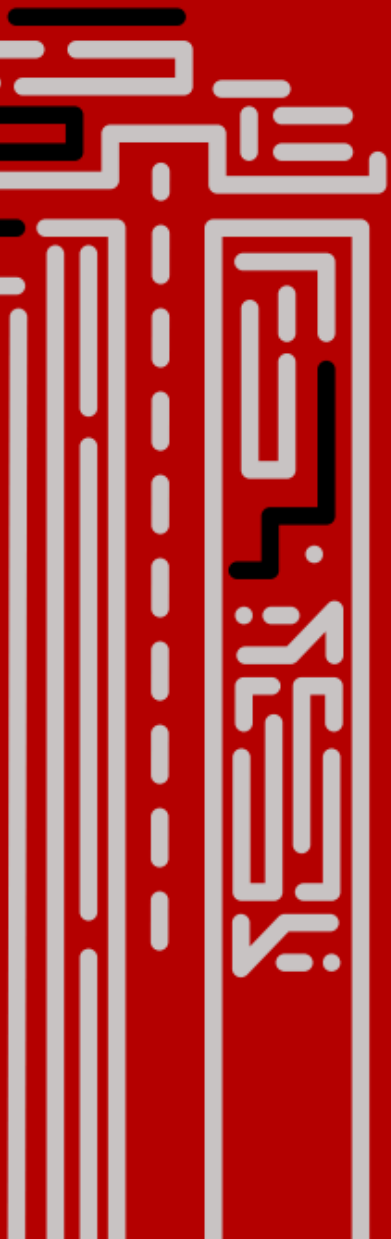


Legal Alert:

Analysis of a recent decision by the Employment and Labour Relations Court on termination of probationary contracts.



“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.... 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.”



Introduction

A three-judge bench of the Employment and Labour Relations Court (ELRC) at Nairobi, (Mbaru J, Abuodha J and Ndolo J) in a decision rendered on 30th July 2021 in the case of **Monica Munira Kibuchi & 6 others v Mount Kenya University & Another [2021] eKLR** (hereinafter referred to as the Mount Kenya University case) declared that section 42 (1) of the Employment Act, 2007 (the Act) is inconsistent with articles 24, 41 and 47 of the Constitution to the extent that it excludes employees on probation from the provisions of Section 41 of the Act. Section 42 of the Act provides as follows:

- 1. The provisions of Section 41(1) shall not apply where 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.***

Section 41 of the Act provides that:

- 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.***

The effect of section 42 (1) is that it excludes the right to be given reasons being contemplated by an employer for termination of employment and to be heard before termination of a probationary contract.

Facts of the case

The facts of the case as reported in the decision are summarized as follows:

The Respondent, Mount Kenya University, advertised for various positions in the daily newspapers on 30th September 2015. The Petitioners applied for those positions and were invited for interviews on various dates in December 2015. They were asked to collect their letters of appointment on various dates in January 2016. They were supposed to work on probation until 30th April, 2016. The Respondent required the Petitioners to resign from their former employment. They tendered their resignation letters and reported for duty on 1st February 2016. Sometime in April 2016, the Respondent sent a memo to the petitioners requiring them to submit their employment data such as pay slips and certificates of service from their former employers. The Petitioners later learnt that this was part of the Respondent's investigations into how they were recruited. The Petitioners received their letters of termination on 30th April 2016 (on the last day of the probationary period) together with 14 days salary in lieu of notice as per the contract.

Aggrieved by the termination, the Petitioners filed the petition on 23rd June 2016 seeking among other reliefs, a declaration that Section 42 (1) of the Employment Act, 2007 as unconstitutional and that the Respondent's decision to terminate their employment was unconstitutional, null and void.

The findings and decision of the Court

Section 42(1) of the Employment Act states that the provisions of Section 41 shall not apply where an employer terminates a probationary contract. Section 41 provides that an employer should explain to an employee the reason for termination and afford them the opportunity to make representations. The employer should also inform the employee that they have a right to have another employee or union representative of their choice present when being heard.

The Petitioners submitted that the exclusion of the provisions of section 41 of the Act to probationary contracts was draconian in its application in that it implied that an employer could dismiss an employee from employment at will during the probationary period. The Petitioner contended that section 42(1) was therefore constitutionally impermissible as it was inconsistent with the provisions of Articles 41, 47 and 50 of the Constitution.

The court noted that previous decisions on Section 42 (1) of the Act are divided. For instance, Rika J in the case of ***Danish Jalang'o v Amicabre Travel Services [2014] eKLR*** held that there is no obligation under Sections 43 and 45 of the Act for employers to give valid and fair reasons for termination of probationary contracts, or to hear such employees at all. 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 stated further that the probationary part of a contract of employment is the period where an employee is tested and they cannot therefore anticipate the same safeguards to be available for them like for an employee already confirmed to their position.

A digest of this case is available in ***Kashindis' Digest of Employment Cases.1***

Ndolo J on the other hand in the case of ***Evans Kiage Onchwari V Hotel Ambassadeur Nairobi [2016] eKLR*** stated in obiter (as a by the way since the matter was not substantially in issue) that Section 42 (1) of the Act is unconstitutional because it limits the entitlement to fair labour practices by reason of one's period of employment.

Although not cited in the ***Mount Kenya University case, Radido J in Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Limited [2014]eKLR*** held that an employee on probation is not entitled to notification and a hearing before termination but that an employer is still bound to give reasons and to prove that the reasons are valid and fair as required by Sections 43 and 45 of the Act. A digest of this case is available in ***Kashindis' Digest of Employment Cases. 2***

1 Case Number 86 of George Kashindi and Irene Kashindi, 'Kashindis' Digest of Employment cases: *A comprehensive digest of employment and labour relations in Kenya*' (2020) Page 225.

2 Case Number 84 of Kashindis' Digest of Employment cases: *A comprehensive digest of employment and labour relations cases in Kenya*' Page 221

Another previous case that was not cited in the ***Mount Kenya University case***, which touched on section 42 of the Act, is that of ***Happiness Nyabonyi Maingo v Shreeji Chemicals Limited [2020] eKLR*** decided by Onesmus Makau J who stated that an employer must have a valid and fair reason for terminating a probationary contract prematurely. The judge added that Section 42 also does not bar a probationary employee from challenging fairness or lawfulness of termination and that such an employee still enjoys protection from unfair termination. The court reiterated that the obligation to justify the reason for terminating a contract under Section 43, 45 and 47 (5) of the Employment Act applies equally to termination of a probationary contract.

The three-judge bench in the ***Mount Kenya University case*** also considered cases from other Commonwealth jurisdictions such as South Africa and Canada. It was noted that the practice in these countries leans towards granting an employee the opportunity to be heard before termination of a probationary contract.

The Court noted that section 2 of the Act defines an employee to include one under a probationary contract. The court held that a reading of Section 41 together with Section 42 (2) of the Act (which provides for an aggregate probation term of 12 months), renders Section 42 (1) illogical.

The court added that it is illogical to grant apprentices or indentured learners who are employees as defined in Section 2, the safeguards under section 41 of the Act but deny the same safeguards to employees on probation.

In arriving at this conclusion, the court noted that employment or the lack of it is such an emotive issue as it influences a person's confidence, dignity and societal status. As such, the failure to secure a job and or loss of one has a direct relationship with a person's confidence, dignity and place in society. According to the court, 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, as required by Article 24 of the Constitution.

The three judge bench therefore held that there is no reasonable or justifiable cause in excluding an employee under a probationary contract from the safeguards provided under section 41 of the Act. In the final analysis, the court held that Section 42(1) of the Act is inconsistent with Articles 24, 41 and 47 of the Constitution to the extent that it excludes employees having probationary contracts from the provisions of Section 41 of the Act. Article 41 guarantees the right to fair labour practice while Article 47 protects the right to fair administrative action which includes the right to be notified of reasons of an adverse action against an individual.

The court did not however, find the Respondents liable on the basis they were applying the law as it was then and that they could not be condemned for the manner in which they had terminated the Petitioner's employment.

Our analysis of the decision

The Employment Act, 2007 protects employees from unfair/ unlawful termination. Section 41 as read with Sections 43 and 45 of the Act provide for the requirements for fair termination. Section 45 states that unfair termination occurs where the employer fails to prove that there are valid and fair reasons for termination and that they conducted the termination in accordance with fair procedure. The Act further provides that the reasons for termination should be related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer. The burden of proof on the validity of reasons is on the employer.

In this case, the Court held that the general definition of the word employee connotes that all employees have a right to equal enjoyment of the safeguards under the law. The court noted that the limitation in Section 42 (1) does not meet the constitutional test for limitation of a right in Article 24 of the Constitution.

What next?

The architecture and design of employment law in Kenya leans heavily towards protection of the employee as the weaker party in the relationship.

The impact of this decision is that employers are required to comply with the two-pronged test for fair/lawful termination during probation as required by Section 41 of the Employment Act, 2007. This means that employers must firstly, have valid reasons for termination of the probationary contracts (commonly referred to as substantive justification) and secondly, they must ensure procedural fairness by affording the employee the right to be heard and to be accompanied by a fellow employee or a union representative of their choice during the hearing.

Considering that the probationary period is aimed at assessing whether an employee's skill set match the requirements of the position, it is vitally important for employers to have mechanisms in place of assessing the suitability and performance of employees during probation period in order to ensure that they meet the substantive justification test, in addition to the requirement for procedural fairness.

Whereas this is not the first decision on Section 42 of the Act as noted above, it is notably the first that has conclusively found this section unconstitutional to the extent that it takes away the legal safeguards available to employees under Section 41 of the Act.

Despite the earlier conflicting decisions by judges of the same court, this decision will predominate matters to do with termination of employees on probation in the foreseeable future unless it is overturned on appeal.

Authors



Irene Kashindi

Advocate of the High Court of Kenya
Partner | Munyao Muthama & Kashindi Advocates
Director | Training and Consulting Associates
Co-author | Kashindis' Digest of Employment Cases
C | +254 720 248 416
E | irene.kashindi@mmkadv.co.ke
W | www.mmkadv.co.ke



Irene Kashindi

Irene Kashindi is recognised in Band 1 in Employment by Chambers Global 2021. She is widely lauded as one of the field's most prominent lawyers, with a practice encompassing contentious and non-contentious work.

She is regularly instructed by notable regional employers in sectors including telecoms and consumer goods in connection with executive dismissal and labour disputes. Clients consider her to be *"thorough and very professional"* and appreciate her for going *"above and beyond what is required."*



Faith Wangong'u,

Trainee Lawyer
Munyao Muthama & Kashindi Advocates
E | legalassitant@mmkadv.co.ke
W | www.mmkadv.co.ke

Awards & Accolades

Legal 500 Employment (Tier 2)



Munyao Muthama & Kashindi has attracted an impressive number of Kenyan corporates, such as Safaricom, along with financial institutions, agencies and trade unions. The firm has a fine record in contentious and non-contentious matters, including headline unfair dismissal claims, labour relations and collective bargaining. Irene Kashindi is a recognised employment specialist, covering both contentious and non-contentious matters. George Kashindi provides further senior-level experience.

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Commentators consider the practice group to be *"knowledgeable and competent,"* further noting: *"The culture of the company is to give very well-researched and detailed information."*

Another source said: *"The team is well-coordinated and dedicated to its work."*

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Kashindis' Digest of Employment Cases

Our partners, Irene and George Kashindi, have recently (in August 2020) co-authored "*Kashindi's Digest of Employment Cases*" which analyses select cases by the Employment and Labour Relations Court, the Court of Appeal and the Supreme Court.

The Digest covers cases more than *25 key thematic areas* in **employment** and **labour relations** ranging from **recruitment** to **termination/retirement** of employment and important matters in between.

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Our Employment & Labour Relations practice was ranked in Band 3. Chambers Global described the practice as *“well respected in employment and labour relations practice handling a breadth of contentious and non-contentious work notable disputes capabilities cover issues such as constructive dismissal and terminations, with extensive experience appearing before the Employment and Labour Relations Court and Appellate Court...This is complemented by its advisory practice, including investigations”*.



Other Members of the Employment & Labour Relations Practice



George Kashindi

Advocate of the High Court of Kenya
Partner | Munyao Muthama & Kashindi Advocates
Director | Training and Consulting Associates
Co-author | Kashindis' Digest of Employment Cases
C | +254 722 554 407
E | kashindi@mmkadv.co.ke
W | www.mmkadv.co.ke



Margaret Miringu

Advocate of the High Court of Kenya
Partner | Munyao Muthama and Kashindi Advocates
C | +254 722 861 985
E | miringu@mmkadv.co.ke
W | www.mmkadv.co.ke



Antony Aringa

Advocate of the High Court of Kenya
Associate | Munyao Muthama and Kashindi
Advocates
C | +254 715 063 277
E | aringa@mmkadv.co.ke
W | www.mmkadv.co.ke

NAIROBI:

AEA Plaza, 6th Floor
Valley Road
P.O. Box 24482-00100
Tel: +254 20 2117477 / 2714208
Email: nairobi@mmkadv.co.ke

MOMBASA:

Mombasa Uni Plaza, 4th Floor
Moi Avenue Off Aga Khan Road
P.O. Box 2419-80100
Tel: +254 41 2319403/3
Mombasa
Email: info@mmkadv.com

KAKAMEGA:

Ambwere Complex
Kakamega Kisumu Road
Tel: +254 56 2031295
Kakamega
Email: kakamega@mmkadv.com

