



## JUDGMENT HANDED DOWN BY EMPLOYMENT AND LABOUR RELATIONS COURT ON TERMINATION OF PROBATIONARY EMPLOYEES

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### EMPLOYMENT CASE ESTABLISHES UNCONSTITUTIONALITY OF SECTION 42(1) OF THE EMPLOYMENT ACT, 2007

#### **Probation in Employment**

The Employment Act, 2007 governs employment contracts under Kenya law. Provisions under the Act allow employers to employ employees under probationary terms prior to confirmation of employment. The probationary period is limited to a period of not more than 6 months, nevertheless subject to the employees' consent, this may be extended a further 6 months. Thus, a probationary period cannot be in excess of the aggregate term of one year.

Kenyan courts have adjudicated probationary periods extensively, for example, cases such as *Benjamin Nyambati Ondiba v. Egerton University [2014] eKLR* established that, "an employer puts an employee on probation so as to be able to assess his performances and capability within the workforce and the essence of section 42 of the Employment Act, 2007, is to allow the employer terminate the contract of service less time where the employee's performance should be wanting."

In another case, *Danish Jalango & Another v. Amicabre Travel Services [2014] eKLR*, the court held that employee contracts subject to probationary terms pursuant to section 42(2) of the Employment Act could be terminated without the application of sections 43 and 45 regarding, “procedural and substantive justification”.

On July 30 2021, the Employment and Labour Relations Court (ELRC) substantively changed this position in Kenyan law by ordering that to the extent 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.

### **The Court’s Ruling in Petition No. 94 of 2016**

The petitioners in *Monica Munira Kibuchi & 6 others v. Mount Kenya University; Attorney General (Interested Party) [2021] eKLR* were interviewed and appointed on various dates in January 2016 by the 1<sup>st</sup> Respondent. On or about April of that same year, the Respondent began investigating the recruitment process of said petitioners without informing them. Consequently, at the end of the probationary period, the Respondent terminated their employment.

In its ruling, the ELRC held that probationary employees must be afforded the opportunity to be heard before the contract is terminated. In doing so, it highlighted Article 47 of the Constitution which confers on every person the right to administrative action that was reasonable and procedurally fair, among others. Further to this point, where it is likely that a fundamental freedom has been or is likely to be affected by administrative actions, the person has a right to be provided written reasons for the action.

The ELRC pointed out that section 42(2) in providing for consultation for the extension of the probationary period showed that in the majority of cases, a probationary employee was usually engaged with the management of issues regarding performance as well as other issues contained in their probationary employment contract. As a result, some consultation was implied and had to take place.

The Court further explained that Section 41 provides that before dismissal on grounds of misconduct, poor performance and so on, the employer was required to explain to the employee the reason termination was being considered and prior to termination, consider any representation such employee or their representative may make. Section 2 of the Employment Act defines an employee to include a person earning wages or salary as well as an apprentice and indentured learner. The also Act defines a probation contract in terms of the duration of the contract, however there is no segregation or isolation of a probationary employee from the definition



of an employee. The ELRC thus surmised that reading section 41 with the implicit provisions of section 42(2) rendered illogical the provisions of section 42(1). In other words, affording an apprentice and indentured learner the procedural benefits of section 41 but denying the same to the probationary employee made no sense.

The ELRC thus concluded that given that Labour rights form part of the Bill of Rights (Article 41) and that Article 24 prohibits the limitation of a fundamental freedom except by law and only to the extent the limitation is reasonable and justifiable, there was no reasonable or justifiable cause in the exclusion of a probationary employee from the procedural safeguards in section 41 of the Employment Act. As such, the ELRC held that, insofar as section 42(1) excluded an employee holding a probationary contract from the provisions of section 41 of the Employment Act, it was inconsistent with Articles 41 and 47 of the Constitution.

In conclusion, notwithstanding the need for employers to engage employees on probationary terms, it is a matter of law that such employees are provided the same procedural safeguards as afforded to their regular employees, apprentices and indentured learners.

The ELRC's ruling can be accessed here: <http://kenyalaw.org/caselaw/cases/view/217394/>



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