



Strathmore University
Law School

**EQUAL TREATMENT FOR ALL WORKERS: AN ANALYSIS OF THE TERMINATION
OF EMPLOYMENT PROBATION CONTRACTS**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
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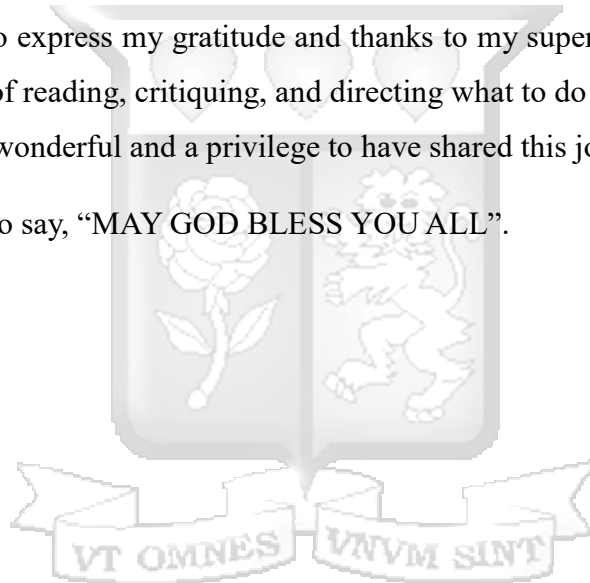
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Declaration

I, ANTHONY OYUNGU OMURUNGA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *Oyungu*

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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: *M.Muindi*.....

[Dr. Melissa Muindi]



Abstract

The employees on probationary contracts are not protected very well under the Kenyan legal framework because the denies them from the fundamental rights like a fair hearing a fair labor practices which are guaranteed by the Constitution, the Termination of Employment Convention and the Employment Relationship Recommendation which advocate for equality of all employees including those ones under probationary contracts. The existing provisions concerning the dismissal of probationary employees as outlined in the Employment Act of 2007 have raised concerns, as they allow employers to terminate the employment of probationary staff without providing them with essential rights like providing a chance to present their case, claiming that their employment contracts were unfairly terminated and an opportunity to lodge a complaint for unfair dismissal.

Moreover, although the probationary period is intended to assess the employee's suitability for long-term employment, the existing legal framework lacks established criteria for evaluating suitability during this period. Instead, the determination is solely at the discretion of the employer, who may set challenging standards for employees to meet during their probationary tenure.

As a result, employees on probationary employment contracts are denied essential rights that are provided by the 2010 Constitution and international conventions. Furthermore, the employers are granted more powers to determine the suitability of the probationary employees and they can terminate the contracts of probationary employees without being reprimanded by the law. It is for these reasons that there is a need for change in the current legal framework to promote the equality to employees on employment contracts and probationary employment contracts and reduce the powers the employers have over the employees.

List of cases

1. Kenyan Case Law

Catherine E. Nyawira Nyaga v. the Wilderness Lodges Limited [2010] eKLR.

Danish Jalang'o v Amicabre Travel Services Limited [2014] eKLR.

Evans Kiage Onchwari V Hotel Ambassadeur [2016] eKLR.

Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another [2021] eKLR

2. South African Case Law

Eskom v Mokoena [1997] 8 BLLR 965 (LAC).

SACTWU v Mediterranean Woollen Mills (Pty) Ltd [2011] safli.org.

3. Canadian Case Law

Nicholson v. Haldimand-Norfolk Regional Police Commissioners (1979) 1 S.C.R. 311

4. Colombian Case Law

Ly v. Interior Health Authority (2017) BCSC 42.

5. United States of America Case Law

Albermarle Paper Co. v Moody, 422 U.S. 405 (1975).

Griggs v Duke Power Co., 401.424 (1971).

New York City Transit Authority v Beazer 440 U.S. 568 (1979).

List of Legal Instruments

2010 Kenyan Constitution

Employment Act (Act No. 11 of 2007).

Employment and Labor Relations Act (Act No 20 of 2011).

Employment Relationship Recommendation, 2006



CHAPTER ONE

1. INTRODUCTION

1.1. Background

A probation employment contract is a contract of employment, which should not be more than twelve months duration or part thereof, is in writing, and expressly states that it is for a probationary period.¹ The main reason for the issuance of probation contracts is to determine whether the worker is suitable for the business in the long term. Employees working under probation contracts have not experienced the same if not better working conditions as compared to those working under employment contracts.² This has been clearly shown in how those working under probation contracts have their contracts terminated as compared to those who are working under normal employment acts.

Termination of probation contracts and employment contracts are covered under the Employment Act. Under section 41 (1), the employer should notify the employee that his or her contract will be terminated and the grounds for the termination. Subsection 2 states that before the employer terminates the contract, the employer should give the employee a fair hearing and have a representative for the hearing. Section 43 stipulates that the employer should give valid reasons for the termination. Finally, according to section 45(1), the termination of an employee's contract should not occur unfairly, with section 45(2) outlining the specific grounds for what constitutes unfair termination. However, according to section 42(1), the procedure stipulated in Section 41 does not apply to probation contracts.

Despite the infringement of the Constitution's bill of rights by the Act by limiting the rights without a legitimate reason, courts opted for a literal interpretation of the controversial sections 41 and 42. For example, in the case of *Danish Jalang'o & another v Amicabre Travel Services Limited*³, Justice Rika stated:

¹ Section 2, Employment Act (Act No. 11 of 2007).

² Section 42(1), Employment Act (Act No. 11 of 2007).

³ *Danish Jalang'o & another –v- Amicabre Travel Services Limited* [2014] eKLR.

“There is no obligation under Section 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 following the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract...”.

Nonetheless, the pivotal moment occurred in the litigation involving *Monica Munira Kibuchi and six others versus Mount Kenya University and another party*⁴. Here, the court, having meticulously examined rulings from prior cases presided over by Judges Rika, Lenaola, and Ndolo, determined that Section 42(1), which exempted employees under probationary contracts from the protections outlined in Section 41 of the Employment Act, contradicted Articles 41 and 47 of the Constitution. Therefore, the court declared that the relevant section was null and void. Similar rationale and conclusions were also identified in the case of *Evans Kiage Onchwari v. Hotel Ambassadeur Nairobi*, wherein Honorable Justice Ndolo asserted that:

*“Article 41 of the Constitution of Kenya 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.”*⁵

Against this backdrop, the Hon. Judge proceeded to find that Section 42(1) of the Employment Act, 2007 was unconstitutional and discriminatory to the employee because it denies an employee under probationary contract the right to a fair hearing as guaranteed under Section 41 of the Employment Act, 2007.

1.2. Problem Statement

There is an increasing trend for employers in Kenya to employ new employees on the basis of a probationary contract.⁶ However, due to sections 42(1), 45(3) and 47(6) of the Employment Act deprive employees on probationary employment contracts the rights of a fair hearing and raising

⁴ *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR.

⁵ *Evans Kiage Onchwari V Hotel Ambassadeur Nairobi* [2016] eKLR.

⁶ Gathongo J,” *Towards a fair hearing for all employees: a case of probationary employee’s in kenya and the right to be heard prior to dismissal*” Volume 41, Obiter, I, December 2020. 556

a complaint of unfair termination by the employer.⁷ This will raise the risks of discrimination of employees on probationary contracts in the workplace. This has led to many employees who were on probationary contracts taking the matters of unfair termination against their employers to the Employment and Labor Relations Court.⁸ However, those matters have been decided against the employees.⁹ The main problem this dissertation aims at evaluating whether employees under probation employment contracts should have similar rights to employees under employment contracts regarding termination of their employment contracts.

1.3. Research Objectives

1. To examine the legal framework governing employment probation contracts.
2. To assess the required standards to be taken into consideration to decide the suitability of the employee during the probation period and how other states have determined that the termination was fair.
3. To evaluate the consequences of controversial provisions of the Employment Act remaining active and the best remedy to solve this issue of probation contract employees being denied their rights in the termination process.

1.4. Research Questions

1. What is the legal framework governing employment probation contracts?
2. What are the required standards to be taken into consideration to decide the suitability of the employee during the probationary period by the employers and how have other states determined that the termination process was fair?

⁷ Gathongo J,” Towards a fair hearing for all employees: a case of probationary employee’s in kenya and the right to be heard prior to dismissal” Volume 41, Obiter, I, December 2020. 556.

⁸ Otieno N, “ A Review of the Challenges in the Implementation of Disciplinary Rules and Regulations in Organizations in Kenya” , 1, East African Scholars Journal of Economics, Business and Management, 2,2018. 40.

⁹ Gathongo J,” Towards a fair hearing for all employees: a case of probationary employee’s in kenya and the right to be heard prior to dismissal” Volume 41, Obiter, I, December 2020. 556.

3. What are the consequences of controversial provisions of the Employment Act remaining active and what is the best remedy to solve this issue of probation contract employees being denied their rights in the termination process?

1.5. Hypothesis

Probation contract employees should have their contracts terminated the same way as employees on employment contracts. This is because the current provision in the employment contract that covers termination of the probation of employment contracts is inconsistent with Articles 41 and 50 of the Kenyan Constitution and the International laws adopted by Kenya. Another reason for the contracts being terminated under the same procedure is the ambiguity left between the court decisions on how the statute is interpreted. If the statute is not amended there will be no rights that would protect the probation worker during the termination of their contracts

Therefore, if there is an amendment in section 42 (1) of the Employment Act to allow probation workers to have the rights covered under section 41, there will be an elimination of unconstitutionality in section 42(1) as probation workers will be provided the reasons for their termination and will be given a fair hearing to appeal the termination by their employers.

1.6. Justification of the Study

There has been a trend of employees being handed probation contracts.¹⁰ If the employers are satisfied with the employee's performance, then the employee is then handed a normal contract. If not, the employee's contract is terminated under section 42(1) of the Employment Act. This is not beneficial to employees as denied the right to know the reason for the termination and be given a fair hearing which is against Articles 41 and 47 of the Constitution. This study will be beneficial to lawmakers because it will be beneficial to them in the future when they are amending certain provisions of the Employment Act.

¹⁰ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 556.

1.7. Theoretical Framework

1.7.1. Discrimination Law Theory by Khaitan

The theory that will be related to the dissertation is Khaitan's theory on Discrimination Law. In his chapter of the book, he explains the mischief that the law was seeking to correct.¹¹ He also asks the functional question concerning discrimination law: what does it do?

To answer these questions, Khaitan stated that there will be the need to refer to the four conditions that all anti-discrimination norms must satisfy. The first norm was the Personal Grounds Condition. In this condition, the duty-imposing norm in question must require some connection between the act or omission prohibited or mandated by the norm on the one hand and certain attributes or characteristics that persons have called 'grounds', on the other. This meant that section 42 (1) of the Employment Act was created with to deny them the rights under section 41.

The second condition was the Cognate Groups Condition. In this condition, a protected ground must be capable of classifying persons into more than one class of persons, loosely called 'groups'. This means that under the Employment Act the employees can be further classified as probation workers.

The third condition was the Relative Disadvantage Condition. In this condition, of all groups defined by a given universal order ground, members of at least one group must be significantly more likely to suffer abiding, pervasive, and substantial disadvantage than the members of at least one other cognate group. This situation is relevant because, due to Section 42(1) of the Employment Act, the introduction of this provision has resulted in probation workers experiencing difficulties in accessing their rights as outlined in Section 41.

The final condition he discussed was the Eccentric Distribution Condition. Under this condition, the norm that imposes a duty must be formulated in a way that is expected to allocate the tangible benefits in question to certain members, but not all, of the intended beneficiary group.¹² The rights when a contract is terminated under section 41 and 47 is to create equity for the employees but through the creation of section 42(1) the probation workers are unable to benefit from those rights

¹¹ Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015,118.

¹² Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015, 118.

His argument posits that the overarching goal of discrimination law is to promote the welfare of individuals by ensuring access to essential resources for those who are deprived of such access due to their association with protected groups. These groups, in turn, are delineated by specific characteristics or attributes that align with leading a fulfilling life. He asserted that the majority, if not all, groups, such as individuals with lower-than-average IQs, experience various forms of relative disadvantage, which are often based on characteristics that hold either value or moral insignificance.¹³

Khaitan proposed that to justify the objective of discrimination law, it is necessary to address whether alleviating significant, enduring, and widespread disadvantages experienced by a particular group compared to similar groups (hereafter referred to as 'relative group disadvantage') is morally significant.¹⁴ He responded that it indeed raises moral concerns, as relative group disadvantage disrupts the guaranteed access to fundamental necessities, consequently impeding the freedom of the disadvantaged group's members.¹⁵ The basic goods are three and include: secured access to negative freedom which is related to this dissertation because probation employees should have access to those rights during the contract termination process like a fair hearing.

Another basic good is an adequate range of valuable opportunities. This means that the employees should have opportunities to have their rights protected. This pertains to the dissertation as it advocates for employers to uphold employees' rights during the termination process. He recalled the emphasis on ensuring access security. It is insufficient merely to have immediate access to goods; one must also be free from the reasonable apprehension of losing such access. He also recalled that we need to have as much negative freedom which is freedom from unjustified interference. He also recalled we also need to have optimal (as opposed to maximal or equal) access to a range of valuable opportunities and adequate self-respect to lead a good life.¹⁶

How this theory is linked to this dissertation is how the current Employment Act is denying probation workers essential rights like a right to a fair hearing for the reason of the termination of their contracts covered under section 41 and section 42. This also contradicts Article 41 of the

¹³ Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015, 138.

¹⁴ Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015, 121.

¹⁵ Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015, 122.

¹⁶ Khaitan T, 'The Point of Discrimination of Law' Oxford University Press, London, 2015, 122.

Constitution, which addresses fair labor relations, and Article 50, which guarantees the right to a fair hearing.

1.7.2. Disparate Impact Discrimination

The theory of disparate impact first originated in the case of civil rights law in *Griggs v. Duke Power Co.*,¹⁷ the leading case recognizing the theory as a basis for liability under Title VII of the Civil Rights Act of 1964.¹⁸ It was a purely statutory case, concerned with a private employer and claims only under Title VII of United States of America's Civil Rights Act of 1964.

The pivotal ruling in the case emphasized that practices, procedures, or tests that appear neutral on the surface, regardless of their intent, cannot be upheld if they perpetuate the status quo of past discriminatory employment practices. While the opinion notably relieved the plaintiff of the obligation to prove intentional discrimination, it didn't specify precisely what the plaintiff needed to establish for disparate impact or what the defendant needed to justify a practice with such an impact. In that particular case, the plaintiff's burden was fulfilled with only minimal statistical evidence, while the defendant's burden was articulated in various ways, such as demonstrating "business necessity," showing a link to job performance, proving a tangible connection to successful performance, or establishing a clear relevance to the specific employment in question. Subsequently, the theory sporadically extended to additional statutory claims, occasionally via court rulings and at other times through legislative action. In the scenario of probationary employees, the employers had to prove that the termination was lawful and related to the employees' work performance.

The strictly chronological narrative of these advancements would unveil a history marked by uncertainty, with decisions to embrace or dismiss liability for disparate impact swiftly accompanied by clarifications and restrictions. The overarching motif throughout these advancements is that the theory of disparate impact presents not just one question, but two: firstly, whether to acknowledge liability based on this premise, essentially transferring a portion of the plaintiff's obligation to demonstrate discrimination onto the defendant to prove its absence; and

¹⁷ *Griggs v Duke Power Co.*, 401.424 (1971).

¹⁸ Rutherglen G, "Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality", 74 *Fordham Law Review*, 4, 2006. 2314.

secondly, the extent to which this burden is transferred to the defendant and the specific terms in which it is delineated.¹⁹

According to this theory, several tests were devised to illustrate instances of discriminatory practices in the employment sector. Initially, the plaintiff must establish that a specific employment practice, which appears neutral on its face, results in unequal impact concerning a protected group. If this is proven, the defendant-employer can argue that the contested practice is essential for the job in question and aligns with business requirements. Even if the defendant successfully demonstrates this, the plaintiff can prevail by proving that the employer could have employed an alternative practice yielding less discriminatory outcomes.²⁰

The subsequent phase in the legal process involves the "business necessity" defense. This defense serves as the focal point of disparate impact analysis, effectively balancing Title VII's dual objectives of mitigating discrimination effects while granting employers latitude to pursue significant business objectives.²¹

Initially, the scope of the business necessity defense appeared limited. In the *Griggs* case, Duke Power introduced new hiring criteria, such as a high school diploma and passing a "general intelligence" test, for divisions that were previously exclusively white. However, Duke Power did not impose these requirements in divisions where black employees had been hired before. The Court determined that these new requirements were not justified as a business necessity because "employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." Additionally, the requirements were implemented without conducting any analysis of their future impact.²²

By 1979, the Court began to interpret business necessity with a more lenient approach. In the case of *New York City Transit Authority v. Beazer*²³, the transit authority enacted a regulation prohibiting drug users from employment, which included individuals currently undergoing methadone

¹⁹ Rutherglen G, "Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality", 74 Fordham Law Review, 4, 2006. 2314.

²⁰ Solon Barocas and Andrew D. Selbst, "Big's Data Disparate Impact", 104 California Law Review, 3, 2016. 701.

²¹ Solon Barocas and Andrew D. Selbst, "Big's Data Disparate Impact", 104 California Law Review, 3, 2016. 702.

²² Solon Barocas and Andrew D. Selbst, "Big's Data Disparate Impact", 104 California Law Review, 3, 2016. 702.

²³ *New York City Transit Authority v Beazer* 440 U.S. 568 (1979).

treatment, commonly known as recovering heroin addicts. In its commentary, the Court expressed that a "narcotics rule," which notably serves the "legitimate employment goals of safety and efficiency," was unquestionably job-related. This constituted the entirety of the analysis regarding the business necessity defense in the case. Additionally, this rationale was deemed applicable to the entire transit authority, even though only 25 percent of the positions were categorized as "safety sensitive." The standards for determining job-relatedness or business necessity were vague before the Wards Cove case. However, despite the passage of the 1991 Act, the confusion persisted.²⁴

Since that time, courts have acknowledged that the concept of business necessity falls somewhere between two extremes. Some courts insist that the criteria used in hiring must have a clear and obvious connection to the job in question, or that they must show a significant correlation with job performance.

However, the Third Circuit briefly stood apart, asserting that hiring criteria must effectively gauge the minimal qualifications necessary for successful job performance to meet the stringent business necessity standard. This stricter criterion would essentially prohibit the use of general aptitude tests that result in any form of unequal impact because it's impossible to demonstrate that a specific cutoff score reliably distinguishes between those capable of performing the job and those who are not. For instance, other unmeasured skills and abilities might compensate for a lower score on an aptitude test, making a specific minimum score unnecessary if it doesn't assess the basic qualifications.

However, in a subsequent case, the Third Circuit acknowledged that Title VII doesn't compel employers to select someone less qualified (as opposed to unqualified) in the name of nondiscrimination. It also noted that aptitude tests can be valid hiring tools if they accurately assess a person's qualifications.²⁵

The final component of the disparate impact test is the "alternative employment practice" aspect. Following *Griggs*, the Supreme Court ruled in *Albermarle Paper Co. v. Moody*²⁶ that if an employer successfully demonstrates that its tests are 'job-related,' it is still possible for the aggrieved party to demonstrate that other tests or selection methods, which do not have a similarly adverse racial

²⁴ Solon Barocas and Andrew D. Selbst, "Big's Data Disparate Impact", 104 California Law Review, 3, 2016. 703.

²⁵ Solon Barocas and Andrew D. Selbst, "Big's Data Disparate Impact", 104 California Law Review, 3, 2016. 704.

²⁶ *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

impact, could still fulfill the employer's legitimate goal of 'effective and reliable work performance.' The theory will be important to this dissertation because to determine whether a certain termination of the probationary contracts or the provision governing that termination is discriminatory, a detailed test will be carried out by the courts. That will be covered in the next chapters.

1.8. Literature Review

There are various authors and majorly advocates that have written articles and research papers which are related to the Overarching Research Question which is about whether probationary employees should have their contracts terminated the same way as contracted employees.

There will be a reliance on those articles and research papers that analyze the jurisdiction of Kenya and other common law states' legal systems legal system and relate their opinions to the hypothesis.

1.8.1. Rights that a probation contract employee has been denied by the Employment Act during the termination process.

Raluca Dimitriu argued that an employee on probation has the same rights and responsibilities as any other employee. Their employment contract extends beyond the probationary period if they are deemed suitable for the job. However, the contract will terminate if the employer determines that the individual is not a good fit for the position.²⁷

Omed Ismail talked about ILO standards aiming to protect the workers by requiring member states to have a procedure for terminating the contract with the steps including there being a valid reason for the termination, a reasonable notice period, the employee having the right to defend against the allegation made by the employer and lastly the right to appeal against the termination.²⁸ Omed Ismail also contended that under the Iraqi Labour Code, an employer's ability to terminate employment during a probationary period is not without restrictions. He referenced section 3, Article 37, which stipulates that an employer can terminate the contract within the probationary period only if the worker proves unqualified for the job, and even then, the employer must provide

²⁷ Raluca Dimitriu, "Difficulties in enforcing the new probation period", 1, Juridical Tribune, 1, 2011. 23.

²⁸ Ismail O, "Unfair Termination of employment contracts in light of international and EU standards: An approach to Iraq Labour Law", published University of Debrecen, Hungary, 2022.19.

at least a seven-day notice prior to termination. Thus, the right to terminate probationary employees is not absolute.²⁹ He supported his argument with references to rulings from the Spanish Constitutional Court dated 16 October 1984 and 16 September 1988, which restrict employers' powers to dismiss probationary employees for reasons not related to work performance, particularly if it involves the violation of a fundamental right.³⁰ However, the permissible reason for such a termination must be inadequate job performance, which must be explicitly stated.

Furthermore, he argued that the potential for unfair dismissal arises when employers misuse their authority to terminate the contracts of probationary employees.³¹ Ismail argued that if an employee's contract is terminated, they can claim unfair dismissal and sue if the employer lacks a valid reason, or if the reason provided does not pertain to poor job performance. Also, he argued that another scenario for possible unfair dismissal occurs when an employee disputes the employer's claim of poor performance, rejecting the employer's assessment and accusing them of abusing their termination rights. Such disputes complicate the case and necessitate a thorough court investigation to scrutinize the reasons for termination. Addressing these issues raises several critical questions that the court must resolve.

The fundamental question is whether employers possess an unrestricted right to assess a worker's performance and suitability for the job. If such a right is granted, it implies that their ability to terminate the contract would not be under court scrutiny, leading to the dismissal of any claims of unfair termination made by the worker. However, the right of employers to evaluate an employee's job performance should not be unlimited; otherwise, it could lead to the exploitation of probationary workers, allowing employers to terminate contracts on the mere pretext of poor performance. Therefore, granting employers an absolute right to evaluate contradicts the core principles of labor law, which aim to provide substantial protection to workers.³²

²⁹ Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, Profuturo, 4, 2019. 81.

³⁰ Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, Profuturo, 4, 2019. 86.

³¹ Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, Profuturo, 4, 2019. 82.

³² Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, Profuturo, 4, 2019. 82.

Solomon Gyesi was against the notion of employers terminating the contract of the employee at any time without assigning any reason according to the Previous Ghanaian Labour Act before it was replaced with the 2003 Labour Act. This position is referred to as the traditional rule. This rule was defined by the court in the case of *Kobi v Ghana Manganese Co Ltd*³³ as:

“The traditional rule in employer-employee relationship, relied upon by the Court of Appeal (in the instant case) is that in dispensing with the services of an employee, an employer is at perfect liberty to either give or refuse to give reasons. However, in exercising that right, fairness must be the watchword.”³⁴

Thomas Grobler emphasized that although many legal systems grant employers the power to terminate probationary employees without stating a reason, in the Netherlands, employees can request a written statement from the employer detailing the actual reason for their termination. In certain situations, employees may also be protected from dismissal during the probationary period under the principle of bona fides, which mandates fair and honest conduct and the absence of bad faith between parties. According to the Civil Code, such statements must be written and fair to both parties.³⁵

He further argued that the primary difference in pre-dismissal requirements between probationary and tenured employees is that probationary employees can be dismissed for less compelling reasons than their tenured counterparts. In practice, the probationary employment period has shown minimal impact on the future job opportunities of those undergoing probation.³⁶

Dahlstrom F reaffirms that when an individual begins employment at a new workplace, the contract commonly includes a probationary period.³⁷ Dahlstrom clarifies that employees do not have the same level of protection from dismissal during the probationary period as they do after it ends. Nevertheless, she acknowledges that workers under probationary periods still retain certain

³³ *Kobi v Ghana Manganese Co Ltd* [2008] SCGLR 771.

³⁴ Gyesi S, “Termination of contract of employment; reason(s) required or not? a review of Ghana’s labour statutes and case laws”, 3, UCC Law Journal, 2, 2024. 61.

³⁵ Grobler T, “International perspectives on the termination of employment during the probation period” published University of Pretoria, Pretoria, 2018.26.

³⁶ Grobler T, “International perspectives on the termination of employment during the probation period” published University of Pretoria, Pretoria, 2018.54.

³⁷ George M, “Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions” published, Mzumbe University, Mzumbe, 2022, 20-21.

legal protections. For instance, if termination occurs during the probationary period, individuals are entitled to receive the same notice period and payment for accrued annual leave as non-probationary employees.³⁸

In his article, Johana Gathongo argued that Section 41, Section 42, and Section 47 of the Employment Act do not afford probationary employees the chance to present their case before termination, akin to regular employees.³⁹

Johana Gathongo began by arguing whether the definition of employees under section 2 is inclusive of probation employees. He contends that the responses to these inquiries were crucial in determining whether the Employment Act unfairly restricts probationary employees' entitlement to a hearing before termination of their employment. He noted that pursuant to section 3(2), the Employment Act is applicable to all employees engaged by any employer under a contract of service.⁴⁰ According to the act, the concept of a contract encompasses the employer-employee dynamic, wherein the employed individual commits to serving another for a specified duration in exchange for compensation. Probationary employees are engaged through fixed-term employment contracts. Therefore, they should be granted the same protection against unjust termination as any other employee.⁴¹

Kabazzi Maurice Lwanga highlighted that it is crucial to recognize that the concept of legitimate expectation, as defined by Black's Law Dictionary, pertains to promises or commitments for which the law provides a remedy in case of breach, or which the law acknowledges as a duty. This principle might not extend to probationary employees as it does to confirmed ones. Additionally, it may not apply when a fixed-term employee's contract ends without a renewal option clause. This stance is observed in Uganda, Kenya, and across East Africa.⁴²

³⁸ George M, "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022, 20-21.

³⁹ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 569.

⁴⁰ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 563.

⁴¹ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 563.

⁴² Kabazzi M, "Legitimate expectation in termination of employment: an economic perspective", 23, Makerere Law Journal, 1, 2021. 420.

He observed that if a probationary employee continues working for an employer after the probation period ends and the employer continues to benefit from their service, the law presumes the existence of some form of contract between them. Additionally, he pointed out that if an employer neglects to inform the probationer of the probationary period's outcome but allows them to keep working, the court will uphold the probationer's reasonable and legitimate expectation.⁴³

Moreover, he emphasized that the termination of a probationary employee necessitates a fair hearing. In the case of *Huble v Nigerian Maritime Services Ltd*⁴⁴, a German individual was engaged by the Respondent under a probationary period lasting six months. At the conclusion of this period, the employer neglected to communicate that the services were no longer required but allowed the individual to continue performing duties as they had during the probationary period. Subsequently, the employment was abruptly terminated, prompting the individual to initiate legal action contesting the termination. Chief Justice Taylor asserted that by retaining the individual in their employment without informing them of the outcome of their probationary performance, the employer's actions implied confirmation of the appointment by conduct. Therefore, the termination was deemed subject to reasonable notice and not solely at the discretion of the Respondent.⁴⁵

Consequently, he concluded that it is not surprising that the doctrine of legitimate expectation or expectation interest has been brought up in labor disputes concerning the termination of fixed-term contracts by employers in East Africa. Currently, there is scant jurisprudence in Uganda, Kenya, and Tanzania regarding its application in areas beyond fixed-term contracts. He proposed the integration of the principle of legitimate expectation into the labor laws of East African countries to promote fairness in resolving labor disputes.⁴⁶

⁴³ Kabazzi M, "Legitimate expectation in termination of employment: an economic perspective", 23, *Makerere Law Journal*, 1, 2021. 421.

⁴⁴ *Huble v Nigerian Maritime Services Ltd* (1978) LLJR – SC.

⁴⁵ Kabazzi M, "Legitimate expectation in termination of employment: an economic perspective", 23, *Makerere Law Journal*, 1, 2021. 421.

⁴⁶ Kabazzi M, "Legitimate expectation in termination of employment: an economic perspective", 23, *Makerere Law Journal*, 1, 2021.422.

1.8.2. Improving the statutory procedure for termination of probation employment contracts

For the employees to have their rights to be recognized, the termination process should also be fair so that it does not leave any party at a disadvantage. Johana Gathongo emphasized the importance of Article 2(5) of the Kenyan Constitution, recognizing international law as a fundamental pillar of the nation's legal structure. His argument is grounded in the essential function international law serves in evaluating domestic laws. It is noteworthy that Kenya has been an active member of the International Labour Organization since January 13, 1964, consistently fulfilling its obligations as a participating state.⁴⁷ Subsequently, he elaborates on the significance of the Termination of Employment Convention, and the Termination of Employment Recommendation.⁴⁸ He clarifies that the Convention sought to formalize fundamental principles of fairness and legality on the global stage.

He then elaborated that the Convention stipulated that a worker's employment should not be terminated unless there exists a valid reason for such action, linked either to the worker's capacity or behavior, or to the operational needs of the enterprise, establishment, or service. Moreover, he argued that the aforementioned convention states that a worker's employment should not be terminated due to issues regarding the worker's conduct or performance until they have been given a chance to defend themselves against any accusations unless it is unreasonable to expect the employer to offer this opportunity.⁴⁹

Ezekiel R.B. in his article stated that it was clear that the extent of legal protection for probationary employees concerning issues of dismissal or termination is a subject of conflicting views and decisions. He argues that putting an employee on probation should not be taken to mean that there shall not be any observance of fair labor practice or principles before such employee is terminated for whatever reason, because it is always assumed that it is usually easier to terminate probationary employee than confirmed employee. He further stated that a probationary employee has equal rights and protections as is the case with an employee on permanent terms or confirmed one. He

⁴⁷ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 557.

⁴⁸ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 558.

⁴⁹ Gathongo J, "Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 558.

stated that employers must establish employment policies or practices concerning acceptable terms and conditions of employment, ensuring a conducive work environment, offering facilities and training, and establishing suitable performance evaluation systems before considering termination or disciplinary actions. He considers that a probationary employee has rights which may include a right not to be discriminated, the right to training, fair and transparent performance evaluation, a decent work environment, fair termination and disciplinary procedures that follow the provisions of the Constitution and relevant international conventions.⁵⁰

Omed Ismail talked about ILO standards aiming to protect the workers by requiring member states to have a procedure for terminating the contract with the steps including there being a valid reason for the termination, a reasonable notice period, the employee having the right to defend against the allegation made by the employer and lastly the right to appeal against the termination. For flexibility purposes the ILO allows member states to exclude some categories of employees from the procedures and certain rights provided by the international instruments due to the nature and duration of the contract.⁵¹

He also notes that most countries in the European Union have been successful in adopting the ILO standards into their labour laws. Other European Union countries have created the EU flexicurity model which does not aim at exchanging flexibility for the security of the rights of the employees and vice versa but tries to balance the two aspects.⁵² For example, the model does not eradicate the grounds for termination of an employment contract but eliminates the strictness if the grounds ensures the grounds do not impede the operation of the business and repeal undue process of termination.⁵³

JO Abusomwan noted that the rules governing termination of employment have recently evolved under the National Industrial Court of Nigeria (NICN), mandating employers to adhere strictly to termination procedures outlined in private employment contracts, including notice periods; and

⁵⁰ Ezekiel, R.B, 'Termination of Probationary Employee; Debunking some Myths about Tanzania Labour Legislation', 4 Open University Law Journal, 1 2013. 140-148.

⁵¹ Ismail O, "Unfair Termination of employment contracts in light of international and EU standards: An approach to Iraq Labour Law", published University of Debrecen, Hungary, 2022. 19

⁵² Ismail O, "Unfair Termination of employment contracts in light of international and EU standards: An approach to Iraq Labour Law", published University of Debrecen, Hungary, 2022. 19.

⁵³ Ismail O, "Unfair Termination of employment contracts in light of international and EU standards: An approach to Iraq Labour Law", published University of Debrecen, Hungary, 2022. 20.

furnish valid and justifiable reasons for termination. This shift signals a departure from the traditional notion of "he who hires can fire," with the NICN leading the charge by prioritizing adherence to principles of good or international best practices in labor and industrial regulations.⁵⁴

Solomon Gyesi wrote that the current Ghanaian Labour Act provided that a termination process was fair if the employer was able to prove the reason for the termination was fair. Some of the reasons included in the act were mutual agreement between the employer and the worker; by the worker on grounds of ill treatment or sexual harassment; on the death of the worker, on medical grounds, inability of the worker to carry out work due to sickness or accident; or incompetence or proven misconduct of the worker. The other option was the termination was made in accordance with a fair procedure or this Act. He was against the Ghanaian courts' reliance on the procedure for terminating employment to hold that an employer can terminate the employment of a worker without giving any reasons even though Ghana's Labour Act provides the reasons for fair termination of employment and the grounds on which an employer can terminate the employment of a worker.⁵⁵

Lastly, Kabazzi Maurice Lwanga initiated a discussion regarding whether the doctrine applies solely to procedural rights or if it also encompasses substantive rights. Substantive legitimate expectation safeguards interests tied to substantive rights. He goes on to clarify that procedural legitimate expectation can ensure equitable procedures for maintaining or obtaining a right, such as providing reasons for termination or adhering to past or promised procedures. He further elaborates that the courts have wrestled and continue to wrestle with the concept of safeguarding substantive expectations. Consequently, the notion of fairness has evolved beyond its original procedural scope to encompass the protection of substantive expectations.⁵⁶

1.9. Methodology

The first methodology that will be useful for this dissertation will be the legal doctrinal research methodology. This is because to understand whether there is a legal gap within the Employment

⁵⁴ JO Abusomwan, "Termination of contract of employment during probationary period: need for judicial review", 5, *International Review of Law and Jurisprudence*, 1,2023, 32.

⁵⁵ Gyesi S, "Termination of contract of employment; reason(s) required or not? a review of ghana's labour statutes and case laws", 3, *UCC Law Journal*, 2, 2024. 63.

⁵⁶ Kabazzi M, "Legitimate expectation in termination of employment: an economic perspective", 23, *Makerere Law Journal*, 1, 2021. 417.

laws governing termination of probationary employment contracts, there will be a need to read and understand the legal sources that have identified the legal gap.⁵⁷ There will be also the need for understanding how the courts have reacted to the legal gap in the employment laws.

There have been disadvantages to using the legal doctrinal research methodology. The initial obstacle lies in obtaining dependable data, as it falls upon the researcher to source reliable information and execute a proficient dissertation. A subsequent challenge arises from the divergence between basic social actions and legal standards, rendering doctrinal legal research somewhat arbitrary. Finally, doctrinal legal research is sometimes criticized as merely a superficial examination of legal principles, as it occasionally neglects the broader financial, social, and political implications of the legal system.⁵⁸

Another methodology that will be implemented is the comparative analysis method. This is because Kenya's legal framework does not stipulate the standards to be taken into account to decide the suitability of the employee during the probationary period in the evaluation processes. Other jurisdictions have had courts set up a test to determine the suitability of the probationary employees and whether the standards have been followed. Canada and Colombia while other countries like South Africa had a criterion in their code of good practice which set up a procedure to determine whether the process prior, during and after the dismissal process of employees including those on probationary employment contracts was followed. The analysis will be covered in chapter 3.

1.10. Chapter Breakdown

Chapter one will form the first chapter of this study. It details, among others, the research objectives, conceptual framework, and justification of the study and thus sets the foundation for the subsequent chapters.

Chapter two will be about the current legal framework governing the rights of probationary employees when it comes to termination. It will include domestic statutes like the 2010

⁵⁷ W Bradley Wendel, "Explanation in legal scholarship: the inferential structure of doctrinal legal analysis", 5, Cornell Law Faculty Distributions, 1, 2011. 1035.

⁵⁸ Malhotra N, 'A critical analysis of underlying concepts of doctrinal research' 8 International journal of legal development and allied issues 1, 2021, 82.

Constitution and the Employment Act plus international statutes like the Termination of Employment Convention.

Chapter three will be about the current ILO standards of determining the suitability of employees during the probationary period and an analysis of Kenya's position to adapting the standards compared to ILO member states.

Chapter four will cover what will be the consequences of the current labour regime will have on employees with probationary contracts.

Apart from concluding what was discovered from the study, chapter five will also be about the recommendations for the consequences covered in chapter four.



CHAPTER TWO

2. LEGAL FRAMEWORK GOVERNING PROBATION EMPLOYEES

2.1. Introduction

This chapter discusses the rights of probationary employees about the Kenyan legal framework. The chapter highlights the way the legal system of Kenya has dealt with the rights of a person serving a probationary period before being employed permanently or being released by the employer. In this chapter, the focus is on the legal framework of probationary rights under international conventions as well as municipal laws. It will encompass diverse judicial rulings concerning the legal structure that governs probationary workers. The dissertation will go further to see the strengths and weaknesses to the effect, if all rights of probationary employees recognized by the said instruments are protected.

2.2. Statutory Regime

The relevant laws that have been enacted or adopted from International Law to promote the rights of employees include domestic laws (the Constitution, the Employment Act, the Employment and Labour Relations Act) and International Conventions (Termination of Employment Convention [International Labour Organization Convention No. 158], and the Employment Relationship Recommendation, 2006).

2.2.1. The 2010 Constitution

The Constitution stands as the highest law within the nation, and no statute, government entity, or individual should violate its provisions. According to Article 2(4) of the Constitution, any law conflicting with it is nullified to the extent of inconsistency, and any action or failure to act against the Constitution is deemed invalid. Moreover, under Article 2(5), any treaty or convention ratified by Kenya is integrated into the laws of Kenya under the Constitution.⁵⁹ This will be important when discussing the various treaties in this chapter.

The Constitution further stipulates that a right or fundamental freedom outlined in the Bill of Rights cannot be restricted unless explicitly stated in the law. In such instances, any limitation

⁵⁹ Article 2 (4) and (5), Constitution of Kenya (2010).

must be reasonable and justifiable within the parameters of an open and democratic society founded on principles of human dignity, equality, and freedom.⁶⁰ When justifying the reasonableness of the boundaries or extent of the limitation, factors to consider include the nature of the right or fundamental freedom, the significance of the limitation's purpose, the nature and scope of the limitation, the necessity to safeguard the rights and fundamental freedoms of all individuals without compromising those of others, and the correlation between the limitation and its purpose, along with the existence of less restrictive methods to achieve the intended goal.

Article 27, paragraphs 1 and 2, mandates equality before the law and the right to equal protection and benefits for all individuals. This encompasses the full and equitable enjoyment of all rights and fundamental freedoms by each person, ensuring equality and freedom from discrimination as guaranteed by the Constitution. Furthermore, Article 41(1) guarantees equitable labor practices for every individual, including those under probationary employment contracts, thereby ensuring fair treatment. Additionally, Article 50 guarantees every individual the right to a fair and public hearing before a court or an impartial tribunal for the resolution of legal disputes, allowing employees the opportunity to contest the validity of termination reasons. Unfortunately, the subsequent statute discussed fails to extend these rights to all employees.

2.2.2. Employment Act (EA)

The Employment Act serves as the primary legislation governing the rights of employees in Kenya. The legislation was enacted before the promulgation of the 2010 Constitution and the adoption of the current Constitution. The purpose of passing this legislation is to revoke the prior Employment Act, establish and delineate the fundamental rights of employees, and stipulate the fundamental conditions of employment for employees.

Section 2 of the legislation delineates an employee as an individual engaged in labor for remuneration, encompassing apprentices and indentured learners within its scope.⁶¹ There will be challenges raised about the definition of an employee in one of the cases mentioned at the end of the chapter. Section 2 further elucidates a probation contract as an employment agreement lasting no longer than twelve months, or any part thereof. A contract of this nature must be formally

⁶⁰ Article 24(1), Constitution of Kenya (2010).

⁶¹ Section 2, Employment Act (Act No 11 of 2007).

documented in writing, clearly specifying its probationary status, during which the employer retains the authority to assess and review the employee before confirming their appointment.⁶² Moreover, it is essential for an employer to provide an employee with fair assessment, guidance, training, and counseling to enable them to deliver satisfactory service. In cases where the employer identifies substandard performance, they should inform the employee of any areas in which their performance falls short of the required standards.

Section 42(2) stipulates that the probationary duration shall not exceed six months from the commencement of the contract. Yet, there is the possibility of prolonging this duration by an extra six months, contingent upon mutual consent between the employer and the employee, thereby extending it to a total of twelve months. Additionally, Section 42(3) firmly establishes that employers are prohibited from employing an individual under a probationary contract for longer than a cumulative period of twelve months. Section 42(4) stipulates that either party involved in the probationary contract can end the contract by providing a notice of termination lasting at least seven days, or the employer can opt to compensate the employee with seven days' wages in lieu of providing the notice period.⁶³

Section 41(1) of the legislation states that, barring the provisions outlined in section 42(1), an employer must, prior to dismissing an employee due to misconduct, inadequate performance, or physical incapacity, elucidate in clear terms the grounds for contemplating termination. Additionally, the employee has the right to request the presence of another employee or a representative from the shop floor union of their preference during this clarification process. Moreover, according to section 41(2), it stipulates that the employee must be afforded a fair hearing and the option to be represented before terminating their employment or summarily dismissing them under sections 44(3) or (4).⁶⁴

Nonetheless, a probationary employee is deprived of the entitlements outlined in section 41, as Section 42(1) specifies that the provisions of section 41 are inapplicable in cases where termination

⁶² Section 2, Employment Act (Act No 11 of 2007).

⁶³ Section 42, Employment Act (Act No 11 of 2007).

⁶⁴ Section 41, Employment Act (Act No 11 of 2007).

of employment ends a probationary contract.⁶⁵ Moreover, this section prevents the probationary contract employees from other rights.

Section 47 specifies that any employee whose employment has been terminated or who has been dismissed summarily during a probationary contract is not qualified to file a complaint under that particular section.⁶⁶ Another entitlement that might be withheld from an employee under a probationary contract is protection against unjust termination as stipulated in section 45(3) of the act. This is due to the requirement that the employee must have been consistently employed by their employer for a duration of no less than thirteen months immediately preceding the termination date.⁶⁷ This occurs because section 42(2) specifies that the probationary term ought not to exceed six months from the contract's commencement. Nevertheless, there exists the possibility of prolonging it for an additional six months with the employer's consent, resulting in a total of twelve months.

Section 42 (1) has been the subject of criticism by the courts and courts have advised for the section to be repealed because of its unconstitutionality.

2.2.2.1. Case Law

In this subsection, we will conduct an in-depth examination of two cases, one of which was adjudicated before the enactment of the 2010 Constitution, while the other was decided after the promulgation of the 2010 Constitution.

2.2.2.1.1. Danish Jalang'o v Amicabre Travel Services Limited⁶⁸

The Claimants, who worked as Drivers for the Respondent Transport Company, allege that their contracts were terminated by the Respondent. The 1st Claimant asserts that his contract was terminated due to misconduct, whereas the 2nd Claimant contends that his contract was terminated due to negligence or incompetence. Both Claimants argue that the termination was unjust and illegal.

⁶⁵ Section 42(1), Employment Act (Act No 11 of 2007).

⁶⁶ Section 47, Employment Act (Act No 11 of 2007).

⁶⁷ Section 45(3), Employment Act (Act No 11 of 2007).

⁶⁸ Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR.

In the ruling, the court reaffirmed that section 42 [1] of the Employment Act 2007 specifies that the regulations outlined in section 41 do not extend to employees under probationary contracts. Moreover, the court underscored that section 42(4), which permits termination with a 7-day notice or payment of 7 days' wages by the employer to the employee, suggests that employers are not obligated to provide probationary employees with a hearing for any of the reasons delineated under Section 41. The court also stated:

“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 the probationary contract is strictly regulated by the terms of the contract. The only question the Court should have asked was whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days' wages before termination, there can be no further demands made on the Employer. If the Employee is advised termination is because the Employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.”

Finally, the court reaffirmed that violations of probationary contracts are adjudicated through laws governing wrongful or unlawful termination, rather than those concerning unjustified or unfair termination. *In the Industrial Court of Kenya, Cause Number 784 of 2010, Catherine E. Nyawira Nyaga v. Wilderness Lodges Limited [UR]*⁶⁹, the Court determined that the Employer's extension of the Claimant's probationary period without her consent was unlawful and breached the terms of her probation. Damages were awarded for this breach.

⁶⁹ *Catherine E. Nyawira Nyaga v. the Wilderness Lodges Limited* [2010] eKLR.

2.2.2.1.2. Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another⁷⁰

In this case, the petitioners' contracts had been terminated during their probation without being taken through a fair hearing process. The petitioners asserted that the respondent's decision to terminate their employment was unjust, arbitrary, and lacking transparency. They argued that this decision contradicted Articles 10, 25, 41, 47, and 50(1) of the Constitution of Kenya, 2010, and therefore should have been deemed null and void.

In its ruling, the court observed that Section 2 of the Act did not distinguish between employees under standard employment contracts and those under probationary contracts. Rather, it defined an employee as any person engaged for wages or salary, encompassing apprentices and indentured learners. Despite the Act delineating probation contracts by their duration, it did not establish a separate classification for individuals employed under such contracts within the broader definition of an employee. Consequently, the court concluded that interpreting Section 41 alongside the implied provisions of Section 42(2) resulted in the illogicality of Section 42(1)'s provisions. Furthermore, it was considered inconsistent under the Act to afford procedural safeguards outlined in Section 41 to apprentices and indentured learners, who are encompassed by the definition of an employee per Section 2, while simultaneously denying those protections to employees solely due to their probationary contract status.

The court also highlighted Article 24 of the Constitution, emphasizing that any legislation aiming to restrict or modify labor rights must do so to the extent that such restrictions or modifications are reasonable and justifiable in an open and democratic society. Apart from the inconsistencies noted between Sections 42(1), 42(2), and 41, the court determined that there was no reasonable or justifiable basis for exempting an employee under a probationary contract from the procedural safeguards outlined in Section 41 of the Employment Act

⁷⁰Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR.

The court determined that the exclusion of an employee under a probationary contract from the provisions of Section 41 of the Employment Act, as stated in section 42(1), is inconsistent with Articles 41 and 47 of the Constitution, thus rendering it null and void.

2.2.3. Employment and Labour Relations Court Act

Section 4 of the Act outlines the establishment of the Employment and Labour Relations Court.⁷¹ Section 12 delineates the jurisdiction of the court, including its authority to adjudicate disputes arising from or related to employment between employers and employees.⁷²

2.2.4. Termination of Employment Convention (International Labour Organization Convention No. 158)

The governing body of the International Labour Organization (ILO) ratified this convention to address shifts in labor relations witnessed across various nations, especially regarding the termination of employment at the employer's discretion without justified grounds.⁷³ The central aim of the Convention is to codify essential principles of equity and legality at an international level.

The Convention provides that a worker's employment shall not be terminated unless there is a legitimate reason related to the worker's ability or behavior, or based on the operational needs of the business, establishment, or service.⁷⁴

Furthermore, Article 7 alongside Recommendation No. 166 Worker's defense provides:

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”⁷⁵

⁷¹ Section 4, Employment and Labour Relations Court Act (Act No 20 of 2011).

⁷² Section 12(1), Employment and Labour Relations Act (Act No 20 of 2011).

⁷³ Preamble, Termination of Employment Convention, 20TH June 1982, Convention No. 158.

⁷⁴ Article 4, Termination of Employment Convention, 20TH June 1982, Convention No. 158.

⁷⁵ Article 7, Termination of Employment Convention, 20TH June 1982, Convention No. 158.

2.2.5. Employment Relationship Recommendation, 2006

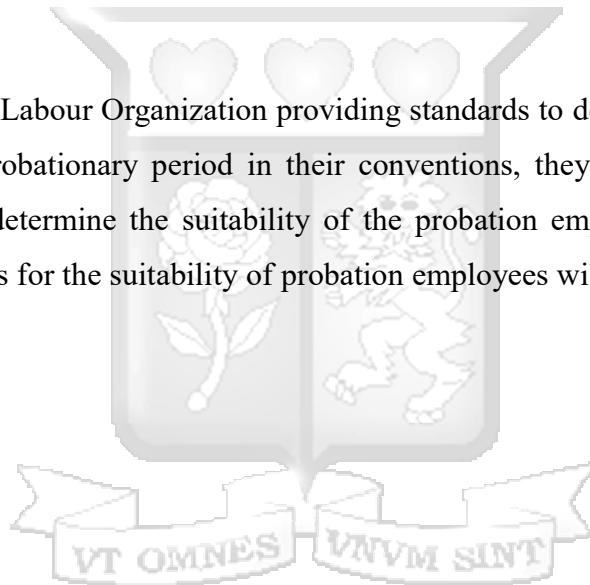
Article 2 of the recommendation provides:

“Member states are duty-bound to adopt in their domestic law the scope of relevant laws and regulations, in order to guarantee effective protection for employees who perform work in the context of an employment relationship”.⁷⁶

Article 9 of the recommendation emphasizes that in determining the existence of an employment relationship, prominence should be on the facts relating to performance of work and remuneration of the workers irrespective of how the relationship is characterized or any contrary arrangement that may have been agreed between the parties.⁷⁷

2.3. Conclusion

Despite the International Labour Organization providing standards to determine the suitability of employees during the probationary period in their conventions, they have not mentioned the required standards that determine the suitability of the probation employees in Kenya’s legal framework. The standards for the suitability of probation employees will be discussed in the next chapter.



⁷⁶Article 2, Employment Relationship Recommendation, 31ST May 2006, LO Employment Relations Recommendation 198 of 2006.

⁷⁷Article 9, Employment Relationship Recommendation, 31ST May 2006, LO Employment Relations Recommendation 198 of 2006.

CHAPTER THREE

3. QUALIFICATIONS TO DETERMINE THE SUITABILITY OF EMPLOYEES DURING THE PROBATION PERIOD

3.1. Introduction

On most occasions, employers hire employees on probation contracts to determine whether they are suitable for them in the long term. We have already discussed that employment contracts are for six months with an option to extend it to 12 months. However, neither the Employment Act nor the court have provided the employer with the standards to determine the suitability of the employee during the probationary period. I will briefly describe the standards applied by the International Labour Organisation. Furthermore, there will be an analysis of how Kenya and other member states of the ILO have adopted standards to determine the suitability of employees during the probation period.

3.2. Kenya

Kenyan legislation offers specific protection regarding employment termination through various laws, such as the Employment Act (EA), the Trade Disputes Act (TDA), the Labour Institution Act (LIA), the Industrial Court Act (ICA), and the Regulation of Wages and Conditions of Employment Act (RWCEA). Additionally, the Constitution of Kenya ensures protection against unfair labor practices, notably outlined in Article 41(1), which guarantees the right to fair labor practices for every individual.⁷⁸

The Employment Act delineates the definitions of an employee and the probationary contract within its provision on definitions. It stipulates that the probationary contract should not exceed 12 months. Furthermore, the Act imposes obligations on employers, requiring that no employee be unfairly dismissed. In this regard, the employer bears the onus of justifying the grounds for termination. Consequently, the employer must demonstrate not only valid reasons for termination but also diligent adherence to reasonable procedures in investigating the matter, conducting a

⁷⁸ Folarin A, "Job security in developing countries: A comparative perspective", 1, *Ife Journal of International and Comparative Law*, 1, 2016. 16.

hearing, and appropriately addressing any appeals before resorting to termination. Failure to fulfill these obligations results in the termination being considered unfair.⁷⁹

In the case of an employee on probation, the period of probation shall not exceed 6 months and the employer is only required to give the probationer 7 days' notice or payment in lieu of the notice. The Legislation denies the Employee from been given an opportunity for a fair hearing because he is an employee on probation.

A termination is considered unfair if the employer cannot demonstrate the validity of the reason for termination and the fairness of that reason, whether it is based on the operational needs of the employer or related to the employee's conduct, capacity, or compatibility. According to the Act, in cases of complaints regarding unfair termination of employment or wrongful dismissal, the initial burden of proof rests on the employee to show that an unfair termination or wrongful dismissal has occurred. Subsequently, the burden shifts to the employer to justify the grounds for the termination or dismissal. This means that the employee must first establish to the court that their termination was unfair, after which the employer must convince the court of the fairness of the dismissal reason. The failure of the employer to justify the dismissal constitutes unfair termination or wrongful dismissal.⁸⁰

However, these rights can be denied to the employee on probation because the act provides that for an employee to claim for unfair termination, he must be employed by the employer for 13 consecutive months. The same legislation denies employees on probation from lodging a complaint because they are on probationary contracts.

Furthermore, the international convention related to termination of employment contracts does not compel states to commit to any international standard for probationary employees.⁸¹ Therefore, the employer possesses unrestricted authority to assess the employee's performance without establishing suitability requirements beforehand or disclosing the basis of assessment at the start of employment. The unrestricted authority of the employer to assess employees as they see fit

⁷⁹ Folarin A, "Job security in developing countries: A comparative perspective", 1, *Ife Journal of International and Comparative Law*, 1, 2016. 16.

⁸⁰ Folarin A, "Job security in developing countries: A comparative perspective", 1, *Ife Journal of International and Comparative Law*, 1, 2016. 17.

⁸¹ Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, *Profuturo*, 4, 2019. 79.

could potentially result in the exploitation of probationary employees and wrongful termination on grounds of alleged underperformance.

Therefore, the absolute right of employers to evaluate probationary employees directly contradicts the fundamental principle of labor law, which focuses on offering adequate protection to workers. Based on this principle, it becomes apparent that the likelihood of unfair termination increases, as employees may dispute the employer's claims of their subpar performance, leading them to reject the employer's evaluation and perceive it as an abuse of the right to terminate the contract.⁸²

3.3. ILO Standards

International law forms an important benchmark for complementing and evaluating Kenya's domestic legislation governing employees. Kenya has been a member of the International Labor Organization (ILO) for a long time and continues to perform its obligations as a member state.⁸³

A probationary period is a set period that provides more leeway to the employers in dealing with newly recruited employees. In this period, the employer monitors closely the employee's performance to determine their capability and compatibility before being permanently confirmed in the position.⁸⁴

Through its Conventions and Recommendations, the ILO aims to direct the governments of the member states to take initiatives to make sure that both probationary and confirmed employees are afforded full protection as provided by the ILO. To guarantee rights to probationary employees, the ILO has provided judgments and recommendations on the status of probationary employees as well as how to deal with the said category of employees.⁸⁵

The instruments establish guidelines and a structure wherein an employee's employment should only be terminated if there exists a valid reason. Essentially, the Convention aims to guarantee fairness, both in substance and procedure, before any employer-initiated dismissal or termination.

⁸² George M," Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 77.

⁸³ George M," Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 81.

⁸⁴ George M," Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 81.

⁸⁵ Ismail O.A, "Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends", 9, Profuturo, 4, 2019. 78

Consequently, the employer must provide a valid explanation for such actions. According to this Convention, a justification is deemed valid only if it relates to the employee's performance or behavior, or if it is founded on the operational needs of the enterprise, establishment, or service.⁸⁶

Moreover, ILO Convention 158 specifies that several factors cannot be considered legitimate reasons for dismissal. These include being a member of a union, serving as a workers' representative, as well as considerations such as race, color, gender, marital status, familial obligations, pregnancy, religious beliefs, political stance, nationality, or social background, and being on maternity leave.⁸⁷

It has been noted that the ILO consistently advocates that when an organization mandates a probationary period for an employee upon their appointment, it is required to establish clear objectives. These objectives assist the employee in understanding the criteria used to evaluate their performance, thereby aiding the employee in comprehending the basis of employer assessment and facilitating the delivery of services to the expected standards.⁸⁸

Furthermore, the ILO advocates that the employer follows the proper procedures in assessing the merits of an employee. Should the employer deem the employee's performance unsatisfactory, they must promptly notify the employee to allow them an opportunity to address the issue. Furthermore, if there is a possibility that the appointment will not be confirmed at the end of the probationary period due to performance concerns, the employer must provide specific warnings to the employee.⁸⁹

The ILO Tribunal has repeatedly determined that an entity engaging staff under probation must not only offer direction, guidance, and counsel regarding their duties but also establish goals for these employees, clarifying the criteria for evaluating their performance. It is incumbent upon the employer to timely and clearly communicate to the employee any areas of performance requiring

⁸⁶ PS Pillay, "Balancing the interests of employer and employee in dismissal for misconduct", published Nelson Mandela University, Port Elizabeth, 2018. 11.

⁸⁷ SM Pastory, "Unfair Termination and Conundrum surrounding the Remedy of Compensation in Tanzania", 4, BiLD Law Journal, 1, 2019. 140.

⁸⁸ George M, "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 81.

⁸⁹ George M, "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 81.

enhancement and to caution them about the potential for dismissal after the probationary period. This ensures that both parties can address any issues promptly.⁹⁰

The problem is that Employers in Kenya do not stipulate the standards that are needed to be taken into account to decide the suitability of the employee during the probationary period in the evaluation processes. Therefore, without specific standards for assessing recruitment conditions established by law, the authority to establish these evaluation criteria remains vested in the employer. The likelihood of unjust termination increases significantly during the probationary period when the employee lacks the means to contest the case effectively. The employer can easily prevail by claiming that the employee failed to meet recruitment conditions during the probationary period, especially when there are no established standards for evaluating such conditions.⁹¹

In other jurisdictions such as South Africa, Canada, and Colombia, there exists a concept known as the "suitability standards test," which plays a crucial role in evaluating the suitability of probationary employees during the recruitment process. The standards employed by these countries will be further discussed in the upcoming subchapters.

3.4. Development of the Standards in law in common law countries

3.4.1 South Africa

In South Africa, there existed item eight sub item one of the code of good practice concerning Dismissal. However, the interpretation and application of these clauses have had a checkered history, resulting in the oft-echoed sentiment that probationary clauses are not worth the paper they are written on. It was later replaced by the Labor Relations Amendment Act in 2002 which provided a more detailed set of rules governing the probationary process.⁹²

According to common law, the employer maintained the authority to end the employment contract during the probationary period if the probation's purpose was thwarted. With the development of

⁹⁰ Abdul S, "The rights of persons working under probation period in an employment setting: a comparative analysis between Tanzanian and South African jurisdictions", published Open University of Tanzania, Miomboni, 2019. 64.

⁹¹ George M, "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 76.

⁹² Cohen T, "Worth the paper they are written on"? A look at the new probation provisions' 6, African Journals Online 1,2002, 57.

the unfair labor practice regime in the 1980s, the need for the protection of vulnerable probationary employees was recognized. As a result, the Industrial Court required that to fairly dismiss a probationer, the dismissal must satisfy the requirements of substantive and procedural fairness.⁹³

In 1988, the definition of "unfair labor practice" was revised in the Labor Relations Amendment Act to include an exception regarding protection against unfair dismissal within the initial six months of employment. During this period, in cases of disciplinary action, a dismissal was not considered an unfair labor practice if it followed a fair procedure.⁹⁴

In the case of dismissal for grounds other than disciplinary action, termination could take place during the first six months of employment, by an applicable agreement or contract of service. Concern was expressed that this clause effectively re-introduced the common law position in the case of non-disciplinary dismissals. However, this stance was brief, as the Labour Relations Amendment Act of 1991 reinstated the pre-1988 definition of unfair labor practice, thereby eliminating the statutory probationary period.⁹⁵

The jurisprudence of the industrial court was raised by the previous Labour Appeal in the case of *SACTWU v Mediterranean Woollen Mills (Pty) Ltd*⁹⁶ where it stated that the employer who does not wish to confirm a probationary employee's post must show:

- (a) The probationary employee was given an opportunity to improve.
- (b) The probationary employee was made aware that his work performance is unacceptable.
- (c) The probationary employee was counseled and consulted if he is not able to handle the work.
- (d) The probationary employee was treated sympathetically and with patience. Only after these factors have been complied with and the probationary employee still fails to perform satisfactorily can his employment be terminated after a hearing. The hearing must have complied with the rules of Natural Justice.⁹⁷

⁹³ Cohen T, Worth the paper they are written on"? A look at the new probation provisions' 6, African Journals Online 1,2002, 57.

⁹⁴ Cohen T, Worth the paper they are written on"? A look at the new probation provisions' 6, African Journals Online 1,2002, 57

⁹⁵ Cohen T, Worth the paper they are written on"? A look at the new probation provisions', 58.

⁹⁶ *SACTWU v Mediterranean Woollen Mills (Pty) Ltd* [2011] saflii.org.

⁹⁷ Grobler T, "International perspectives on the termination of employment during the probation period" published University of Pretoria, Pretoria, 2018. 50.

This legal precedent established the groundwork for the regulations outlined in the Code of Good Practice found within South Africa's Labor Relations Act regarding dismissals. Even though the intent behind probationary clauses is evident, both the Labor Court and the CCMA upheld the perspective that probationary employees should receive equal protection against unjust dismissal as permanent employees. The interpretation was attributed to the virtually identical wording of the previous item 8(1) and item 8(2) of the Code of Good Practice which, aside from providing for tenured employees to be allowed a further "reasonable period of time for improvement", imposed almost identical obligations on the employer.

In 1999, the Department of Labor highlighted the necessity of implementing a probationary period of six months for new employees. This was because the clauses gave further burden to the employers to give more reasonable time to employees like they do to probationary employees. During this period, employers would be required to demonstrate a lesser burden in proving the substantive fairness of dismissals based on issues such as incompatibility or failure to meet work standards. This recommendation was reflected in the Labor Relations Amendment Bill of 2000 in the form of a proposed amendment to section 188 recommending a statutory probationary period during which substantive fairness of dismissal would be assumed and an employer only needed to prove procedural fairness.⁹⁸

Although there was a clear acknowledgment of the necessity to distinguish between how probationary employees and tenured employees are treated, the suggestion to establish a statutory probationary period was discarded in the Labor Relations Amendment Act of 2002. Instead, the Act primarily focused on amending the unfair dismissal provisions, with the addition of a new item 8(I) into the Code of Good Practice: Dismissal on probation.⁹⁹

To sum things up, the relevant provisions of item 8(1) of the code are:

1. Item 8(1)(a) which provides that an employer may require a newly hired employee to serve a period of probation before the appointment of the employee is confirmed.
2. Item 8(1)(b) which provides that the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment.

⁹⁸ Cohen T, 'Worth the paper they are written on'? A look at the new probation provisions', 59.

⁹⁹ Cohen T, 'Worth the paper they are written on'? A look at the new probation provisions', 59.

3. Item 8(1)(d) which stipulates that the employee's performance must be evaluated during the probationary period. Employers must ensure that employees receive equitable evaluations, instruction, training, guidance, or counseling to empower them to provide satisfactory service.
4. Item 8(1)(e) which specifies that if an employer determines that an employee's performance falls below the standard, the employer must provide guidance to the employee regarding any areas where their performance is deemed inadequate. If the employer considers the employee to be lacking in competence, they should communicate to the employee the precise areas where they are deficient. After fulfilling the requirements specified in subitems (g) or (h), respectively, the employer then has the choice to either extend the probationary period or terminate the employee, depending on the circumstances.¹⁰⁰

While the Code of Good Practice does not define the criteria for the assessment of suitability for continued employment, recent case law on the issue extends the net of suitability to include criteria such as skills and performance, compatibility, compliance with company rules, and assimilation into corporate culture.¹⁰¹

Additionally, Section 20(3)(d) of the Employment Equity Act 55 of 1998 lists "the capacity to acquire, within a reasonable time, the ability to do the job" among the criteria for evaluating an employee's suitability for a position. This implies that a person who cannot acquire the ability to do a job within a reasonable period cannot be considered "suitably qualified" to perform it and, if appointed on a probationary basis, cannot expect to have her or his appointment to be confirmed.

In the determination of poor work performance, the initial consideration revolves around whether the employee has not met a performance benchmark. In the *Eskom v Mokoena*¹⁰² case, the prior ruling of the Labor Appeal Court supported the notion that an employer has the right to establish the performance criteria it expects its employees to fulfill, with the court refraining from interference unless these standards are deemed unreasonable. Furthermore, it emphasized that it is the responsibility of the employer to determine whether or not those standards have been fulfilled,

¹⁰⁰ Cohen T, 'Worth the paper they are written on'? A look at the new probation provisions', 59.

¹⁰¹ Cohen T, 'Worth the paper they are written on'? A look at the new probation provisions', 62.

¹⁰² *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC).

and once more, the court will refrain from intervening unless the assessment is deemed unreasonable.¹⁰³

Under the current regime, every employee covered by the Labor Relations Act has the right not to be unfairly dismissed in terms of section 185(a) of the Labor Relation Act. Dismissal, including termination during the probationary period, is considered unfair if the employer cannot demonstrate that the dismissal was for a legitimate reason and that a fair process was followed. Substantive fairness pertains to the justification for the employee's dismissal, while procedural fairness concerns the process used to carry out the dismissal. This was because Section 188 of the Labor Relation Act provides that:

“ Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”¹⁰⁴

3.4.2. Canada

In Canada, the Supreme Court of the Country has developed something known as the “reasonable opportunity test” the principle in which the suitability of probationary employees should be demonstrated. This principle requires employers to set employment standards that are reasonable, and that can easily be complied with by probationary employees.

Also, the employer is obliged to inform the employee of the acceptable standards for testing suitability at the commencement of the probationary period, and failure to do that the employer will not be immune when the employee opts to take the procedures requiring reinstatement of employment.

Furthermore, it has been observed that probationary employees should be provided with a fair chance to showcase their capability to meet the standards established by the employer upon hiring. In this context, offering a fair opportunity entails assessing the employee's ability to collaborate

¹⁰³ Grobler T, “International perspectives on the termination of employment during the probation period” published University of Pretoria, Pretoria, 2018. 42.

¹⁰⁴ Paul Smit and Joaquin Grobler, “Dismissal during probationary period of employment in South Africa: an international perspective”, 29, African Journal of International and Comparative Law, 4, 2021. 485.

with colleagues and other factors deemed essential by the employer for the successful fulfillment of the role.¹⁰⁵

In Canadian common law, the issue of cause for termination most frequently emerges under the law concerning summary dismissal. Typically, an employer ends an employment contract without notice, claiming just cause to bypass the obligation to provide notice. The employee might then file a wrongful dismissal lawsuit, contending that the employer did not meet the standard for cause. The court is then tasked with determining whether the employee committed the alleged breach and, if so, whether the breach was serious enough to justify summary dismissal. If the employer cannot meet the standard for summary dismissal, the court will calculate damages based on the lost wages and benefits for the period during which notice should have been given to the employee. Hence, common law damages for wrongful dismissal compensate not for the actual loss resulting from the termination itself, but for the loss arising from the lack of notice. In rare cases, if the employer acted in bad faith during the dismissal or treated the employee maliciously, aggravated and punitive damages may be awarded.¹⁰⁶

The Canadian Supreme Court, in the case of *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*¹⁰⁷, established the reasonable opportunity test. Nicholson contended that his employment was terminated without cause during the probationary period. The court overturned the decision of the Board of Commissioners of Police, deeming it an unjust termination, and awarded costs to Nicholson. This ruling underscored the principle that employers must uphold reasonable standards and inform employees of the criteria for assessing suitability. Failure to do so may expose the employer to legal action by an employee seeking reinstatement during probation.¹⁰⁸

¹⁰⁵ George M,” Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions” published, Mzumbe University, Mzumbe, 2022. 76.

¹⁰⁶ Doorey D and Hills A, “Statutory Unfair Dismissal in Canada: What is the Value of a Lost Job?”,33, Kings Law Journal, 2, 2022. 7.

¹⁰⁷ *Nicholson v. Haldimand-Norfolk Regional Police Commissioners* (1979) 1 S.C.R. 311.

¹⁰⁸ George M,” Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions” published, Mzumbe University, Mzumbe, 2022. 66.

3.4.3. Colombia

Colombia is one of the Latin American countries with a labor code rooted in the civil law system, which governs the allowable forms and lengths of labor contracts, as well as the terms for ending them. The labor code prefers full-time, permanent employment over part-time, fixed-term, or temporary contracts. The distinctions among these contracts lie not only in the duration of employment but also in the termination conditions. Whereas permanent contracts include obligations for severance pay, temporary contracts may be ended without cost once the agreed duration has concluded.¹⁰⁹

Termination laws mandate that employers cover four kinds of expenses: advance notice, severance pay, seniority bonuses for terminated employees, and wages lost during any litigation if the dismissal is contested by the employee. The calculation of these costs should include the period of advance notice because, typically, the laws give companies the option to either provide prior notification or pay an amount equivalent to the wages for that notice period.

The second element of dismissal cost is compensation for unjustified termination. According to Colombian law, all employment contracts inherently include a condition that allows for the resolution of the contract through financial compensation or severance payment, covering both lost profits and consequential damages, if the contract is breached.¹¹⁰ It would be against the principle of contractual freedom to bind the parties indefinitely to an employment agreement. In most Latin American countries, an employer's financial troubles do not constitute a valid reason for dismissal, so any reduction in staff would fall under this category. The method for calculating this compensation involves multiples of the recent wage and years of service.

In certain countries, employers must pay an extra amount called a seniority premium when the employment relationship ends, no matter the reason or who initiated the termination. In Ecuador,

¹⁰⁹ Heckman J and Pages C, "The Cost of Job Security Regulation: Evidence from Latin American Labor Markets", Inter-American Development Bank , I-ADB Research Department Working paper no 430, 2000, 6 < publications.iadb.org >, On 29th April 2024

¹¹⁰ J.N. Daza Fernández, "Fixed-term contract legislation in Colombia: a proposal towards a flexicurity labour market from a comparative perspective", Published Tilburg University, Tilburg, 2018. 38.

Colombia, Panama, Peru, and Venezuela, workers are entitled to this benefit whether they are dismissed without justification or choose to resign voluntarily.¹¹¹

Lastly, employers are obligated to cover an employee's lost wages for the duration of any legal proceedings if the employee sues the employer. This requirement boosts the total cost of termination by raising the cumulative compensation owed and/or diminishing the workers' motivation to reach an out-of-court settlement.¹¹²

Colombian legislation does not create special benefits for fixed-term contracts to balance their disadvantaged position, except from the case explained in the dismissal law.¹¹³ However, the legislation ensures that the employer in the exercise of his faculties cannot develop discriminatory policies for the mere fact of the modality of contract used to hire his employees, even if those conditions were acknowledged by the worker at the beginning of his contract or accepted by him.¹¹⁴

In Colombia, evaluating the suitability of a probationary employee involves considering four requirements set by the employer. The origin of these four requirements test was from the case of *Ly v. Interior Health Authority*¹¹⁵. In this case, Mr. Ly claimed wrongful dismissal from his position during the probationary period by the respondents. In the Judgement, The British Columbia Supreme Court concluded that the employer had not sufficiently communicated to Mr. Ly the standards by which he would be assessed. Also, he had not been given a reasonable opportunity to demonstrate his suitability and had not met the required standard of good faith in assessing him.

The court in that case established four requirements to test the suitability of the probationary employees. Firstly, the employer must define suitability criteria beforehand and show that the probationary employee was informed of these criteria, ensuring their awareness either before or at

¹¹¹ Heckman J and Pages C, "The Cost of Job Security Regulation: Evidence from Latin American Labor Markets", Inter-American Development Bank , I-ADB Research Department Working paper no 430, 2000, 7 <publications.iadb.org>, on 25th May 2024.

¹¹² Heckman J and Pages C, "The Cost of Job Security Regulation: Evidence from Latin American Labor Markets", Inter-American Development Bank , I-ADB Research Department Working paper no 430, 2000, 8 <publications.iadb.org>, On 29th April 2024

¹¹³ J.N. Daza Fernández, "Fixed-term contract legislation in Colombia: a proposal towards a flexicurity labour market from a comparative perspective", Published Tilburg University, Tilburg, 2018.41.

¹¹⁴ J.N. Daza Fernández, "Fixed-term contract legislation in Colombia: a proposal towards a flexicurity labour market from a comparative perspective", Published Tilburg University, Tilburg, 2018.41.

¹¹⁵ *Ly v. Interior Health Authority* (2017) BCSC 42.

the start of employment. Secondly, during the evaluation process, the employer must act impartially and with due diligence. Thirdly, the employer needs to provide evidence that the employee was given a fair opportunity to demonstrate suitability for the position. Fourthly, the employer's decision-making process should undergo scrutiny to determine if it is grounded in an honest, fair, and reasonable evaluation of the employee's suitability, encompassing not just job skills and performance, but also character, judgment, compatibility, and reliability.¹¹⁶

Furthermore, it has been observed that in these jurisdictions, suitability standard tests are highly significant as they restrict the employer's authority to terminate probationary employees arbitrarily based on non-suitability. The presence of suitability standards test will now require the employer to prove that the non-suitability of the probationer was based on the suitability requirements as stated above, failure to do that the consequences will be held liable for unfair termination of the employee's contract.¹¹⁷

3.5. Conclusion

Taking into account the International Labor Organization's recommendation for member states to establish standards for assessing employee suitability during probation, along with courts in certain countries adopting such tests, the fourth chapter will explore the adverse consequences of countries like Kenya not implementing these standards for employee suitability. There will be a brief discussion on the consequences of not adopting the standards and not amending certain provisions of the principal legislation governing employment.

¹¹⁶ George M., "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 77.

¹¹⁷ George M., "Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022. 77.

CHAPTER FOUR

4. CONSEQUENCES OF KENYA'S LEGAL FRAMEWORK ON EMPLOYEES WITH PROBATION CONTRACTS

4.1 Introduction

After reviewing the standards adopted by the ILO and checking suitability tests adopted by countries like Colombia and Canada, it will be important to point out the consequences of Kenya's current legal framework not being able to improve the termination process and create standards for the suitability of employees during the probation period.

4.2. Consequences

4.2.1. Employees on probationary contracts are denied fundamental rights.

Because of the existence of section 42 in the Employment Act, employees under probationary contracts are being deprived of fundamental rights that they would have enjoyed if they were not under probationary contracts. This situation would violate the principles of natural justice, which strive to ensure a fair outcome through unbiased adjudication.¹¹⁸

One of the two fundamental principles of natural justice is **Audi alteram partem**, which translates to "hear the other side" or the principle that no one should be condemned without being allowed to present their defense¹¹⁹ This principle is encompassed within both Article 50 of the Constitution and section 41 of the Employment Act.

According to the principles of fairness, anyone who decides without considering both perspectives, even if the decision seems correct, has not acted justly. Providing a hearing would allow a probationary employee to refute the accusations made against them or at least offer some form of defense.¹²⁰

¹¹⁸ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 566.

¹¹⁹ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 566.

¹²⁰ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 566.

It also gives them the chance to persuade the employer to explore alternatives to termination. Sometimes, all they seek from the courts is to alleviate their sense of injustice for not having been granted a fair chance to defend themselves against allegations that significantly impact their prospects. The principle obligates an employer to act fairly by affording the employee a chance to clarify their position before making any decision that could profoundly impact the employee's career.¹²¹

Section 42(1) denies the right when the employee is under a probationary employment contract. This section violates Article 50 of the Constitution which is the most supreme law of the country. The omission of a right to be heard for probationary employees under the Employment Act is arbitrary. Moreover, it is inequitable, unjust, and unreasonably encroaches upon and undermines the essence of the Constitution.¹²²

Furthermore, section 42(2) inflicts another heavy blow on employees on probationary contracts. This is because the section specifies that the probation period should not exceed six months but may be prolonged for an additional period of up to six months with the employee's consent. The employee might not have the chance to pursue a claim for unfair termination due to the Employment Act's requirement that the employee must have been consistently employed by their employer for at least thirteen months leading up to the termination date to have the grounds to contest being unfairly terminated.

Another right that an employee under a probationary contract is denied is the right to make a complaint about his or her dismissal by the employer. This is because section 47 of the principal legislation governing employment prohibits probationary employees from lodging a complaint regarding the termination of their contract or their summary dismissal by the employer. This contradicts the fundamental principle of a healthy employment relationship, which holds that the employment bond should be characterized by equity, fairness, and mutual benefit for both the employer and the employee within the workplace.¹²³ Additionally, Article 41 of the Constitution

¹²¹ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 566.

¹²² Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 568.

¹²³ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 564.

reinforces this, outlining various labor rights, with a crucial emphasis on the right to fair labor practices guaranteed to "every individual.

4.2.2. Employers are given huge control over the termination process of probationary employees

Thus, the unqualified authority granted to employers to assess probationary employees directly opposes the core tenet of labor law, which prioritizes providing sufficient safeguards for workers. This principle highlights the heightened risk of unjust termination, as employees may challenge the employer's assertions of their inadequate performance, resulting in the rejection of the employer's evaluation and the perception of it as an abuse of the right to terminate the contract.¹²⁴ Employers are required to consistently operate in good faith when evaluating a probationary employee's suitability for a permanent position. Nonetheless, under the existing law governing probationary employees, this principle may be undermined, potentially resulting in the misuse of the primary intent of probation.¹²⁵

Furthermore, as previously mentioned in the previous subchapter, the employer may deny an employee under a probation contract from making a complaint about the termination of his or her probation contract of employment or summary dismissal. Furthermore, the employer is the only one with the power to grant an extension of the probation period from 6 months to twelve months in total with the agreement with the employee. By preventing the probation contracts from being more than 12 months, the employee has leeway to terminate the probation employee's contracts and not be charged with unfair termination of the employee's contract.

Moreover, the employer is afforded the discretion to forgo providing the employee with a fair hearing. This discretion stems from section 42(1) of the Employment Act, which deprives employees under probation contracts of the right to a fair hearing as outlined in section 41 of the same act. Consequently, the employer possesses the authority to terminate the probationary contract of the employee without affording them a fair hearing to address the grounds for termination.

¹²⁴ George M," Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions" published, Mzumbe University, Mzumbe, 2022, 77.

¹²⁵ Gathongo J," Towards a fair hearing for all employees: a case of probationary employee's in kenya and the right to be heard prior to dismissal" Volume 41, Obiter, I, December 2020. 568.

4.3. Conclusion

In Kenya, all legislation, including the Employment Act, is subordinate to the Constitution and must adhere to its principles. This means that they must align with the Constitution and uphold its values. Particularly, the preamble of the Constitution, which emphasizes the right to dignity and fair hearing, strongly opposes the notion that anyone should lose their job, regardless of its significance, without due process. The fundamental rights enshrined in the Constitution should serve as the primary guideline for all laws and regulations in the nation. With that in mind, the final chapter will provide recommendations to the employment act to fit with the Constitutional principles and the various international conventions.



CHAPTER 5

5. CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Under chapter 5, there will be a signification of the culmination of the findings presented in the preceding chapters, along with recommendations regarding the dissertation's results and findings. If the recommendations provided herein below are worked effectively by lawmakers and the court, it will consequently not only improve Kenya's legal framework governing the employment sector but also probationary rights will be properly granted and protected simply because it has been observed that the same is less protected by the present labor regime.

5.2. General Findings

There is a contradiction among the statutes that govern the rights of probationary employees. Despite the 2010 Kenyan Constitution, Termination of Employment Convention, and the Employment Relationship Recommendation guaranteeing that there is no discrimination against employees by not limiting their rights provided that there is a good reason for the limitation, like a fair hearing during the termination process and, the Employment Act contradicts from the other statutes due to the following reason. The probationary employee under the Act is denied essential rights that are guaranteed to other employees during the termination process.

Firstly, the probationary employee is denied the right of a fair hearing to defend their allegation. Another right that the probationary employee is given is the right from unfair termination because, under the Act, the employee has to be working under the employer for thirteen consecutive months since the beginning of the employment. This is detrimental to the probationary employee because he or she is employed for 6 months with the option of another 6 months on agreement with the employer. Lastly, the Probationary employee is denied the right to raise a complaint of unfair termination by the employer.

The Employment Labor Relations Court in the *Monica Kibuchi* case found that it had jurisdiction over the matter under the Employment and Labor Relations Court Act and after the whole process declared that section 42(1) of the Employment Act was unconstitutional because it contradicted the right to fair labor practices and right to a fair hearing.

Furthermore, other countries that are members of the International Labor Organization have taken steps to protect the rights of the Probationary employees. South Africa initially had the code of good practice of dismissal. Because of the mixed history of the interpretation and application of the clauses of the code, it was later replaced by the Labor Amendment Act of 2002 which provides a more detailed set of rules governing the probationary process. Canada and Colombia Courts on the other hand each set up suitability standard tests for the suitability of the probationary employee for permanent employment.

Lastly, the existence of the contradictory provisions of the Employment Act, it has had negative effects on the Probationary employee. It has denied Probationary employees essential rights during the termination process, and it has granted employers unnecessary powers to terminate the contracts of Probationary employees with ease.

5.3. Recommendations

We have seen in the general conclusions that there are challenges that the employees on probationary contracts are facing due to the shaping of the Kenyan legal framework covering the employees. These challenges are unconstitutional because they discriminate against probationary employees by denying them certain rights that employees on longer employment contracts have.

Therefore, it is crucial to reform the legal framework in Kenya about employees, ensuring that the rights afforded to probationary employees by the Constitution and international conventions are incorporated into domestic employment laws where they are currently absent. For this reason, these are the following recommendations for the challenges probationary employees are facing.

5.3.1. Repealing of sections of section 42(1) and repealing of section 47(6)

Section 42 subsection 1 and section 47 subsection 6 of the Employment Act are perceived as discriminatory towards employees under probationary contracts. This is due to their denial of the employee's right to a fair hearing and the ability to lodge a complaint regarding summary dismissal and unfair termination of employment. Such provisions contradict the principles of fair and equitable labor practices and the right to a fair hearing as advocated by Articles 41 and 50 of the Constitution.

To avoid discrimination against the employees on probationary contracts by being denied their rights, it is highly recommended that the relevant subsections be repealed to enable employees on

probationary contracts to raise a complaint and ensure that the employers give the employees a fair hearing to defend the unfair termination of the probationary contracts.

5.3.2. Increasing the Duration of Probation Contracts to allow Section 45 to apply to them.

For an employee to be allowed to make a complaint that their employment contract was terminated unfairly by the employer, the employee should be employed for 13 consecutive months before the date of the termination. This is not beneficial for employees under probationary contracts as section 42(2) already provides that the duration of contracts for employees under probation period should be six months. The same provision also states that the contract may be extended for a further period of not more than six months with the agreement of the employee. This means that the employees under probation contracts don't fall under the threshold for making a complaint for unfair termination under section 45.

To avoid probationary employees from being denied this right, the recommendation for this issue is the amendment to section 42(2) to make the duration of employees under probation contracts to more than 13 months, precisely around 18 months with the employer being able to extend the duration of the period to 24 months. This will give employers more time to evaluate the suitability of the employees. Furthermore, it will allow the employees under probationary contracts to meet the threshold of section 45(3).

5.3.3. Courts making or adopting tests to determine standards of suitability of employees on probationary employment contracts.

Unlike Kenya, The Supreme courts in Canada and Colombia have established a test to determine the standards of suitability for the probationary employees and failure to follow the tests deemed that the employers have terminated the contract of the probationary employee unfairly. This helped the courts in the long run to determine the cases because there were precedents that were deemed to be in line with their laws.

The Kenyan labor regime should now consider suitability standards tests when dealing with probationary employees. The state or the courts can make the standards, or the state can incorporate the suitability tests from other countries like Canada and Colombia. This would ensure in the long run that the employers relay the standards and suitability criteria to the probationary employee before or at the commencement of employment. The employers may notify this by interviewing

them and incorporating them as one of the terms of the probationary contracts before the employee signs the contract. Another approach involves implementing a document outlining recruitment conditions, which the employee signs and acknowledges to confirm awareness of these conditions. Additionally, recording instances of the employee's failure to meet these conditions is advisable.

Integrating tests will restrict the employer's ability to arbitrarily dismiss probationary employees due to perceived unsuitability. Furthermore, the employer will be required to provide evidence of the employee's unsuitability based on predetermined criteria. Consequently, the employer will need to furnish evidence demonstrating that terminations during probationary periods were not unlawful but aligned with the stipulated criteria.



REFERENCES

Research Paper

Abdul S, “The rights of persons working under probation period in an employment setting: a comparative analysis between Tanzanian and South African jurisdictions”, published Open University of Tanzania, Miomboni, 2019.

George M,” Research report on a critique on the rights of probationary employees: a comparative analysis between Tanzania and Kenya jurisdictions” published, Mzumbe University, Mzumbe, 2022.

Grobler T, “International perspectives on the termination of employment during the probation period” published University of Pretoria, Pretoria, 2018.

PS Pillay, “Balancing the interests of employer and employee in dismissal for misconduct”, published Nelson Mandela University, Port Elizabeth, 2018.

Chapter of a book

Khaitan T, ‘The Point of Discrimination of Law’ Oxford University Press, London, 2015. 118-139.

Hard copy journals

Cohen T, Worth the paper they are written on"? A look at the new probation provisions’ 6, African Journals Online 1,2002.

Doorey D and Hills A, “Statutory Unfair Dismissal in Canada: What is the Value of a Lost Job?”,33, Kings Law Journal, 2, 2022.

Ezekiel, R.B, ‘Termination of Probationary Employee; Debunking some Myths about Tanzania Labour Legislation’, 4 Open University Law Journal, 1 2013.

Gathongo J,” Towards a fair hearing for all employees: a case of probationary employee’s in Kenya and the right to be heard prior to dismissal” Volume 41, Obiter, I, December 2020.

Gyesi S, “Termination of contract of employment; reason(s) required or not? a review of Ghana’s labour statutes and case laws”, 3, UCC Law Journal, 2, 2024.

larin A, “Job security in developing countries: A comparative perspective”, 1, *Ife Journal of International and Comparative Law*, 1, 2016.

Ismail O.A, “Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends”, 9, *Profuturo*, 4, 2019.

JO Abusomwan, “Termination of contract of employment during probationary period: need for judicial review”, 5, *International Review of Law and Jurisprudence*, 1, 2023

J.N. Daza Fernández, “Fixed-term contract legislation in Colombia: a proposal towards a flexicurity labor market from a comparative perspective”, Published Tilburg University, Tilburg, 2018. 38.

Kabazzi M, “Legitimate expectation in termination of employment: an economic perspective”, 23, *Makerere Law Journal*, 1, 2021.

Malhotra N, ‘A critical analysis of underlying concepts of doctrinal research’ 8 *International Journal of legal development and allied issues* 1, 2021, 82.

Otieno N, “A Review of the Challenges in the Implementation of Disciplinary Rules and Regulations in Organizations in Kenya”, 1, *East African Scholars Journal of Economics, Business and Management*, 2, 2018.

Paul Smit and Joaquin Grobler, “Dismissal during probationary period of employment in South Africa: an international perspective”, 29, *African Journal of International and Comparative Law*, 4, 2021.

Raluca Dimitriu, “Difficulties in enforcing the new probation period”, 1, *Juridical Tribune*, 1, 2011.

Rutherglen G, “Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality”, 74 *Fordham Law Review*, 4, 2006.

SM Pastory, “Unfair Termination and Conundrum surrounding the Remedy of Compensation in Tanzania”, 4, *BiLD Law Journal*, 1, 2019.

Solon Barocas and Andrew D. Selbst, “Big’s Data Disparate Impact”, 104 *California Law Review*, 3, 2016.

W Bradley Wendel, “Explanation in legal scholarship: the inferential structure of doctrinal legal analysis”, 5, Cornell Law Faculty Distributions, 1, 2011.

Online Journals

Heckman J and Pages C, “The Cost of Job Security Regulation: Evidence from Latin American Labor Markets”, Inter-American Development Bank , I-ADB Research Department Working paper no 430, 2000, < publications.iadb.org >, On 29th April 2024.

