

TOWARDS A FAIR HEARING FOR ALL EMPLOYEES: A CASE OF PROBATIONARY EMPLOYEE'S IN KENYA AND THE RIGHT TO BE HEARD PRIOR TO DISMISSAL

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SUMMARY

An employer may require a newly hired employee to serve a reasonable period of probation to establish whether or not his or her performance is of an acceptable standard before permanently engaging the employee. Even so, the current provisions relating to termination of probationary employees under the Employment Act, 2007 (EA) remains a source of concern. Currently, an employer may terminate the employment of a probationary employee at will and without affording such employee an opportunity to be heard. The *status quo* has received firm approval by the Employment and Labour Relations Court accentuating that employers are immune from claims of unfair termination of a probationary employee. This article argues that for termination to be considered procedurally fair whether during a probation period or not, it should be preceded by an opportunity for an employee to state a case in response to the charges levelled against him or her. This article highlights that all laws in Kenya, including the EA are subject to the Constitution, particularly article 41(1) of the Constitution which guarantees "every person" the right to fair labour practice. Equally, article 27 of the Constitution states that everyone is equal before the law and has a right to equal protection and benefit of the law. Allowing employers' the freedom to terminate employment without following due process certainly open up the floodgates for abuse of the primary purpose of probation. The mere fact that a contract of employment is labelled as "probationary contract" should not be used as a licence by employers to erode the constitutionally entrenched labour rights. The primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. This can only be achieved by protecting vulnerable and marginalised employees such as probationary employees who participate in unpredictable forms of employment. This article maintains that prominence should be on the existence of an employment relationship and fair labour practice as opposed to the existence of a conditional contract of employment. The existence of an employment relationship should serve as the main "port of entry" through which all employees access the rights and protection guaranteed by labour legislation.

1 INTRODUCTION

There is an increasing trend for employers in Kenya to employ new employees on the basis of a probationary period. Unfortunately, in some instances, these employers have little understanding of the meaning of probation. It is common amongst Kenyan employers that because of the conditional nature of the probationary employment, they are at liberty to terminate the employment without having to comply with the rules of natural justice. In the same way, employers frequently believe, wrongly, that some of the labour law rights do not have to be complied with. In terms of labour law, a probationary employee is one who has a contract of employment; the continuation of which is conditional on whether the employee demonstrated satisfactory ability to carry out the responsibilities stipulated under the job description.¹ The essence of a probationary appointment is to test the employee's suitability for a particular job over a reasonable, mutually agreed period of time.² That is the only legitimate purpose of a probationary period.³ The period is not to be used by an employer for any other improper motive such as to deprive employees' permanent employment⁴ or deny a probationary employee of his or her fundamental rights and basic conditions and terms of employment provided for under the EA.⁵ But while this describes the purpose of a probationary period, this article seeks to critically discuss the impact of the provisions of the EA dealing with the circumstances where an employer seeks to terminate an employee's appointment during probation.⁶

One particular right usually not complied with is the right to be heard before termination. As will be seen below, this derives from the provisions of the EA as well as decisions made by the Employment and Labour Relations Court which provide employers with immunity against any unfair termination claims made by probationary employees.

¹ Grogan *Workplace Law* 11ed (2014) 301.

² Abrahams, Govindjee, Van der Walt, Calitz and Chicktay *Labour Law in Context* 2ed (2017) 154. See also *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* 2014 28 eKLR (E&LRC), *Abraham Gumba v Kenya Medical Supplies Authority* 2014 46 eKLR (E&LRC), *Carole Nyambura Thiga v Oxfam* 2013 42 e-KLR (E&LRC) and *Kenya Union of Journalists v the Standard Group Limited* 2009 43 eKLR (E&LRC). It is important to note that suitability may not necessarily relate only to the employee's ability to do the job, but may also include other aspects such as the employee's character, his general attitude towards the job, as well as his ability to get along with other employees, Van Niekerk, Christianson, McGregor, Smith and Van Eck *Law@work* 3ed (2015) 194 and Grogan *Workplace Law* 301.

³ Israelstam "Probation is Not the Easy Way Out For Employers" (2016) 1 <https://www.labourguide.co.za/most-recent/872-probation-is-not-the-easy> (accessed 2019-09-23). See also *George Kabue v Nokia Siemens Networks* 2014 eKLR (E&LRC).

⁴ Schedule 8 Item 8 of the Labour Relations Act 66 of 1995 of South Africa (as amended); Abrahams *et al Labour Law in Context* 154 and Van Niekerk *et al Law@work* 194.

⁵ The Employment Act, 2007 (EA). See also *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* 2014 9 eKLR (E&LRC). The abuse of probation is strictly prohibited. Abuse occurs for instance where an employer engages successive employees on probation (the probationer is dismissed prior to engaging another probationer and so forth) or putting employees on successive fixed term contracts under the guise of probation.

⁶ S 41, s 42 and s 47 of the EA.

2 APPLICATION OF INTERNATIONAL LAW IN KENYA

International law forms an important benchmark for evaluating domestic legislation.⁷ Kenya has been a member of the ILO since 13 January 1964 and continues to perform its obligation as a member state.⁸ To this end, the country has ratified a total of 50 ILO Conventions which include 7 out of 8 fundamental Conventions, 3 out of 4 Governance Conventions (Priority) and 40 out of 177 Technical Conventions.⁹ The Kenyan Constitution¹⁰ declares in peremptory terms that the general rules of international law shall form part of the law of Kenya and that any treaty or Convention ratified by Kenya shall form part of the Law of Kenya.¹¹ The rules set out in international labour standards give content to the constitutional principles.¹² In *Veronica Muthio Kioka v Catholic University of Eastern Africa*, the court emphasised the importance of transforming Kenya from a dualistic¹³ state where national law prevailed over international law to a monistic state where national laws are on an equal footing with international law.¹⁴ This is a contrast from the previous dualist approach under the repealed Constitution.¹⁵ What is noteworthy is that when interpreting and applying the EA, the court, is duty-bound to consider international law not only for the reason that the Constitution requires it, but also because of the obligation flowing from the ILO Constitution as a member state.¹⁶

⁷ ILO 2011 International Trading Centre, Use of International Law by Domestic Courts, Compendium of Court Decisions 3.

⁸ ILO "Country Profile" <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11003:0::NO:3> (accessed 2019-05-12).

⁹ ILO "Ratifications for Kenya" https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:1033153 (accessed 2019-05-12).

¹⁰ The Constitution of the Republic of Kenya, 2010 (the Constitution).

¹¹ Art 2(5) of the Constitution. See also art 2(6) of the Constitution, *Mitu-Bell Welfare Society v Attorney General* 2011 eKLR 15 (HC), *John Kabui Mwai v Kenya National Examination Council* 2011 6 eKLR (HC) and *Okwanda v The Minister of Health and Medical Services* 2012 5 eKLR (HC).

¹² *Re the Matter of Zipporah Wambui Mathara* 2010 eKLR (E&LRC) 3–4. See also Oduor "The Status of International Law in Kenya" 2014 2 *Africa Nazarene University Law Journal* 98.

¹³ Marian "The Dualist and Monist Theories: International Law's" 2007 *The Juridical Current* 24. Dualism is generally dualism refers to a system in which international law is treated and separately observed from the domestic laws of a State. Monism, can be described as the assumption that domestic laws and international laws are one and the same, and indeed, that they carry the same gravity in the local jurisdiction that applies this system. Following the promulgation of the Constitution, Kenya became a monist state, meaning, in essence, that all other international treaties that Kenya has ratified would now become domestic laws and would carry the same force as the Constitution.

¹⁴ *David Njoroge Macharia v Republic* 2011 eKLR (E&LRC) 15. See also *Veronica Muthio Kioka v Catholic University of Eastern Africa* 2010 eKLR (IC) 17–18 and Kabau and Njoroge "The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System" 2011 44 *Comparative and International Law Journal of Southern Africa* 293–294.

¹⁵ The Constitution of the Republic of Kenya, 1963.

¹⁶ Art 21(4) of the Constitution stipulates that "the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms".

2 1 Convention No. 158 and Recommendation No. 166 concerning termination of employment

Generally, this Convention was adopted by the governing body of the ILO to address developments in the field of labour relation that had occurred in many countries particularly relating to the termination of employment at the will of the employer for untested reasons.¹⁷ The essence of the Convention is to codify the elementary principles of equity and law at the international level. The Convention articulates in compulsory terms that

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”¹⁸

Besides, the foregoing Convention provides that:

“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.”¹⁹

The spirit of article 7 is to rectify the common law position which disregarded the rules of natural justice, discussed below, in terminating an employee’s contract of employment. In other words, article 7 seeks to ensure that an employer provides an employee with an opportunity to exonerate himself regarding the allegations levelled against him.

2 2 ILO Employment Relations Recommendation 198 of 2006

In terms of this Recommendation, 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.²⁰ The Recommendation aims to eradicate disguised employment. It emphasises 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 characterised or any contrary arrangement that may have been agreed between the parties.²¹

¹⁷ Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection Against Unjustified Dismissal* (1995) par 76. See also ILO “Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment” https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_100768.pdf (accessed 2018-05-12).

¹⁸ Art 4 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment.

¹⁹ Art 7 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment (1982).

²⁰ Art 2 of the ILO Employment Relations Recommendation 198 of 2006.

²¹ Art 9 of the ILO Employment Relations Recommendation 198 of 2006.

3 PROBATIONARY EMPLOYEES' LEGAL POSITION UNDER THE EA

Under the EA a "probationary contract" is defined to mean a written contract of employment, which is of not more than twelve months duration or part thereof and expressly states that it is for a probationary period.²² Sections 41, 42 and 47 are of particular importance when an employer considers terminating a probationary employee's contract of employment.

3 1 Section 42: Termination of probationary contracts

This provision states:

"The provisions of section 41 [*Notification and hearing before termination on grounds of misconduct*] shall not apply where a termination of employment terminates a probationary contract."²³ A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."²⁴

3 2 Section 41: Notification and hearing before termination on grounds of misconduct

This provision reads as follows:

"Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.²⁵ Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."²⁶

3 3 Section 47: Complaint of summary dismissal and unfair termination

This provision states:

"No employee whose services have been terminated or who has been summarily dismissed during a probationary contract shall make a complaint under this section."²⁷

²² S 2 of the EA.

²³ S 42(1) of the EA.

²⁴ S 42(4) of the EA.

²⁵ S 41(1) of the EA.

²⁶ S 41(2) of the EA.

²⁷ S 47(6) of the EA.

The above sections, read in the proper context, mean that employees on probation do not have the right to be heard prior to termination like other “employees”. Section 42(2) specifies in peremptory terms that a probationary period shall not be more than six months, but with the agreement of the employee, it may be extended for a further period of not more than six months. This means that the maximum statutory probationary period shall not exceed twelve months. For that reason, probationary employees are automatically excluded from protection against unfair termination²⁸ because section 45(3) provides:

“an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated”.

A cursory analysis of the Employment and Labour Relations Court decisions reveals that the court is disposed to lean in favour of employers in assessing the grounds for dismissing a probationary employee. Some of the most frequently relied upon judgments in which the scope and application of the above provisions were given effect are considered.

3 3 1 *Abraham Gumba v Kenya Medical Supplies Authority*²⁹

In this case, the applicant was employed on a fixed-term contract as an Information Technology Officer. The employer wrote to the applicant terminating his contract of employment with immediate effect. The reasons advanced for termination included poor work performance, insubordination and interference with the employer’s ICT system. There was no notice or warning given prior to the termination. In fact, it was revealed in evidence that no offences had been brought to the attention of the applicant by the employer before termination. Amongst others, he sought an order declaring the termination of employment unlawful.

Several questions were raised but one particular question was whether the applicant was at the time of termination employed on probation. Although after critical analysis of the facts, the court found that he was not a probationary employee, it highlighted that if he was, then there would be no need to go into further inquiry because section 42(1) of the EA does not place any obligation on the employer to give an employee on probation, any formal charges or hear the employee in his defence before termination. But in the event that he was found not on probation, then the court would be compelled to determine whether termination was procedurally and substantively fair and whether the applicant was entitled to the remedies sought in the claim.

²⁸ S 45(1) of the EA.

²⁹ *Abraham Gumba v Kenya Medical Supplies Authority* 2014 5 eKLR (E&LRC) 36.

3 3 2 *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd*³⁰

In casu, the applicant was employed by the Emerald Hotels as an Executive Assistant by a letter dated 24 July 2012. The letter stated that she was to report for duty on 20 August 2012. One of the terms of the employment was that the applicant was on probation for a period of two months and during the probation period the contract would be terminable by either party giving seven days' written notice or salary in lieu of notice. On 22 August 2012, the employer served the applicant with a letter informing her that her appointment was being revoked with immediate effect. The revocation letter further informed her that she was to be paid for the two days she had worked and seven days' salary in lieu of notice.

The key questions before the court were whether an employee under probation is entitled to a hearing before termination and whether provisions of section 45 of the EA are applicable.³¹

In arriving at its judgment, the court held that section 42 of the EA ousts the application of the procedural fairness requirements of section 41 of the EA in termination during a probationary period. The court accentuated that the consequence of section 42 of the EA is that an employee who is still serving under probation is not entitled to a hearing before a decision to terminate is taken. The court affirmed that the rules of natural justice do not apply in such situations. On that basis, the court found that the employer did not breach the statutory protection of following fair procedure before terminating an employee. However, the court conceded that the challenge and the impact in application of the foregoing provision might need to await a decision from a higher court.

3 3 3 *Danish Jalang'o v Amicabre Travel Services Limited*³²

The question was whether the termination during probation is subject to a procedural and substantive fairness test. Briefly, the applicants were employed as drivers by the employer, a transport company, both on one-year contracts. The second applicant Mr Christopher Kisia Kivango required to work under probation for the first six months. The terms of the contract of employment allowed either party to terminate the contract during probation, by giving at least a seven days' notice of termination, or by payment *in lieu* of notice. His termination happened on 23 March 2012, well within the probation period.

³⁰ *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* 2014 16 eKLR (E&LRC) 23.

³¹ In terms of s 45 an employer shall terminate the employment of an employee unfairly. In other words, termination must both be procedurally and substantively fair.

³² *Danish Jalang'o & Another v Amicabre Travel Services Limited* 2014 6 eKLR (E&LRC). See also Industrial Court of Kenya Case between *Carole Nyambura Thiga v Oxfam* [2013] e-KLR (IC) and *Abraham Gumba v Kenya Medical Supplies Authority* 2014 36 eKLR (E&LRC) where the court reached a similar conclusion. See also *Linus Barasa Odhiambo v Wells Fargo Limited* 2012 eKLR (E&LRC).

In its judgment, the court reiterated that section 42(1) of the EA 2007 is unambiguous on the fact that the provisions of section 41 of the EA, which regulates the law of fair termination procedure, shall not apply with regard to probationary contracts.³³ The court repeated that section 42(4) of the EA only provides for termination through a seven-day notice or payment of seven days' wages by the employer to the employee. The court highlighted further that section 42 of the EA is a *sui generis* or standalone law, regulating a special, formative, employer-employee relationship.³⁴ The court summarised the legal position as follows:

"There is no obligation under section 43³⁵ and 45³⁶ 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 only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the employee received pay in lieu of notice; and, whether the employee 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 2007 EA grants. If the employee has received notice of seven days before termination, or is paid seven days' wages before termination, there can be no further demands 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."

It is evident from the above court judgements that an employee's appointment who is on probation can be terminated at any time during the period and without an employer holding a hearing. This can only implicate that the Employment and Labour Relations Court is not amenable to recourse to the use of constitutionally entrenched human rights provisions to protect probationary employees against unfair termination. The above legal position is also open to abuse of the primary purpose of probation. For instance, it may be subject to abuse where employers repeatedly dismiss probationary employees at the end of their probation periods and replacing them with newly-hired probationary employees. In the long run, this leaves probationary employees vulnerable to employer exploitation.

³³ See also the Industrial Court of Kenya decision in *Carole Nyambura Thiga v Oxfam* [2013] e-KLR (IC) where the Court affirmed that the protection afforded regular Employees under the unfair termination provisions, are not available to Employees whose contracts are terminated while on probation.

³⁴ *Danish Jalang'o & Another v Amicabre Travel Services Limited supra* 21.

³⁵ S 43 of the EA deals with proof of reason for termination and states that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of s 45. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

³⁶ S 45 of the EA deals generally with substantive and procedural fairness in dismissal or termination on employment. On the one hand, substantive fairness deals with the reasons for the dismissal. In order for a dismissal to be fair, there must be valid reasons for such conduct by an employer (see examples of fair reasons listed in s 45(2) of the EA). Procedural fairness, on the other hand, deals with the formal procedures prescribed by the law which are to be followed by an employer before dismissing an employee (see s 45(2) of the EA).

3 4 Analysis of the above legal position on termination of probationary employees'

At the outset, it is important to consider a few questions: who do the provisions of the EA apply to? Is the definition of "employee" in the EA inclusive of probationary employees? The answers to these questions are integral in finding out whether the EA unduly limits probationary employees' right to be heard prior to termination of employment. Although regrettable, the entitlement for protection against unfair termination under the EA and according to courts hinges on whether one is an "employee" or "probationary employee".

Worth mentioning is that, subject to section 3(2)³⁷, the EA applies to all employees employed by any employer under a contract of service.³⁸ A contract of service, as per the definition in the EA, captures the employer-employee relationship, where the person employed agrees to serve the other for a period of time in return for a wage or salary. Probationary employees are employed under a fixed-term contract of service. Accordingly, the protection against unfair termination should extend to them like any other employee.

The EA defines an employee to mean a person employed for wages or a salary and includes an "apprentice" and "indentured learner."³⁹ It is clear that the definition is circumscribed by the "remuneration" requirement. At the core of the definition lies an employment relationship where one person (without any distinction of employee status) works or renders services for another (employer) in exchange for wages or salary. Nowhere does the definition explicitly exclude probationary employees.

Besides, the EA defines an employee to include an apprentice and indentured learner. Although the EA does not define "an apprentice" and "indentured learner", the Industrial Training Act⁴⁰ sheds some light as to the meaning of the terms. The Industrial Training Act defines an "apprentice" to mean

"a person who is bound by a written contract to serve an employer for such period as the Board shall determine with a view to acquiring knowledge, including theory and practice, of a trade in which the employer is reciprocally bound to instruct that person".⁴¹

This relationship is established by reference to criteria such as the employer's right to supervision and control. For that reason, the nature of the probationer's employment contract and the primary purpose of a probation period alluded earlier aligns itself with this definition. In fact, the Cambridge

³⁷ In terms of s 3(2) of the EA, the only category of employee excluded from its application include: the armed forces or the reserve as respectively defined in the Armed Forces Act; the Kenya Police; the Kenya Prisons Service or the Administration Police Force; the National Youth Service and an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

³⁸ S 3(1) of the EA.

³⁹ S 2 of the EA.

⁴⁰ The Industrial Training Act 237 of 1960 (as amended) (the Industrial Training Act).

⁴¹ S 2 of the Industrial Training Act.

dictionary meaning of “an apprentice” includes probationers as one of the synonyms for an apprentice.⁴²

Also, the Industrial Training Act defines an “indentured learner” to mean

“a person, other than an apprentice, who is bound by a written contract to serve an employer for a determined period of less than four years with a view to acquiring knowledge of a trade in which the employer is reciprocally bound to instruct that person.”⁴³

Thus, given the wide scope of the definition of an “employee” in the EA, it is clear as analysed that probationer also falls well within the ambit of the definition. In view of that, probationary employees should be accorded full rights and protection, including the right to be heard prior to termination like permanent employees. The EA lists category of persons who are excluded from its application and probationary employee is not one of them.⁴⁴

4 THE RIGHT TO FAIR LABOUR PRACTICE UNDER ARTICLE 41(1) OF THE CONSTITUTION

Worth noting is that the underpinning principle of a sound employment relationship is that it should be fair, equitable and beneficial to both the employer and the employee in the workplace. Article 41 of the Constitution entrenches various labour rights, key amongst them the right to fair labour practices guaranteed to “every person”.⁴⁵ This right remains probably the most significant labour right under the Constitution because of its all-encompassing nature. Although the Constitution does not contain a precise definition of the concept “fair labour practice”, the converse of a fair labour practice is an unfair labour practice and this is what is prohibited.⁴⁶

⁴² Cambridge Dictionary <http://dictionary.cambridge.org/dictionary/english/apprentice> (accessed 2019-06-11).

⁴³ S 2 of the Industrial Training Act.

⁴⁴ The EA states clearly that it shall not apply to: (a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199), (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force, (c) the National Youth Service and (d) an employer and the employer’s dependants where the dependants are the only employees in a family undertaking.

⁴⁵ Art 41(1) of the Constitution.

⁴⁶ Art legal analogy could be drawn the decision of the Constitutional Court of South Africa in *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) par 33–34 where the court held that “Our Constitution is unique in Constitution aliasing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept. “[T]he concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations

Therefore, an insightful understanding of this right is imperative because the subject of the sentence, namely “every person” must be interpreted with reference to the object of the sentence, namely “labour practices.”⁴⁷

Generally, any interpretation of article 41(1) must be conducted, bearing in mind the importance of ensuring fairness in the working environment is recognised and upheld. In the process, courts must recognise that all laws and regulations, including labour legislation, are always subject to constitutional scrutiny. If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee should have a right to seek a remedy under the EA. If he or she finds no remedy under that Act, the EA must come under constitutional scrutiny for not providing adequate protection to a constitutional right. Similarly, if a labour practice permitted by the EA is not fair, a court might be persuaded to strike down the questioned provision. In *Peter Wambugu Kariuki v Kenya Agricultural Research Institute*⁴⁸ the court held that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established workplace policies or practices that give effect to the elaborations set out in article 41 to promote and protect fairness at work. While in *Aviation and Allied Workers Union v Kenya Airways Ltd*,⁴⁹ the Industrial Court held that even where there were good reasons for an employer to terminate an employee, the employer had to demonstrate that it followed fair procedure. The court held further that where an employee was not fairly treated and an employer undertook processes to defeat the ends of justice it amounted to a labour practice that was fundamentally an unfair labour practice in the meaning of article 41 of the Constitution and therefore unfair termination. It may be argued that the absolute exclusion of the right to be heard before termination of probationary employees fundamentally defeats the ends of justice.

4 1 Who can rely on article 41(1) of the Constitution for protection?

A cursory look at the broad terms of article 41(1) reveals not only a description of the right accorded but also the beneficiaries of the right to fair labour practices; namely “every person,” who then include all types of employees.⁵⁰ In fact, it does not end there; the broad interpretation of the word “every person” means that the scope of protection covers relationships other than the traditional employer-employee relationship. In other words,

of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.”

⁴⁷ Van Niekerk *et al Law@work* 186 states that since there is no definition of “labour practice”, it is necessary that the practice must arise within the employment relationship.

⁴⁸ 2013 13 eKLR (E&LRC) 21.

⁴⁹ 2012 eKLR (IC) par 21.

⁵⁰ Even the categories of employees excluded from the application of the Employment Act such as: the armed forces or the reserve, the Kenya Police, the Kenya Prisons Service or the Administration Police Force, the National Youth Service and an employer and the employer’s dependants where the dependants are the only employees in a family undertaking are protected by art 41(1) of the Constitution because their employment is akin to an employment relationship.

“every person” includes natural and juristic persons.⁵¹ On this basis, therefore, “every person” who is a victim of an unfair labour practice would be entitled to relief in terms of the Constitution. Probationary employees fall within the scope of “every person” and can conceivably turn to article 41(1) of the Constitution for protection against alleged unfair termination without being afforded an opportunity to be heard. In fact, read in its proper context, even those who are expressly excluded⁵² from the application of the EA may also conceivably rely on article 41(1) of the Constitution for relief.

Equally, the Constitution guarantees that every person is equal before the law.⁵³ It also extends the right to equal protection and equal benefit of the law as well as the full and equal enjoyment of all rights and fundamental freedoms to every person.⁵⁴ Effectively it is within the spirit of aArticle 27 that the protection would include employees on probation.

5 PRINCIPLES OF NATURAL JUSTICE

The principles of natural justice as it is understood in its broader sense, refer to procedural fairness. The principles intend to ensure that a fair outcome is reached by an impartial decision-maker. These principles are invariably common to all known legal jurisprudence and are rooted in the minds of all fair-minded persons.

One of the two cardinal principles of natural justice is *audi alteram partem* which literally translates to mean “hear the other party” or the rule that no one should be condemned unheard and without having the opportunity of making his defence.⁵⁵ This means according to the fundamentals of fair play, any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice. Hearing would enable a probationary employee to disprove the charge levelled against him or her, or at least to plead something in mitigation. It also affords them the opportunity to urge the employer to consider alternatives to dismissal or sometimes all they ask of the courts is to assuage their sense of injustice at not having been given a fair opportunity to defend themselves against allegations which gravely impeach their future prospects. The *audi alteram partem* principle noted above imposes a duty upon an employer to act fairly by giving the employee an opportunity to explain him or herself before taking any decision which may extremely affect an employees’ career.

⁵¹ In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) 37, the Constitutional Court of South Africa found that there is nothing in the nature of the right to fair labour practices to suggest that employers, employees and juristic persons, are not entitled to the right.

⁵² See par 36 above.

⁵³ Art 27 of the Constitution.

⁵⁴ Art 27(1) and (2) of the Constitution.

⁵⁵ The other one is *Nemo iudex in causa sua* which means no one should be made a judge in his own cause or the rule against bias. The rule of natural justice provides an opportunity for persons whose rights or interests may be affected by decisions to deny the allegations put forward and provide arguments in their favour, to demonstrate and give reasons why proposed d should not be taken, to call evidence to rebut allegations or claims, to explain allegations or present an innocent explanation, and/ or to provide mitigating circumstances.

So why then did the legislature choose to enact section 42 in disregard of the law of natural justice and fair labour practice in depriving employees on probation unduly of rights they might otherwise have flowing from an employment relationship? A duty to act fairly is implied in employment relationships, and the duty connotes that the employer must give an accused probationary employee a right to be heard. Therefore, it is imperious for employers to respect the fundamental principles of procedural fairness for all employees in the workplace. And when the employer unreasonably fails to observe those principles, then the Employment and Labour Relations Court, if approached, should bravely apply the aforesaid principles in order to defeat the imbalance in the exercise of power. As one professor of comparative law says:

“The quality of the law can be determined by ... the qualities of the judge ... [A] bad statute with a clever judge is a hundred times better than a good statute with a bad judge ... Let us pray for well-drawn statutes but ... let us pray also for judges [who are] clever men with an independent spirit and can stand the weight of honours.”⁵⁶

With this in mind, this article encourages the Employment and Labour Relations Court judges to shun away from its own unfortunate practice and that of the EA of categorisation of employees and different rights ascribed to each category. Surely, this does not only infringe the Constitution, it is also a practice passed by time and should not be used in the workplace as a shield against compliance with procedural fairness before termination. Equally, the mere fact that a contract of employment is phrased as “probationary contract” or expressly states that the contract is for a probationary period should not be used as an easy getaway to erode the entrenched constitutional right to fair labour practice guaranteed to every person, which include probationary employees.⁵⁷ This article emphasises that the relationship between a probationary employee and his or her employer is akin to an employment relationship and not on the mere existence of a conditional contract of employment. In fact, this article submits that reliance on this traditional contract of employment will render labour law less relevant.

All laws in Kenya, including the EA, are subject to the Constitution. As such, they must give effect to the Constitution. Notably the spirit of the preamble of the Constitution, the right to dignity and fair hearing, revolt at the very idea that a person should not lose his or her employment, no matter how small, without following due process. With this in mind, the fundamental rights entrenched in the Constitution should be the first point of reference for all in authority.

If one is to redirect focus on the mandatory provisions of sections 41, 42 and 47 of the EA, weighed up in light of the constitutional principles, they are clearly not justiciable. Yet, these provisions were enacted by the legislature in the enabling Act to unconditionally deny probationary employees’ a right to be heard prior to termination. This article stresses that a visionary court

⁵⁶ Meijers “Case Law and Codified Systems of Private Law” 1950 33 *Journal of Comparative Legislation and International Law* 8.

⁵⁷ Art 41(1) of the Constitution.

inclined to the principles of natural justice in particular *audi alteram partem*, must promote the spirit of articles 41 of the Constitution which provides for commitment to nurture and protect the well-being of all employees in an employment relationship. Further, the article argues that courts that have moulded the law over the ages are those with a deep passion for fairness, equity and social justice that frequently require a departure from stringent inflexible common law rules. The provisions of the EA in question are a point in reference.

Failure by the EA to protect or provide probationary employees with a right to be heard is arbitrary. Equally, it is unjust, unfair and unreasonably infringes and destroys the spirit of the Constitution. In fact, this article observes that like in all disputes there are always two sides to the story and one cannot get to the truth of the matter without hearing both sides. So not only is it a legal requirement but also as a matter of logic and for the feasibility of the end result of a disciplinary hearing, the accused's version must be known to the person deciding his fate. As noted earlier, this requirement is derived from the *audi alteram partem*. It should also be noted that even biblically, procedural fairness and in particular the right to be heard is acclaimed as a principle of divine justice with its roots in the Garden of Eden.⁵⁸ To point out, God gave Adam and Eve an opportunity to make their defence before they were condemned. Indeed the principle is so catholic that no one has questioned its pedigree.

Also, employers must always act in good faith in the assessment of the probationary employee's suitability for a permanent position. But in the current law regulating probationary employees, this may be defeated. At the same time, it may lead to abuse of the primary purpose of probation as alluded earlier. For instance, a common abuse is when employers dismiss an employee who completes their probationary period and replaces them with newly-hired probationary employees. Under such circumstances, it means not only a loss of a particular position or post by the probationary employee, but also loss or denial of the opportunity to pursue his or her profession or career. Such practice unduly deprives a probationary employee permanent employment. The court has stressed that the right to security of employment is a core value of the EA.⁵⁹

In terms of the Constitution, every person is guaranteed an inherent right to dignity and the right to have that dignity respected and protected.⁶⁰ Phillips, a great European author, expresses most forcibly what reputation means if not backed up by the solid foundation of character built on right thinking and right living. He asked:

"Who shall estimate the cost of priceless reputation – that impress which gives his human dross its currency, without which we stand despised, debased, depreciated? Who shall repair it injured? Who can redeem it lost?" Why should this verity be limited to employment with statutory flavour and not to all

⁵⁸ Genesis Chapter 3 in the Holy Bible.

⁵⁹ *Aviation and Allied Workers Union v Kenya Airways Limited* (2012) eKLR (ELRC). Therefore, where an employer seeks to terminate a probationary employee as unsuitable, the employer must demonstrate that it gave the employee a fair or a reasonable opportunity to demonstrate his ability to do the job.

⁶⁰ Art 28 of the Constitution.

employees? Who says that only public employees have reputation that may forever be tarnished? What is the rationale for excluding private employees?⁶¹

In light of this, where a probationary employee is stigmatised at the workplace as a thief for example, and he or she seeks to do nothing else other than having his or her name vindicated of that stigmatisation, there is everything wrong with the judicial system when the court and the legislation tell him or her that the employer can dismiss him or her and all he or she is entitled to is a seven days' notice alternatively pay in lieu of notice before termination of his or her employment. This article submits that the EA should not be applied in piecemeal fashion to grant probationary employees only the right to receive seven days' notice but not to be heard. Employers should be driven away from the judgment seat, and courts should assume this seat, especially where the employer attempts to deprive his probationary employee the right to be heard before termination.

6 CONCLUSION AND RECOMMENDATIONS

It is apparent from the foregoing analysis that Kenyan employment law is still developing but perhaps in reverse. From sections 41, 42 and 47 of the EA, it is clear that probationary employees have fewer rights and protection when compared to permanent employees in relations to the right to be heard prior to termination of employment. The said provisions not only remain harsh in their imposition by employers exercising their superior economic strength to dismiss but even harsher in their application by the Employment and Labour Relations Court acquiescing to the same. This is evident from court judgments discussed above where probationary employees seeking relief from the court for unfair termination have been turned away. The court remains resolute that in the event that the employer is not satisfied with the performance of an employee on probation, the employer retains a free hand to terminate his or her services without due process. Even worse is that the *status quo* still continues, with little or no hope for radical improvements, so necessary for a changing society and a developing economy. In fact, the absence of an employers' willingness to adopt well-known rules of natural justice along with the norm of fairness co-exists with the lack of Employment and Labour Relations Court's will to enforce the same. This acute unfairness against probationary employees is a practice that the law should not tolerate.

Also, from the analysis of article 41(1) of the Constitution it seems safe to conclude that "every person" is determined with reference to being involved in an employment relationship. As a result, "every person" participating in an employment relationship is entitled to fair labour practices irrespective of the contractual condition or the nature of the contract. For this reason, employment contracts (conditional or unconditional) or terms of an employment contract that are contrary to the spirit of the Constitution or limit unreasonably fundamental rights guaranteed in the Constitution should be set aside by the courts. Henceforth, this article recommends that the Kenyan legislature should seriously consider amending the condemned provisions of sections 41, 42 and 47 of the EA in order to reflect and protect a

⁶¹ Smith "Reputation" 1913 13 *The American Journal of Nursing* 593–595.

probationary employee's right to fair labour practices guaranteed by the Constitution, in particular and the right to be heard prior to termination of probationary employees. In the same way, this article accentuates that the Employment and Labour Relations Act should use article 41(1) of the Constitution as a starting point of reference in interpreting the condemned provisions of the EA, ie sections 41, 42 and 47.

As shown above, article 2(5) of the Constitution of Kenya recognises international law as one of the sources of law in Kenya. For that reason, Convention No 158 forms an important and influential point of reference in the interpretation and application of the provisions of EA in question. The Convention envisages that an employee can only be fairly dismissed if the employer follows a fair procedure in doing so. This article emphasises strongly that although an employee may be employed on probation, and that it is within the right and prerogative of an employer to hire employees, it does not mean that employers can simply terminate employment without following due process. Therefore, the amendment will certainly bring the provisions of the EA in line with the international law discussed above.

Perhaps as a supplement, yet important is the need to consider developing a comprehensive Code of Good Practice: Dismissal similar to the one under Schedule 8 of the South African Labour Relations Act.⁶² In South Africa, courts are of the view that probationary employees are entitled to the same protection as any other employee.⁶³ Negotiated by tripartite stakeholder, the Code of Good Practice will seek to regulate the procedures, both substantive and procedural that must be followed when disputes relating to termination of employment for all employees arise. Importantly, it will allow for a more functional approach to labour disputes.

Another disquieting aspect of the EA is that it does not define nor regulate unfair labour practice. This *lacuna* in law is regrettable and does perhaps also contribute to the current piecemeal protection against unfair termination of probationary employees. For this reason, there is an urgent need for the legislature to seriously consider incorporating provisions regulating unfair labour practice in the EA. This will give effect to article 41(1) of the Constitution. It must be remembered that the primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. Yet this is the one element that is singularly lacking in the EA as regards probationary employees right to be heard. In view of that, it remains a key challenge for the court in Kenya to ensure that all employees in the country regardless of their employment conditions are protected against unfair termination.

The decisions arrived at by courts in analysing and interpreting the provisions of EA in question must be sound and guided by the principles of fairness and the Constitution.

⁶² Schedule 8 item 8 of the Labour Relations Act 66 of 1995.

⁶³ *Carlton-Shields v James North* (1990) 11 ILJ 82 (IC), *NUMSA v Tek Corporation Ltd* (1991) 12 ILJ 577 (LAC) par 581H-I, *Schuster v CAPAB Orchestra* (1994) 15 ILJ 109 (LAC), *Camhee v Parkmore Travel* [1997] 2 BLLR (CCMA) par 180 and Grogan *Workplace Law* 302.

Quoting from the case of *Re Spectrum Plus Ltd*,⁶⁴ Lord Nicholls stated:

“Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations”.⁶⁵

It remains to be seen how the issue is resolved if and when the courts considers it explicitly and in all its ramifications. Should this happen, this article emphasis that judges should be guided by the principles alluded by Lord Nicholls. In their role of interpreting sections 41, 42 and 47 of the EA, courts are duty-bound to bring these provisions in line with article 41(1) of the Constitution to protect probationary employees’ right to fair labour practice and unfair termination. In fact, within the terms of article 20(3) of the Constitution, courts are duty-bound to develop the law. Should any law or act be inconsistent with the Constitution, then the court must pronounce a declaration of incompatibility.⁶⁶ Given the broad view of article 41(1) of the Constitution, the Employment and Labour Relations Court reserves the right to strike down labour practices found to be unfair. Accordingly, once the court makes such a declaration, it is presumed that Parliament will amend or repeal the law to bring it in line with the court’s pronouncement. Parliament has a constitutional mandate of formulating legislation which is intended for implementing several provisions of the Constitution for the realisation of the rights guaranteed.⁶⁷ But Parliament, as a law-making body, must strive to promulgate legislation that does not arbitrary and unduly limit right guaranteed to everyone in terms of the Constitution.⁶⁸ Nonetheless, whenever that happens, courts are obliged to exercise their interpretive power to quash such laws.⁶⁹ A typical example was when the High Court in *Samuel Momanyi v The Hon. Attorney General and SDV Transami Kenya Ltd*⁷⁰ declared the provisions of section 45(3) of the EA 2007 unconstitutional in that it was inconsistent with the provisions of articles 28, 41(1), 47, 48 and 50(1) of the Constitution.

On the whole, this article emphasises that sections 41, 42 and 47 of the EA are in direct violation of article 41(1) of the Constitution. They also violate article 27 of the Constitution, which makes it clear that everyone is equal before the law and has a right to equal protection and benefit of the law. Likewise, the condemned provisions infringe the principles of international

⁶⁴ 2005 2 (AC) 680.

⁶⁵ *Re Spectrum Plus Ltd supra* par 32.

⁶⁶ Art 2(4) of the Constitution.

⁶⁷ Art 261(1) of the Constitution. See also Schedule five of the Constitution.

⁶⁸ Art 94(5) reserves the power of making law to Parliament. This article provides that no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

⁶⁹ Roschmann, Wendoh and Ogolla “Human Rights, Separation of Powers and Devolution in the Constitution, 2010: A Comparison and Lessons for EAC Member States” https://www.kas.de/c/document_library/get_file?uuid=1864d0c5-21b0-0920-3696-bf118f4d5b26&groupId=252038 (accessed 2019-07-15).

⁷⁰ *Samuel Momanyi v The Hon. Attorney General and SDV Transami Kenya Ltd* 2012 eKLR (E&LRC).

law concerning termination of employment as well as the rules of natural justice.

It is hoped that the recommendations and suggestions made herein will provide insight that will lead to the eradication of the unfairness within of sections 41, 42 and 47 of the EA. At the same time, it will shape a way forward and further strengthen labour relationships between employers and the rights of probationary employees. Employers are duty-bound to act in good faith and follow due process in the manner in which they terminate employees. The exclusion of probationary employees from the scope of application of the EA's right to be heard prior to termination is inconsistent with the values of a democratic society and should therefore be amended accordingly.

Noteworthy, the Constitution is the supreme law in Kenya. Any other law inconsistent with it is invalid and cannot survive. Accordingly, such law must be amended or repealed. If this is so, then the first in line must be the provisions of the EA in question. A legal analogy can be drawn from the following *dictum* of Budd, an Irish judge in a case where the application of the constitutional right to an employment contract was in issue:

"If an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The Courts will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless... The courts will not so act as to permit anybody of citizens to deprive another of his constitutional rights and will ... see that these rights are protected, whether they are assailed under the guise of a statutory right or otherwise."⁷¹

The Employment and Labour Relations Courts should emulate the foregoing.

⁷¹ *Educational Co v Fitzpatrick* (1961) 2 (IR) par 345–365.