

# DISMISSAL IN KENYA

[cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)



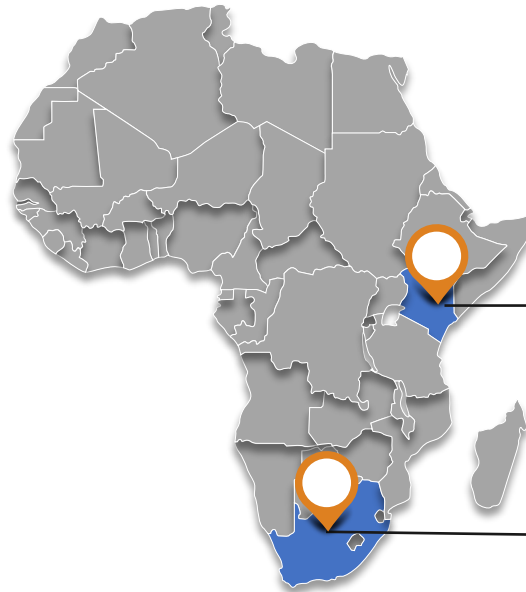
CLIFFE DEKKER HOFMEYR

INCORPORATING  
**KIETI LAW LLP, KENYA**

# AN OVERVIEW OF OUR LAW FIRM

CLIFFE DEKKER HOFMEYR

We are a top, independent,  
African business law firm with  
offices across South Africa  
and Kenya.



**Kenya**  
Nairobi

**South Africa**  
Johannesburg, Cape Town  
and Stellenbosch

# THE TEAM

CLIFFE DEKKER HOFMEYR



**Njeri Wagacha**  
Partner



**Desmond Odhiambo**  
Partner



**Christine Mugenyu**  
Senior Associate



**Rizichi Kashero-Ondego**  
Associate



**Peter Mutema**  
Associate



**Janette Nyaga**  
Associate



**Tyler Hawi Ayah**  
Associate

# OUTLINE

CLIFFE DEKKER HOFMEYR

General  
Grounds for  
Termination

Summary  
Dismissal &  
Gross  
Misconduct

Disability

Sick Leave

Poor  
Performance

Dismissal  
while on  
Probation

Redundancy

# APPLICABLE LAWS AND REGULATIONS IN DISMISSAL



INCORPORATING  
**KIETI LAW LLP, KENYA**



The Constitution of Kenya,  
2010



The Employment Act, 2007

- The Employment (General) Rules,  
2014



The Employment and Labour Relations Court Act, 2011



The Labour Institutions Act No. 12 of 2007

- The Regulation of Wages (General)  
Order



The Labour Relations Act,  
2007



# APPLICABLE LAWS AND REGULATIONS IN DISMISSAL



INCORPORATING  
**KIETI LAW LLP, KENYA**

- The laws and regulations provide for the minimum acceptable standard in employment.
- Employers are allowed to provide higher standards than those provided for in the Law.
- In determining any dispute between an employer and employee and the employer provided better standards than those in the law, the court will consider the employer's standards rather than the minimum standards provided in the law



A black and white photograph of a long, empty railway bridge. The bridge's structure is composed of dark, riveted steel beams that create a strong sense of perspective, leading the eye down the tracks towards a bright light at the far end. The tracks are flanked by wooden ties and cross-ties. The sky is a uniform light gray, and the overall mood is one of solitude and industrial scale.

## **GROUNDS FOR TERMINATION**

# REASONS FOR TERMINATION

Fair Termination

CLIFFE DEKKER HOFMEYR

Reason is valid



Reason is fair



Termination followed fair procedure



# REASONS FOR TERMINATION

Fair Termination : Case Law

CLIFFE DEKKER HOFMEYR



## Jane Nalonja Rutto v New Kenya Cooperative Creameries Limited [2022] eKLR

- The Court found that the reason for termination was not fair.
- The employee was only required to confirm that a tracking system was polling, not that the system was properly installed.
- The reason for termination did not relate to the employee's conduct, capacity and compatibility nor did it relate to the employer's operational requirements.
- The reason for termination was therefore unfair and unlawful.

# REASONS FOR TERMINATION

Fair Termination : Case Law

CLIFFE DEKKER HOFMEYR

## Shekue Kahale Kombo v Governor Lamu County & 2 others [2022] eKLR

- The Court held that issuing a notice of termination was not sufficient to amount to fair procedure.
- An employer had to completely follow due procedure by conducting an inquiry prior to the termination (where applicable) and allowing the employee an opportunity to offer his/her defence.



# REASONS FOR TERMINATION

## Unjustifiable Reasons

CLIFFE DEKKER HOFMEYR

Section 46 of the Employment Act sets out 9 reasons that cannot constitute a fair reason for dismissal:



Employee's initiation or proposed initiation of a complaint or other legal proceedings



Participation in the activities of a trade union



Taking leave



Membership of a trade union



Office as an officer of a trade union or a workers' representative



Pregnancy



Employee's participation in a lawful strike



Employee's refusal to join or withdraw from a trade union



Employee's protected characteristics

# WHEN CAN AN EMPLOYEE CLAIM UNFAIR TERMINATION?

CLIFFE DEKKER HOFMEYR

A dismissal is unfair if it is found that the employer did not act justly and equitable in terminating the employee.

## What the Court Considers

1

Procedure followed

2

Conduct and capability of the employee

3

Employer's compliance with the law

4

Employer's practice in previous terminations

5

The existence of any previous warning letters issued to the employee



**SUMMARY DISMISSAL**

# SUMMARY DISMISSAL

CLIFFE DEKKER HOFMEYR

Summary dismissal takes place when an employer terminates the employment contract without notice or with less notice than what the employee is entitled to in law or in the contract.



# SUMMARY DISMISSAL & GROSS MISCONDUCT

CLIFFE DEKKER HOFMEYR

Section 44 (4) of the Employment Act provides that any of the below may amount to gross misconduct to justify summary dismissal:



Absenteeism



Verbal, physical or sexual abuse



Intoxication during working hours



Insubordination



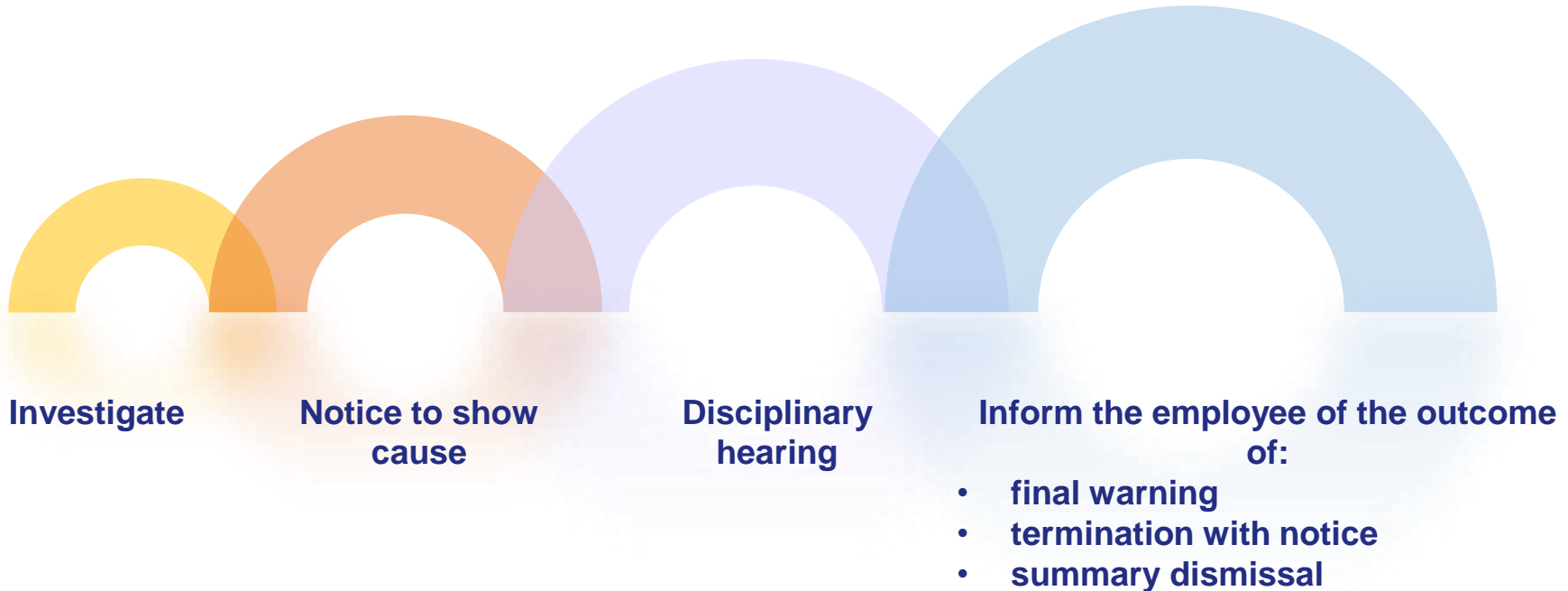
Refusal to work or carelessness



Employee commits or is suspected of committing a criminal offence

# PROCEDURE FOR DEALING WITH GROSS MISCONDUCT

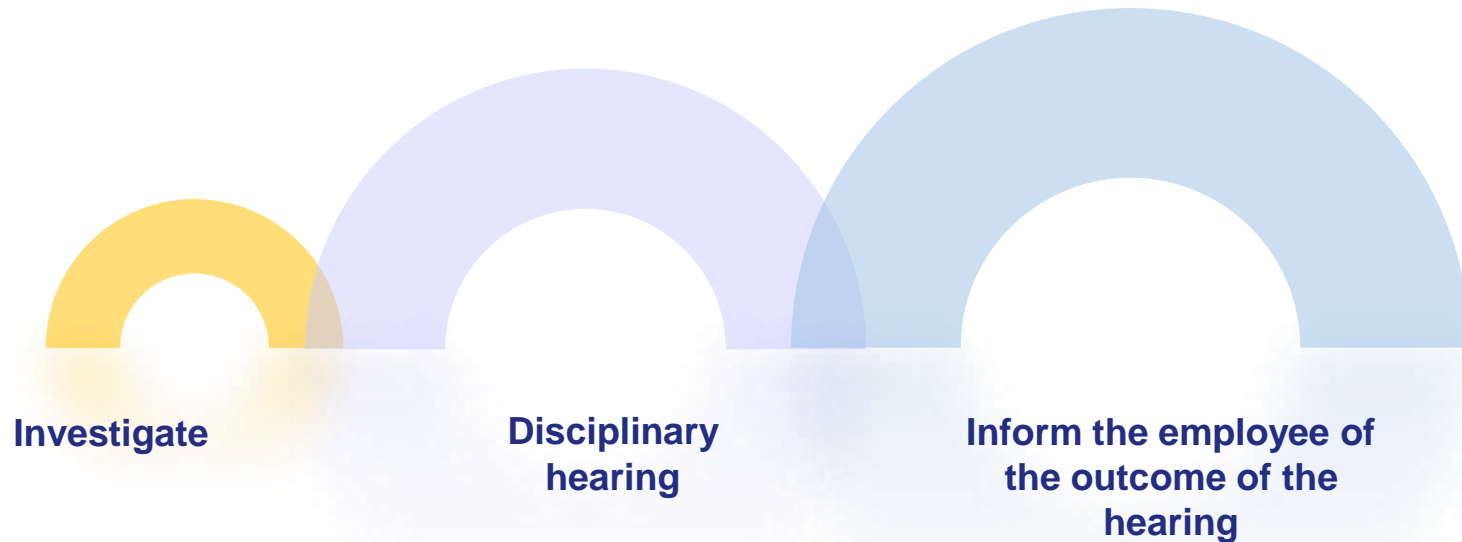
CLIFFE DEKKER HOFMEYR





# PROCEDURE FOR TERMINATING ON SUMMARY DISMISSAL

CLIFFE DEKKER HOFMEYR



# SUMMARY DISMISSAL & GROSS MISCONDUCT

Case Law

CLIFFE DEKKER HOFMEYR

**Olumbe v Standard Global East Africa Limited  
(Cause 578 of 2017) [2022] KEELRC 54 (KLR)**

## Court's Finding

- It is not enough for an employer to generally state that the termination has been occasioned by a gross misconduct.
- An employer must specify the conduct that led to the termination. Specification of the conduct is imperative, so that an employee knows exactly what he/she did, as gross misconduct may come in many forms and shades.
- The term gross misconduct is too global to be termed a reason for dismissal of an employee's contract.

# SUMMARY DISMISSAL & GROSS MISCONDUCT

Case Law

CLIFFE DEKKER HOFMEYR

**Cooperative Bank of Kenya Limited v  
Yator  
(Civil Appeal 87 of 2018) [2021] KECA 95  
(KLR)  
(Civ) (22 October 2021) (Judgment)**

## Court's Finding

- Even in instances of gross misconduct, an employer must ensure **procedural fairness** by allowing the employee to make a defence, before summary dismissal can take place.
- Summary dismissal is not available where the employer has already dealt with and resolved the complaint against the employee. For e.g. by issuing a warning letter.
- That would amount to double punishment over the same complaint, which is unfair and unconscionable.

A black and white photograph of a long, empty railway bridge. The tracks run straight down the center of the frame, receding into the distance towards a bright light at the end of the bridge. The bridge's structure is made of dark, riveted steel beams that form a repeating pattern of triangles and rectangles. The sky is a uniform light gray, and the overall mood is one of solitude and perspective.

**DISABILITY**

# DISABILITY

Section 46 of the Employment Act provides that disability does not constitute a fair reason for dismissal.

**Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment):**

- An employer should reasonably accommodate the needs of an employee living with disability.
- However, only to the extent that the reasonable accommodation will not cause the employer undue hardship.

**Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya [2015] eKLR:**

*“Disabled persons, however, are not ordinary employees, whose terms and conditions of employment are fully addressed through the provisions of the Employment Act 2007 alone; they are a special category of our society.”*

# DISABILITY: PROCEDURE FOR TERMINATION

Reasonably accommodate the employee unless it will cause undue hardship



Conduct a medical assessment



Conduct a hearing



Communicate the decision of the hearing

A black and white photograph of a long, empty railway bridge. The tracks run straight down the center of the frame, receding into the distance towards a bright light at the end of the bridge. The bridge's structure is made of dark, riveted steel beams, creating a strong sense of perspective and depth. The sky is a uniform light gray, and the overall mood is one of solitude and quietness.

**SICK LEAVE**

## **Barnabus Munyinyi Mwai v Directline Assurance Company Limited [2019] eKLR.**

- Employers are entitled to terminate an employee because they are too ill to work, however due care and sensitivity must be exercised.
- An employee who cites sickness as the reason for their absence cannot be taken ab initio to have absconded duty.
- This would be an unfair labour practice and any termination based on such a reason is invalid where it is made without holding a disciplinary hearing.
- Failure to follow due procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination.





# SICK LEAVE: TERMINATION PROCEDURE

1

Show support to recover and resume duty

2

Medical  
examination

3

Specific notice of  
termination



**POOR PERFORMANCE**

# POOR PERFORMANCE

## Naomy Jemutai Kirui v Unilever Tea Kenya Limited [2020] eKLR

The proper procedure once poor performance of an employee is noted is to:

- point out the shortcomings to the employee; and
- give the employee an opportunity to improve over a reasonable length of time.



# POOR PERFORMANCE: PROCEDURE FOR TERMINATION

Conduct an appraisal or review of the employee's performance



Inform the employee the outcome of the appraisal and place the employee on a PIP



Conduct another evaluation to assess the employee's performance at the end of the PIP



Issue a letter notifying the employee that their performance is unsatisfactory



Conduct a disciplinary hearing and terminate; s 41 Employment Act



CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA

A black and white photograph of a long railway bridge. The tracks run straight down the center of the frame, receding into the distance towards a bright light at the end of the bridge. The bridge's structure is made of dark metal beams with many rivets, creating a strong sense of perspective and depth. The sky is a uniform light gray, and the water of a river or lake is visible on the right side of the bridge.

**DISMISSAL WHILST ON PROBATION**

# DISMISSAL WHILST ON PROBATION

Section 42 of the Employment Act excludes the application of Section 41 regarding fair procedure during the termination of probationary contracts.

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

- Section 42 of the Employment Act is unconstitutional.
- An employer cannot justify terminating an employee on probation based on section 42 of the Employment Act.



# DISMISSAL WHILST ON PROBATION

In *John Muthomi Mathiu v Mastermind Tobacco (K) Limited* [2018] eKLR, the court held that:

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

## Termination of Employment



# PROBATIONARY CONTRACT: PROCEDURE FOR TERMINATION

Have a fair and valid reason for terminating the employee



Issue a letter notifying the employee of the reasons for termination



Invite the employee for a disciplinary hearing



Hold the disciplinary hearing



Issue a certificate of service



CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA





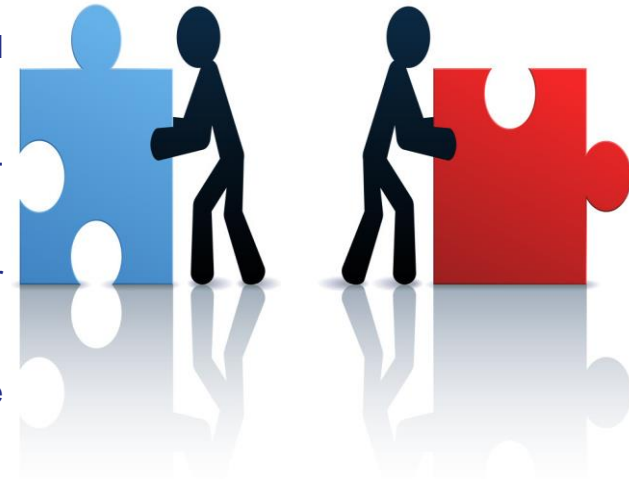
**MUTUAL TERMINATION**

# MUTUAL TERMINATION



INCORPORATING  
**KIETI LAW LLP, KENYA**

- To terminate the employment relationship, parties may enter into a mutual separation agreement.
- Offer of mutual termination should come from the employee or could be misconstrued as constructive dismissal.
- *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (JA 95-2014) [2016] ZALAC 2 (3 February 2016):
  - a separation agreement should be treated in the same manner as any other agreement between an employer and an employee.
  - a contract may be vitiated by duress where intimidation or improper pressure renders the consent of the party subjected to duress not true consent.





**REDUNDANCY**

# REDUNDANCY

CLIFFE DEKKER HOFMEYR

- An employer is generally allowed to terminate an employment contract where there is a redundancy.
- The Employment Act further provides that an employer may fairly terminate an employee's contract solely based on the operational requirements of the employer.



# REDUNDANCY

CLIFFE DEKKER HOFMEYR

1

## **Jane I Khalachi v Oxford University Press E. A Limited Cause no. 924 of 2010**

- Employers have the prerogative to determine the structures of their businesses and make positions redundant.
- Positions become redundant, not employees.
- When the position becomes redundant, the employee can be re-deployed or retrenched.

2

## **Agnes Ongadi v Kenya Electricity Transmission Company Limited [2016] eKLR**

- A redundancy, a restructuring or reorganization commenced with the sole purpose of laying off specific employees is a sham.
- The Employment Act does not list specific instances of redundancy and therefore an employer should ensure that the reason is based on a justifiable business reason.

# REDUNDANCY PROCEDURE

CLIFFE DEKKER HOFMEYR

Notice of intended redundancy to the employee / trade union



Notice of intended redundancy to the Labour Officer



Consultation process



Notice of termination / new appointment / retention



Issue a certificate of service



CLIFFE DEKKER HOFMEYR

INCORPORATING  
**KIETI LAW LLP, KENYA**

**QUESTIONS?**



## COPYRIGHT

---

All rights reserved. This presentation and/or any part thereof is intended for personal use and may not be reproduced or distributed without the express permission of the author/s.

© 2022

[cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)



INCORPORATING  
**KIETI LAW LLP, KENYA**