



**Chomba v Legacy Dental Clinic (Cause E6588 of 2020)
[2025] KEELRC 2565 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2565 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6588 OF 2020
JW KELI, J
SEPTEMBER 26, 2025**

BETWEEN

GRACE MUTHONI CHOMBA CLAIMANT

AND

LEGACY DENTAL CLINIC RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 21st of December 2020, the claimant sued the respondent, said to be the former employer, and sought the following Orders:-

- a. A declaration that the Respondent breached the Claimant’s legitimate expectations and constitutional rights to fair labour practices;
- b. The Respondent be directed by an order of this Honourable court to reinstate the Claimant in employment with full benefits;

In the alternative, this Honourable Court do award the Claimant as follows:

- a. Special damages in the sum of Kshs. 171,5122/=;
- b. General damages for breach of statutory, legal and constitutional rights;
- c. General damages for breach of legitimate expectations;
- d. General damages for unlawful termination ;
- e. General damages for discrimination;
- f. Special damages in the sum of Kshs. 171,512/=;
- g. Costs of this Claim;
- h. Interest thereon at Court rates;



- i. Any other relief that this Honourable Court may deem fit and just.
2. The claimant in support of the claim filed her verifying affidavit sworn on 21st December, 2020 with a bundle of documents attached; list of witnesses of even date; Claimant's witness statement; and list of documents all of even date.
3. The Respondent did not enter appearance or file a Response to the Memorandum of Claim. Consequently, the matter proceeded ex parte through a formal proof hearing of the Claimant's case.

Hearing and evidence

4. The claimant's case proceeded on formal proof on the 28th May 2025 when the claimant adopted as her witness statement dated 21st December 2020 and produced documents and her list of documents dated 21st December 2020 all as her evidence in chief and closed the claimant's case.

The Claimant's case in summary

5. The Claimant's case was that she was employed by the Respondent as a receptionist and dental assistant on or about 19th March, 2018 at a monthly salary of Kshs. 15,000/= . The Claimant states that in the year 2018, her salary was adjusted to Kshs. 16,000/= and that her statutory deductions of NSSF and NHIF were not remitted as required by the Respondent according to the law despite requests by the Claimant. The Claimant avers that in January 2020, she was earning a salary of Kshs. 20,000/= without any statutory deductions, at the time, the Respondent was giving the Claimant two(2) days off every month on alternate weekends. The Claimant avers that she was not given leave throughout her employment save for the two weeks in December when the Clinic would close for the December holidays. It is claimed that the Claimant was never issued with a contract of employment.
6. The Claimant's grievance against the Respondent relates to her unlawful termination from employment. She avers that she was unfairly and verbally dismissed from her employment by the Respondent on 22nd August, 2020 without any sufficient reason and without payment of her dues. It is averred that on the 22nd August, 2020. an office meeting was held where unsubstantiated allegations were leveled against the Claimant about diverting clients to other doctors. It is claimed that no warning letter or suspension letter was issued to the Claimant. The Claimant states that she was verbally instructed to go home pending investigations and await the Respondent's call. From the forgoing facts, it is the Claimant's case that the Respondent breached her constitutional rights to fair labour practices as contained in *the Constitution* and the *Employment Act* and on account thereof she has suffered loss and damage and seek the aforementioned reliefs from the Court.

Determination

Issues for determination

7. The Claimant in her written Submissions dated 30th June, 2025, submitted the following four(4) issues for the Court's determination namely:-
 - a. Whether the Claimant was employed by the Respondent herein,
 - b. Whether the termination of the Claimant's services in accordance with the *Employment Act*,
 - c. whether the Claimant is entitled to any dues from the Respondent herein if so, how much, and,
 - d. whether the Claimant has proved his case beyond reasonable doubt.



8. The court finds the issues for determination in the unopposed claim to be
 - a. Whether the respondent was an employer of the claimant.
 - b. Whether the respondent terminated the employment of the claimant unfairly .
 - c. Whether the claimant is entitled to relief sought.

Whether the respondent was an employer of the claimant

9. The existence of the employment is at the core of the claim. The claimant pleaded that she was employed as a receptionist by the respondent on the 19th march 2018. That she did induction under another employee called Hannah who was a relative of one of the directors. The claimant stated that she was never issued with a contract of service by the respondent. The burden of proof in undefended suits is on the claimant on a balance of probabilities as per section 107-109 of the Evidence Act thus-
'107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”The evidence produced before the court was an extract of the Respondent’s website which had the name of the claimant indicated as Grace, receptionist. It had also had and name of Ann , dental assistant and name of two persons indicated as Dr. Reynolds and Dr. James. The claimant further produced MPESA payments in which she had sums of money from James Kamande, Reynolds Matata and Hanna Kiagiri. The names James and Reynolds resemble the names in the website of the respondent as produced in court. The court finds the foregoing establishes on a balance of probabilities that the claimant was an employee as receptionist of the respondent.

Whether the respondent terminated the employment of the claimant unfairly

9. The claim was undefended. The burden of proof of the unfair termination lies with the claimant and on discharge of the same on balance of probabilities the burden passes to the employer to justify the termination. This was undefended claim and in prove of the claim the claimant only relied on her witness statement which she adopted as her evidence in chief. The claimant’s case is as summarised above.
 1. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or



- (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).
11. The Court has already established the claimant was employed by the respondent. The court had no basis to doubt the employment was terminated. On whether it was unlawful, the Court found that the claimant discharged her burden of proof on balance of probabilities. She stated that she was unfairly and verbally dismissed from her employment by the Respondent on 22nd August, 2020 without any sufficient reason and without payment of her dues. It is averred that on the 22nd August, 2020, an office meeting was held where unsubstantiated allegations were levelled against the Claimant about diverting clients to other doctors. It is claimed that no warning letter or suspension letter was issued to the Claimant. The Claimant states that she was verbally instructed to go home pending investigations and await the Respondent’s call. The Respondent did not call her back. The court confirmed that service of claim effected on the respondent as per affidavit of service of Dickson Ooko Giani sworn on the 3rd February 2025. There was no response. Consequently, the facts of the termination by the claimant stood uncontroverted. The termination of employment ought to be based on valid reasons and proved by the employer according to the provisions of section 43 of the Employment Act. This did not happen. The claimant stated she was to be called. There was no notice to show cause for the court to consider. For the foregoing reasons the court finds that the claim of unfair termination as laid out in the witness statement of the claimant was uncontroverted.
12. There was no procedural hearing to prove the validity of the allegations leading to the suspension. The very failure by the employer to issue a notice to show cause and call the claimant for hearing before termination led the court to make adverse finding that the allegations leading to the undefined suspension had no basis and that the claimant was unlawfully and unfairly terminated from employment on the 22nd August 2020. To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR). The court finds the Respondent unfairly terminated the employment of the claimant.

Whether the claimant is entitled to relief sought.

13. The claimant sought for the following relief-
- c. A declaration that the Respondent breached the Claimant’s legitimate expectations and constitutional rights to fair labour practices;
 - d. The Respondent be directed by an order of this Honourable court to reinstate the Claimant in employment with full benefits;
- In the alternative, this Honourable Court do award the Claimant as follows:
- j. Special damages in the sum of Kshs. 171,5122/=;
 - k. General damages for breach of statutory, legal and constitutional rights;
 - l. General damages for breach of legitimate expectations;
 - m. General damages for unlawful termination ;
 - n. General damages for discrimination;



- o. Special damages in the sum of Kshs. 171,512/=;
 - p. Costs of this Claim;
 - q. Interest thereon at Court rates;
 - r. Any other relief that this Honourable Court may deem fit and just.
14. The court is obliged under section 50 of the [Employment Act](#) to apply the remedies under section 49 of the [Employment Act](#) on finding unfair termination. This was an employment based on oral contract. It was undocumented. The claim was unopposed. The court finds that in written submissions the claimant ignored the claim for re-instatement which is a remedy only available to the claimant within three years of termination as per section 12(3) of the [Employment and Labour Relations Court Act](#) to wit- ‘ (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; ’ The employment having been terminated in August 2020 the relief of reinstatement was no longer available to the claimant. Three years having since lapsed. The court then considered the alternative reliefs sought in the claim.
15. On compensation for the unfair termination - The Claimant submitted that having worked for the Respondent from March 2018 to August 2020 about three years, she had legitimate expectation to continue working but for the unfair termination. That in view of the foregoing consideration, an award of twelve (12) months gross salary is reasonable compensation for the injury suffered. Hence Kshs. 20,000 x 12 years=Kshs. 240, 000/= .The claimant pleaded in her witness statement that as a receptionist she was earning Kshs. 20,000. She adopted the statement as evidence in chief. The claimant pleaded she was employed on 19th March 2018 and her services terminated in august 2020 with salary paid. That was employment of almost 3 years. In determination of the compensation capped at the equivalent of 12 months salary, section 49(4) of the [Employment Act](#) provides for guidelines to apply thus-
- ‘(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee’s length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law;
 - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;



- (j) any expenses reasonable incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”.

Applying the foregoing factors, the court finds that the claimant had been in employment for a period of almost three years, she was not subjected to investigations or a disciplinary hearing to establish the allegations levelled against her by the employer. The employer did not issue any written notice to show cause. The claimant was approximately 25 years as at termination and 30 years this year. There was no difficulty laid before the court in her securing another job as a receptionist in the market. There were no other benefits payable to the claimant and she was not even on pension. Taking the foregoing into account the court finds that compensation equivalent of 5 months gross salary of Kshs. 20000 is adequate compensation noting that the compensation is not about punishment of the employer but in pursuit of justice. Thus Kshs. 100000.

16. On Notice pay- The claimant is entitled to notice pay of 1 months salary under section 35 of the *Employment Act*. The notice pay is also a remedy under section 49 of the *Employment Act*. In addition to the compensation the claimant is awarded notice pay in lieu of Kshs. 20000.
17. On Claim for annual leave in lieu- the claimant submitted that she was entitled to pay in lieu of leave as the Respondent has tendered no evidence of leave records. She stated that in 2018, the clinic closed for two weeks. The claimant did not state to the court that she applied for leave and it was denied. Section 28 (4) of the *Employment Act* limits the days of leave that can be carried forward to 18 months – ‘(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.’ The court awards untaken leave for 18 months thus Kshs. 30000.
18. Claim for Service pay-. The claimant was not under NSSF. Her employment was undocumented. Section 35 (5) of the *Employment Act* provides for service pay-‘35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.’ The regulation of wages order provides for 15 days for every year worked. The same is awarded Kshs. 20,000/30 x 15 days thus Kshs.10,000/=.
19. The claimant submitted that she worked overtime for the Respondent and sought payment for 1461 overtime hours worked, for the sum of Kshs. 121, 512/=. The burden of proof of extra hours worked beyond the official time is on the employee. The claimant stated that she worked 8am to 6pm Monday to Saturday . In total she stated it was 1461 overtime hours during period of employment which she stated was 6 hours overtime for all Saturdays worked and 6 hours for all the public holidays worked. The court emphasis is on the threshold of burden of proof under the *Evidence Act*-

’107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.” The working hours under the Employment Act are stated as – ‘27. Hours of work

- (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.
- (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.”

Saturday thus was a working day for the claimant, with Sunday as the rest day. The claim of 6 extra hours on Saturday was not proved on a balance of probabilities. The working hours under the Regulation of Wages (General) Order, 1982 is as follows-

‘5. Hours of work

- (1) The normal workweek shall consist of no more than fifty-two hours of work spread over six days. The court finds that the claimant did not substantiate the extra hours she worked on Saturday, as that was not her rest day. On public holidays, the claimant did not specify which holidays she worked. In her statement, she stated that the office closed for two weeks in 2018 for Christmas. That period included public holidays, meaning she could not have worked on all of them. The court, in these circumstances, finds that the claim for overtime was not proven on a balance of probabilities.

20. The claimant sought for a Certificate of Service from the respondent pursuant to Section 51(1) of the Employment Act, 2007. That is the law and the same to issue.

Conclusion

21. The claim is allowed. Judgment is entered for the claimant against the respondent as follows-

The termination is held as unlawful and unfair

Notice pay in lieu for 1 month salary Kshs. 20000

Compensation equivalent of 5 months salary Kshs. 100000

Leave pay in lieu equivalent of 18 months Kshs. 30000

Service pay of Kshs. 10000

The total sum awarded of Kshs. 160000 plus costs of the suit is with interest at court rate from date of judgment .

22. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In the presence of:

C/A Otieno



Claimant – Ms Njoki

Respondent – absent

