



**Livoi v Avacare Kenya Limited (Cause E733 of 2023)
[2024] KEELRC 2003 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2003 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E733 OF 2023**

JK GAKERI, J

JULY 31, 2024

BETWEEN

CLIFFORD OTWERE LIVOI CLAIMANT

AND

AVACARE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit on 8th September, 2023 vide an undated Memorandum of Claim alleging unlawful termination, non-payment of overtime and house allowance.
2. It is the Claimant's case that he was employed by the Respondent as a Medical Representative under a contract signed on 18th November, 2019 and served diligently until 18th September, 2020, when his employment was terminated on account of poor performance.
3. It is the Claimant's case that he was not served with a notice to show cause, warning or complaint on his performance and due process was not followed in the termination as he was not accorded an opportunity to be heard as by law required.
4. The Claimant prays for;
 - i. A declaration that the Claimant's employment was unfairly terminated by the Respondent.
 - ii. House allowance Kshs.120,000.00.
 - iii. 3 months' salary for unlawful termination Kshs.240,000.00.
 - iv. Overtime Kshs.256,666.00
Total Kshs.616,666.00.
 - v. Costs of this suit and interest thereon.



- vi. Any other relief the court may deem just and expedient to grant.

Respondent's case

5. In its response filed on 21st September, 2023, the Respondent denies that the Claimant was its employee but states that he was employed on contract as Medical Representative effective 18th November, 2019 and was on probation for a period of 6 months during which period his performance was below expectations and was notified as much vide letter dated 31st July, 2020 when probation ended, it was extended for a period of 3 months from 3rd August, 2023 to 2nd November, 2023 but the Claimant's performance did not improve and the Respondent terminated his employment vide letter dated 18th September, 2020 and was paid final dues amounting to Kshs.225,033.76 and confirmed that he had no further claims against the Respondent.
6. It is the Respondent's case that the Claimant's salary included house allowance as per the contract of employment and he was not entitled to compensation.
7. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

8. The Claimant adopted the written statement and was cross-examined by the Respondent's counsel.
9. The Claimant confirmed that he would report to work at 7.00 am and leave at 6.00 pm and provided raw timesheets he had papered as evidence of overtime.
10. The sheets were dated July 2018 yet he testified that he was employed on 19th November, 2019. He alleged that he made a mistake.
11. The Claimant confirmed that he was employed as a Medical Representative and used to report to the office and the field and overtime depended on the time he reported in either place.
12. Puzzlingly, the Claimant alleged that the appointment letter on record was a forgery though he signed the offer letter but did not disclose the date he did so.
13. The Claimant testified that he did not report the forgery to the police but swore an affidavit on it, because the instant suit is civil not criminal.
14. He admitted that he was paid by the Respondent on termination of employment.

Respondent's evidence

15. RWI, Dr. Sani Dennis confirmed, on cross-examination that the Claimant was employed by the Respondent as a Medical Representative on 18th November, 2019 and assigned a region and reported to the Field Manager, Mr. Oluosi.
16. RWI testified that the Claimant had monthly targets to meet and was supposed to visit doctors, Pharmacies and Hospitals to promote the Respondent's products.
17. The witness confirmed that since it was a sales job, it was the duty of the Claimant to organize himself and reporting to the office was not necessary.
18. It was RWI's testimony that the Claimant was unable to attain his targets during probation and the probation was extended for 3 months after it ended in May 2020.



19. The witness confirmed that the Claimant's performance was reviewed on 31st July, 2020 before which date performance was evaluated monthly.
20. On the time sheets, the witness testified that the same would be approved by the Field Officer, Payroll Manager and the Country Head and all employees had a company email address.
21. The witness confirmed that the extension of probation was slated to end in October 2020.
22. He admitted that the Respondent did not issue a notice to show cause for the alleged poor performance.
23. That the Claimant's salary was inclusive of house allowance as per the contract of employment.
24. According to the Respondent, the Claimant was still on probation in October 2020.
25. The witness confirmed that the Claimant's contract of employment was signed by the Country Head, Group-Head, Group Head Human Capital and the Claimant.
26. On re-examination, RWI testified that he could not find the letter of extension of probation though on record.
27. The witness contradicted himself by testifying that probation was extended from May to July 2020.
28. The witness clarified that Time Sheets showed the days worked in the field and had to be approved by the Line Manager and the Country Head and forwarded to finance for purposes of payment and money spent on lunch was refunded.
29. It was his testimony that the Claimant's Time sheets on record could not pass the test.
30. Finally, the witness testified that during probation, notice of termination of employment was 15 days.

Claimant's submissions

31. The Claimant did not address any specific issue but submits that the Respondent was unable to show that the Claimant's performance was poor or that the termination of employment was fair.
32. According to the Claimant, probation ended on 18th May, 2020 and the Respondent could not explain the Claimant's status between 19th May, 2020 and 30th July, 2020.
33. As to whether the Respondent should be allowed to file additional documents, the Claimant submits that it should not as it had already filed its documents dated 12th September, 2023.
34. That the contract of employment on record be expunged as the signatures on it vary. That only the offer letter ought to be admitted as genuine.

Respondent's submissions

35. By 7th July, 2024 when the court retired to prepare this judgment, the Respondent had not filed submissions.

Analysis and determination

36. It is common ground that the Respondent employed the Claimant on 18th November, 2019 as a Medical Representative to promote its products.
37. It is also not in dispute that the Claimant was on probation for the first 6 months of employment. It therefore follows that probation ended on 17th May, 2020.



38. However, evidence on record shows that the Claimant's probation was extended for three months from 3rd August, 2023 to 2nd November, 2020.
39. Finally, the Claimant's employment was terminated vide letter dated 18th September, 2020 for poor performance.
40. After careful consideration of the claim, response, evidence on record and submissions, the issues for determination are;
 - i. Whether the Claimant was on probation as at the date of termination of employment.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
41. Before delving into the foregoing issues, it is essential to dispose of the question whether the employment contract on record ought to be expunged on account of differing signatures as submitted by the Claimant.
42. During cross-examination, the Claimant testified that his appointment letter was forged and had sworn and filed an affidavit on the forgery.
43. Regrettably, there is no affidavit on record on the issue of signatures.
44. What the Claimant filed are two responses to the Respondent's response to the claim dated 11th October, 2023 and 2nd November, 2023 respectively where he denies having signed the appointment letter and was reporting to a different Line Manager not the one who signed his appointment letter.
45. The Claimant, however adduced no evidence as to who was supposed to sign his appointment letter on behalf of the Respondent, evidence only the Respondent could provide.
46. On the alleged forgery, the Claimant adduced no evidence as he did not amend the witness statement and raised no objection at the hearing.
47. Evidently, the Claimant is inter alia contesting the signature on the contract of employment dated 18th November, 2019 that it was forged.
48. According to the Claimant, the genuine signature is the one on the Letter of Offer dated 18th November, 2019.
49. In support of its case, the Respondent provided several copies of documents such as probation extension letter dated 31st July, 2020, terminal dues letter dated 9th October, 2020, staff final dues computation and collection of final dues Cheque No. 000307 of Kshs.225,033.75 on 15th October, 2020.
50. Similarly, the Claimant's signature on the time sheet resembles signatures on documents provided by the Respondent.
51. The foregoing documents contain the Claimant's signature and to the naked eye, none of them is identical to the alleged genuine signature, though similar in certain respects and RWI confirmed as much on cross-examination.
52. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove that the signature on the employment contract on record was forged.



53. As to whether the Claimant was still on probation as at the date of dismissal on 18th September, 2020, the Claimant testified that when the Respondent's attempt to have him resign on 31st July, 2020 fell through, his probation was extended for 3 months yet it had lapsed on 18th May, 2020.
54. The Respondent's witness testified that the Claimant was still on probation as at the date of termination.
55. Section 2 of the *Employment Act* defines Probationary Contract as;
- A contract of employment which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.
56. Both the Offer Letter and the Employment Contract dated 18th November, 2019 provided for a 6 months probationary period, a fact the Claimant was aware of.
57. Under Section 42 of the *Employment Act*;
- (2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
58. It is common ground that the Claimant's probationary period commenced on 19th November, 2019 and lapsed on 18th May, 2020 and the purported extension from 3rd August, 2020 to 2nd November, 2020 was concluded more than 2 months after the Probationary Contract had lapsed.
59. The Respondent could not explain the Claimant's status after 18th May, 2020 and confirmed that an appraisal was conducted on 31st July, 2020 and a decision to extend probation made.
60. Was the Claimant still serving under a Probationary Contract on 31st July, 2020?
61. The simple answer to the foregoing question is in the negative.
62. Typically, an employee on probation ought to be appraised before the probationary period lapses and a decision made on the way forward.
63. Where the employer does nothing and the Probationary period lapses and the employees continues rendering services and is paid a salary, the employee is deemed to have been confirmed to the position by operation of law and cannot thereafter be subjected to another probationary contract.
64. The foregoing is fortified by the provisions of Section 42(3) of the *Employment Act* that –
- No employer shall employ an employee under a probationary contract for more than the aggregate period provided under sub-section (2).
65. According to the Concise Oxford English Dictionary, 12 Edition, extend means;
- “make larger or longer in space or time”.
66. Similarly, extension means;
- “the action or process of extending an additional period of time given to someone to hold office or fulfil an obligation”.
67. Clearly, the Claimant's Probationary Contract was for 6 months and in the court's view ended after 6 months in May 2020 and the purported extension in August 2020 was of no consequence notwithstanding the fact that the Claimant appended his signature on the letter.



68. As regards termination, the court is guided by the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR that for a termination of employment to pass the fairness test, the employer must have a substantive justification to do so and must have conducted it in accordance with a fair procedure.
69. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
70. The foregoing sentiments are consistent with the provisions of Section 41, 43, 44, 45 and 47(5) of the [Employment Act](#), which address the requirements of reason(s) for termination of employment and fair procedure.
71. While the Respondent maintains that the Claimant's performance was below expectations, the Claimant argues that the Respondent failed to prove or show that his performance was wanting.
72. In determining this issue, the court is guided by the sentiments of Mbaru J. in *Jane Samba Mukala V Ol Tukai Lodge Ltd* (2013) eKLR as follows;

“This is important to note as where poor performance is shown to be the reason for termination, the employer is placed at a higher level of proof as outlined under Section 8 of the [Employment Act](#) to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy in practice on how to measure good performance as against poor performance. Section 5(8)(c) further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employee get a fair chance when they are of poor performance.

Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they had taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance.

The effort leading to this decision must be demonstrated otherwise, it would be an easy option for abuse.

Beyond having an evaluation measure and before termination on the ground of poor performance, an employee must be called and an explanation of the poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.”

73. Mbaru J. was emphatic that provisions of Section 41 of the [Employment Act](#) had to be complied with.
74. In the instant suit, while the Respondent's witness testified that the Claimant had monthly targets to meet, he availed no evidence of the alleged reviews to demonstrate that indeed the Claimant's performance was below expectations.
75. Puzzlingly, although RWI confirmed on cross-examination that the Claimant's performance was reviewed on 31st July, 2020, he did not demonstrate how the Claimant scored.



76. Similarly, RWI adduced no evidence to show that the Respondent had a performance management policy for its staff or the Medical Representatives or that it evaluated or appraised its staff regularly to make decisions on the employee's employment.
77. In the absence of an operational appraisal or evaluation policy or system, it is difficult for the Respondent to prove how it established that the Claimant's performance was below expectation.
78. In the absence of record of the Claimant's agreed monthly targets and performance per month or as at the end of probation or July 31st 2020, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment on 18th September, 2020 and the same was unfair.
79. Concerning procedure, the Claimant testified that he was issued with neither a notice to show cause nor invitation for a hearing and no hearing took place, facts RWI confirmed on cross-examination.
80. From the evidence on record, it is common ground that the provisions of Section 41 of the Employment Act were not complied with.
81. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal emphasized that the elaborate process prescribed by the provisions of Section 41 of the Employment Act was mandatory and non-compliance renders a termination of employment procedurally unfair.
82. For the foregoing reasons, it is the finding of the court that termination of the Claimant's employment by the Respondent was contrary to the provisions of Section 45 of the Employment Act and thus unfair.

Appropriate reliefs

i. Declaration

83. Having found as above, the declaration that the termination of employment was unfair is merited and is granted.

ii. House allowance

84. Although the Claimant argues and testified that he was not paid house allowance for the duration served, and the salary structure on record reveals that there was no entry for house allowance, Clause 7 of the Employment Contract dated 18th November, 2019 issued pursuant to the offer letter states that house allowance was included in the Claimant's net salary.
85. Similarly, the only statutory deduction to the Claimant's salary were NSSF which would appear to suggest that the Respondent was paying tax on the Claimant's salary at its cost.
86. Since the employment contract is the primary document in an employment relationship, its terms are determinative on the terms of the relationship unless otherwise proved as held by the Court of Appeal in *Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu* (2019) eKLR. The court is satisfied that the Claimant has failed to prove entitlement to house allowance. The prayer is declined.

iii. Overtime

87. The Claimant prays for overtime of Kshs.256,666/= and attached two pages of Time Sheets on the Respondent's letterhead for the period 19th October to 18th November, 2019 and 19th November to 18th December, 2019.



88. Surprisingly, the Time Sheets are dated 19th July, 2018, more than one (1) year before the Claimant was employed by the Respondent and only the Claimant has signed the document as the author.
89. RWI testified the form had to be approved by the Line Manager, Country Head and Finance.
90. It is unclear to the court why a claim for overtime, the Claimant first month of employment was not presented to the relevant officers for approval.
91. More significantly, the Claimant's undated written statement on record makes no reference to any unpaid overtime or attempts made to have the same paid.
92. Similarly, the Claimant tendered no evidence to show that he was paid overtime at any time during his employment by the Respondent.
93. In sum, the Claimant has not tendered any evidence as to how the alleged overtime accrued.
94. Relatedly, the contract of employment on record is explicit that the Claimant's working hours was fixed at 45 per week.
95. Neither the offer letter nor the employment contract provided for overtime payment.
96. For the foregoing reasons, the court is not persuaded that the claim for overtime is sustainable and it is dismissed.

iv. Three (3) months' salary compensation for unlawful termination

97. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*.
98. The court has taken into consideration the fact that the Claimant was an employee of the Respondent for a very short time, did not appeal the Respondent's decision or otherwise express his desire to remain in the Respondent's employment. The Claimant had no recorded cases of misconduct or indiscipline and contributed to the termination of his employment.
99. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair, Kshs.240,000.00.
100. In the end, judgment is entered in favour of the Claimant against the Respondent in the following terms;
 - a. Declaration that termination of the Claimant's employment was unfair.
 - b. Equivalent of three (3) months' salary, Kshs.240,000.00.
101. In the circumstances, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

