



**Oduor v Getrudes Children Hospital (Employment and Labour Relations Cause E6553 of 2020) [2024] KEELRC 2426 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2426 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6553 OF 2020  
AN MWAURE, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**JARED OCHIENG ODUOR ..... PETITIONER**

**AND**

**GETRUDES CHILDREN HOSPITAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant in his statement of claim dated 9<sup>th</sup> September 2020 states that he was employed by the respondent on a fixed contract of employment for a period of 5 months from 1<sup>st</sup> August 2019 to 31<sup>st</sup> December 2019.
2. He says he was put on a competent assessment test and was found to be highly adept at his job.
3. He says on 22<sup>nd</sup> October 2019 he was offered a letter of appointment to the position of medical officer clinical department on permanent terms.
4. He says the employment was to take effect from 4<sup>th</sup> November 2019 and his monthly gross salary was to be kshs 230,000/-. He was to serve on probation for 3 months subject to getting satisfactory responses from his references and his former employer only.
5. The claimant states he worked for the respondent until 5<sup>th</sup> June 2020 when he was informed that his contract would not be confirmed as his performance was below expectation. He says he was no longer on probation since his probationary period had expired on 4<sup>th</sup> February 2020.
6. He further says that clause 6 of his letter of employment stipulated that his employment could be terminated by giving 2 months notice or 2 months payment in lieu of notice.



7. He therefore avers that his termination was unlawful and has caused him and his family anguish and emotional distress. He claims for damages due to the above blatant infringement of his rights to fair labour practice.

### **Respondents Response**

8. The respondent filed a response to the memorandum of claim and his response is dated 29<sup>th</sup> September 2022. He admits that the claimant was employed on permanent terms from 4<sup>th</sup> November 2019 but he was to be on probation for 3 months. During the probationary period each party could terminate the contract by giving 2 weeks notice or salary in lieu of notice.
9. The claimant was to be subject to the staff rules and regulations.
10. The respondent says that at the end of the probation in February 2020 the same was extended for a further 3 months and he was put under another supervision due to poor working relationship with his first supervisor. At the end of the extended probation the claimant was found not to have performed competently as required and his appointment was not confirmed.
11. He says he computed claimant's dues and paid him upon clearance. He was also given a certificate of service.
12. The respondent says that the claimant appealed the decision not to confirm him and he was heard on 6<sup>th</sup> July 2020 but the non-confirmation of his employment was upheld.
13. The respondent seeks the Court to find claimants' termination was lawful as he was terminated during his probation.

### **Claimant's evidence.**

14. The claimant during his hearing on 6<sup>th</sup> December 2021 reiterated what he had pleaded that he was terminated without a cause and his probationary period had already expired. He says he was posted to Muthaiga Hospital and was told to continue working awaiting a confirmation but he never got any such confirmation.

### **Respondent's Evidence**

15. The respondent witness RW1 one Kenneth Ochieng gave his evidence in Court on 24<sup>th</sup> April 2024. He says he is the respondent's Human Resource Manager. He admits the claimant employment was not confirmed and so he was terminated during his probationary period. He says the claimant did not receive a notice to extend his probation but was assessed by his supervisor.
16. The witness says claimant was entitled to pension as per his letter of appointment but he was not paid the same.

### **Submissions**

17. The claimants submissions dated 3<sup>rd</sup> June 2024 were considered by this honourable Court. Equally the respondent's submissions dated 1<sup>st</sup> July 2024 were considered.

### **Analysis and Determination**

18. The issues for determination in this case is:



1. Whether the claimant was on probation when his employment was terminated or had he transitioned to a permanent employee.
  2. Was he unlawfully terminated.
19. On the first issue the facts pertaining hereto are that the claimant was given an appointment letter dated 22<sup>nd</sup> October 2019 and was to take effect from 4<sup>th</sup> November 2019 and the contract would be terminated by giving 2 months' notice by either party or salary in lieu of notice. The claimant however was put on three months probation whereby he was to be appraised to confirm the position.
20. The contract further provided that during probationary period either party could terminate the contract by giving 2(two) weeks' notice or two weeks salary in lieu of the notice. He was informed his confirmation would be dependant on positive response from his references and his former employer.
21. The claimant served his probationary period for three months and proceeded to work for another four months. There is no evidence that he was assessed for performance and no letter was given to him to inform him that his probation was extended. In the absence of any such documentation it can only be presumed rightly that the claimant transitioned from being on probation to permanent terms.
22. The Court is persuaded by a case cited by the claimant in his submissions *Daniel Mutuku Njuguna v Kenya Institute of Mass Communicating* (2021) eKLR where a Court held:
- " the long and short of the foregoing premises is that I find that the claimants confirmation happened where claimant passed the 6 months mark without an immediate extension of the probation"
23. The respondent in its submissions states that the claimant's probation period was extended for a further period of three months and was put under a different supervisor. This may have been the intention of the respondent but Courts are guided by facts. There are no documents to prove the claimant was contacted and informed that his probation was to be extended. In fact there is even no letter to show his performance evaluation and extension of the probationary period.
24. As it is trite law that he who alleges must prove (section 107 of the *Evidence Act*) the respondent fell short of proving its allegations that they extended the claimant's probation. The only proposition therefore is that after February 2020 the claimant status became permanent terms employee.
25. In that case, the respondent should have complied with the employment laws in terminating the employee. The employment law provides in mandatory terms that an employer must give an employee valid reason as to why he is considering disciplining such a person. Section 45(1) of the *employment act* provides:
- No employer shall terminate the employment of an employee unfairly
26. The respondent did not give claimant a valid reason as to why he was terminating him. He may have said it was due to poor performance but the law is clear that if an employer was to terminate an employee for poor performance he must prove he had an evaluation tool to evaluate the performance of the employee. He must then have him go for a disciplinary hearing and should be informed he was undergoing disciplinary proceedings and it could lead to his termination.



27. In the above case of Kenya Science Research International Technical Allied Workers Union (KRSITANU) and Another cause No 273 OF 2010 the Court held that:

“a proper procedure once poor performance of an employee is noted is to point out the shortcomings of the employee and give an employee an opportunity to improve over a reasonable length of time.”

In the case, the Court held 2-3 months was a reasonable time for an employee to improve. In addition the Court held in the case of *Jane Wairimu Machira v Mugo Waweru & Associates* (2012) eKLR that an appraisal performance of an employee must of necessity involve active participation of an employee and that a credible performance appraisal process must evidentiary be participatory.

28. By now it is clear which direction the Court is taking in view of the foregoing. In short, the respondent did not present the employee with a valid reason for his termination. In that case issue no 2 is dealt with and it is held that the respondent failed to give a valid reason to terminate the claimant and also failed to follow the mandatory procedure mandated in section 41(1) of the *Employment Act* while taking the employee through the disciplinary process.
29. The Court finds and holds therefore that the claimant was unlawfully terminated and therefore judgment is entered in his favour.
30. Having entered judgment in favour of the claimant the Court holds that the respondent has to compensate.

#### Reliefs

1. Two months salary for failure to give 2 months notice as per the claimants contract Kshs 460,000/-
2. One Month salary equivalent for general damages considering the claimant served respondent for a short period at kshs 230,000/-
3. unpaid leave days is denied as claimant did not give specifics of the days he was claiming the same.
4. Costs are awarded to the claimant and interest at 14% from date of judgment till full payment. Total awarded is kshs 690,000/-.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

