



**Kibui v Harley Street Fertility Centre Kenya Limited (Cause 1331 of 2018)  
[2024] KEELRC 2671 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2671 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1331 OF 2018  
J RIKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**PAULINE WANJIRU KIBUI ..... CLAIMANT**

**AND**

**HARLEY STREET FERTILITY CENTRE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 27<sup>th</sup> August 2018.
2. She states that, she was employed by the Respondent as a Clinical Embryologist, on 1<sup>st</sup> September 2017.
3. She assisted the Respondent, in complying with World Health Organization [WHO] Guidelines, and Standard Operating Procedures.
4. Her contract required her to work, from 8.00 a.m. to 5.00 p.m. with 1-hour lunch break, from Monday to Saturday. Working hours could only be altered through a written notice of 1-month, issued by the Respondent to the Claimant.
5. She however, was routinely required to be in the office at 6.00 a.m. and work until late in the evening. She was also required to work on Sundays, on many occasions.
6. She requested to take leave sometime in July 2017, to attend her uncle's burial. The request was initially denied. Subsequently, she was subjected to harassment at the workplace, and blamed for everything that went wrong at the facility.
7. Her sick off days, overtime and election off day, were lumped together, and computed as annual leave days. She was told she could not claim overtime pay, as it was not included in her contract.
8. She continued to be subjected to harassment by the Respondent. In September 2017, she requested for a day off, to help her sister who had undergone surgery. Her request was denied.



9. In December 2017, she worked alone most of the time. She worked on Sundays and public holidays.
10. She wrote to the Respondent, requesting her work days be reviewed, to work from Monday to Friday. Her request was denied.
11. She was asked to attend a meeting convened by Kenya Obstetrical and Gynaecological Society. On return, she was alleged by the Respondent's 2 Directors, to have attended the conference without their knowledge. Her contract allowed her to attend conferences and workshops, for her professional development.
12. She was issued a warning letter.
13. The Respondent closed for Easter break, on 29<sup>th</sup> March 2018. The Claimant was told not to return to work when the Respondent resumed, on 3<sup>rd</sup> April 2018. She was advised to hand in her resignation letter.
14. On 3<sup>rd</sup> April 2018, she wrote to the Respondent, demanding her arrears of salary. On 6<sup>th</sup> April 2018, the Respondent wrote back, stating that it had summarily dismissed the Claimant. No reason was given to justify the decision.
15. Her salary for the month of April 2018 was withheld. She was denied bonus of Kshs. 270,000, payable under clause 10.3 of her contract. She was not issued notice of 3 months on termination, given under her contract.
16. She prays for Judgment against the Respondent, for: -
  - a. Salary for April 2018 at Kshs. 105,000.
  - b. Notice at Kshs. 315,000.
  - c. Bonus for 2016/2017 at Kshs. 270,000.
  - d. 12 months' salary in compensation for unfair termination at Kshs. 1,260,000.
  - e. Overtime of 65 hours and 55 minutes, gratuity and service at Kshs. 3,793,125.  
Total... Kshs. 5,743,125.
  - f. Certificate of Service to issue.
  - g. Costs, interest and any other suitable relief.
17. The Respondent filed its Statement of Response, on 26<sup>th</sup> September 2018. It is conceded that the Claimant was employed by the Respondent. She did not assist in establishment of WHO Guidelines and Standard Operating Procedures. She degraded existing Standards, through negligence.
18. Her contract stated that the Respondent could vary the hours of work. She could be called upon to work extra hours, or work on weekends, and on public holidays. There was no requirement for the Claimant to be issued a written notice, on change of the working hours. She was only required to report to work earlier than 8.00 a.m., on special occasions, considering the patients' treatment requirements. Such attendance was consensual, and involved other healthcare staff. The Claimant was nonetheless a habitual latecomer, who received several warnings from the Respondent.
19. She was reasonably compensated for all extra hours worked, as shown in the daily and overtime logs for the years 2017-2018. The Claimant was never harassed by the Respondent.



20. She was not authorized by the Respondent, to attend the Kenya Obstetrical and Gynaecological Society function. She attended without authorization, contrary to policy. In event she was required to attend training, the Respondent would authorize and facilitate her, and did so on 2 occasions, at Shivani and Ahmedabad [India].
21. She was negligent in performance of her duties, resulting in numerous complaints by patients. Her summary dismissal was justified.
22. At her interview preceding employment, she misrepresented herself as an experienced Embryologist, with a lot of experience. She alleged that she had previously trained Embryologists, a claim which turned out to be false. The Respondent endeavoured to improve her skills by sending her for trainings abroad.
23. She managed laboratory time poorly, compromising the quality of oocytes [eggs] and sperms of the Respondent's patients. On another occasion, her negligence led to delayed freezing and death of oocytes for the patients. She mislabelled or improperly identified embryos. She falsely documented the laboratory freezing sheets against time lapse in the incubator. She was frequently behind schedule. She was incompatible with colleagues. She did not follow instructions given by her superiors.
24. She breached her contract. She was not allowed to work for other fertility clinics, within Nairobi, for the next 12 months after leaving. The Respondent established that she continued to work for other fertility clinics in Nairobi, contrary to this restrictive covenant.
25. She was the recipient of several warnings from the Respondent, but never heeded the warnings. Her lack of professionalism dented the Respondent's reputation. She received and signed the minutes leading to her dismissal.
26. It was agreed through the minutes, that the Parties, "have discussed and agreed to end the employment contract, effective immediately. In addition, they agree to waive the 3 months' notice period as per the contract and the resultant equivalent of 3 months' salary in lieu." The Claimant signed the minutes voluntarily.
27. The Respondent urges the Court to dismiss the Claim with costs.
28. The Claimant filed a Reply to the Statement of Response, on 28<sup>th</sup> March 2018. She reiterated the contents of her Statement of Claim, while denying the assertions made by the Respondent, in the Statement of Response.
29. She gave evidence on 24<sup>th</sup> March 2023 and 5<sup>th</sup> April 2024, when she rested her case. Dr. P.S. Patel, a Consultant Gynaecologist and IVF expert, and Sweata Shah, a Director of the Respondent, both gave evidence for the Respondent on 5<sup>th</sup> April 2024, closing the hearing. The Claim was last mentioned before the Court on 25<sup>th</sup> June 2024, when the Parties confirmed filing and exchange of their Submissions.
30. The Claimant adopted her Witness Statement and Documents on record, [1-6]. On cross-examination, she told the Court that she has 2 Master's Degrees in biology. They were acquired from Makerere University in Uganda, and a University in Belgium. She had training in Indonesia as well. She had hands-on experience with animals and human beings.
31. It is not correct, as alleged by the Respondent, that her performance was wanting. She attended a meeting with Management, on 24<sup>th</sup> February 2018. She signed the minutes, but did not agree with the contents.



32. She signed the minutes on resignation. She was coerced to sign. She did not indicate that there was any dispute between the Parties, on signing the minutes.
33. It is true that she was taken for training to Ahmedabad and Shivani. Training did not add value. She had presented herself as an expert. It was her responsibility to ensure viability of patients' sperms. She never contributed to death of sperms. She understood the importance of observing time, during sperm harvesting. She was issued a formal warning for delaying the process of collecting eggs [OCR].
34. Her salary was Kshs. 105,000 monthly. She claims overtime of 65 hours. She does not know how the daily rate was arrived at. Anything above her normal working hours, was overtime. She prays for overtime of Kshs. 3.7 million, while compensation equivalent of 12 months' salary is claimed at a lesser amount of Kshs. 1.2 million. She worked for 20 months. The Claimant was not expected to train her team members. Bonus was governed by the contract. The Claimant did not complete 36 months. She worked for 20 months.
35. Redirected, she reiterated that she was a complete Embryologist, educated and trained in Uganda, Belgium and Indonesia. She was trained in IVF with requisite certificates. The trainings facilitated by the Respondent were for 1 week and 4 days. They were supplemental. For her first and subsequent Degrees, she spent about 10 years. The Respondent did not complain about her qualifications, until she was asked to resign. Sperms or eggs can die for other reasons, other than those attributed by the Respondent to the Claimant. She was not given reason to justify resignation. Her contract gave bonus to her after 18 months of service. It was not paid. She worked on weekends and public holidays without compensation.
36. Dr. P.S. Patel relied on his Witness Statement on record. He explained that clinical embryology deals with test-tube babies, in a layman's language. The Doctors give hormones to female patients. Once eggs are ready, they are harvested. The male partner gives sperms.
37. The Embryologist separates the eggs and grades them. She receives the sperms and grades them. She fertilizes each egg. Humidity and oxygen are monitored by the Embryologist. The Doctors select the healthiest fertilized eggs, and implant them in a female. A pregnancy test follows.
38. The Embryologist, is at the heart of the process. The laboratory is very sensitive. Even the Doctors do not have free access. It is a sterile atmosphere.
39. Punctuality of the Embryologist is crucial. She does all the preparatory work. The Doctor gives the Embryologist a notice of 40 hours, before a scheduled procedure. If harvesting of eggs is delayed, the quality of the eggs is poor. Procedure is expensive and emotionally taxing.
40. Dr. Patel did not recall seeing the Claimant before. He did not know her personally. He was approached and given records by the Respondent. The Claimant's documents and biodata, showed she had extensive training in human embryology.
41. Cross-examined, Dr. Patel confirmed that he did not know the Claimant personally. He never interacted with her professionally. He did not dispute her education and training. He would have hired her himself, based on her certificates. He reviewed medical records, which disclosed time-lapse in grading of embryos. He looked at data recorded between 2017 and 2018. He did not review patients' data. This was confidential. He was not privy to termination of the Claimant's contract.
42. Redirected, Dr. Patel restated that the Claimant was qualified, based on her records. He did not examine patients' data. There was time-lapse in grading of embryos. Dr. Patel consulted Gynaecologists who were involved. He was called in to assist in review of data, by the Respondent's Dr. Murage.



43. Sweata Shah relied on her Witness Statement and 2 Bundles of Documents filed by the Respondent, in her evidence-in-chief.
44. She told the Court on cross-examination, that she is not a Doctor. She is not an Embryologist. She is an eye-specialist. She could not testify about embryology. She did not dispute the Claimant's Degrees. The Respondent alleged that the Claimant falsified data. There were time-lapse images. There was reference made by the Respondent, to patient complaints. The complaints were not documented. The Claimant's contract did not designate her as a trainer. She was expected to train her colleagues, because she was a Senior Embryologist. The Respondent never said that the Claimant was unqualified. There were gaps, in her hands-on training. Sweata was present, when the Claimant left employment. The Claimant was not given a formal hearing. She did not dispute the contents of the minutes.
45. Redirected, Sweata told the Court that she is not an IVF expert. The Respondent's IVF expert Dr. Goswami was present, when the Claimant was hired. There was discrepancy between the Claimant's theoretical knowledge and practical work. She was offered trainings. The Parties agreed not to continue with the contractual relationship.
46. The issues are whether, the Claimant's contract was terminated unfairly or at all by the Respondent; and whether she merits the reliefs sought.

**The Court Finds: -**

47. The Claimant was employed by the Respondent, through a contract dated 1<sup>st</sup> September 2016, as a Clinical Embryologist.
48. The Respondent is in the business of In-Vitro Fertilization [IVF], a process which entails the joining of a woman's egg and a man's sperms, in a laboratory dish, intended to result is a baby. Dr. Patel, an IVF expert who testified for the Respondent, informed the Court that in common parlance, the process results in a test tube baby.
49. The Claimant's duties were contained in a comprehensive list, appended to the contract, and included among others, collection of eggs and sperms from patients for processing; maintaining their viability; using assisted reproductive technologies; monitoring embryo development; and selecting embryo for transfer to the recipient women.
50. The contract was for 3 years, commencing 5<sup>th</sup> September 2016, and expiring on 4<sup>th</sup> August 2019.
51. The Claimant did not serve her contract to the end. She left in circumstances which are contested, on 29<sup>th</sup> March 2018, about 1 ½ years, to the end of the contract.
52. She states that the Respondent terminated her contract unfairly, while the Respondent's position is that the Claimant resigned voluntarily, as shown in the minutes of a meeting held on 29<sup>th</sup> March 2018, attended by the Claimant, Sweata Shah and Dr. Alfred Murage.
53. Did the Claimant resign voluntarily, or was she pushed out?
54. There are various communications between the Parties over the period of she served, in which the Respondent complained that the Claimant was not discharging her sensitive IVF role, satisfactorily.
55. On 14<sup>th</sup> November 2017, the Claimant's work was the subject of a discussion between Sweata and Dr. Goswami, resulting in a communication to the Claimant, that she needed to improve her teamwork, time-management, attitude to colleagues, and train her juniors.



56. Sweata Shah e-mailed the Claimant on 3<sup>rd</sup> December 2017, complaining that a review of the attendance register, showed that the Claimant reported to work at 8.45 a.m. on most days.
57. There was a recorded meeting held on 24<sup>th</sup> February 2018, attended by Sweata, Goswami and the Claimant, where it was observed that the Claimant had a lot of experience in her field, and had been facilitated for training by the Respondent in India, but was prone to making mistakes.
58. Among the mistakes highlighted at the meeting, was that the Claimant ran the laboratory schedule poorly, leading to significant errors in handling of sperms and eggs; she delayed freezing of oocytes for over 12 hours, resulting in poor thawing; mislabelling of embryos; and poor communication regarding laboratory stocks.
59. It was highlighted that the Claimant received a warning dated 9<sup>th</sup> November 2017, but there was no improvement. The Claimant signed the minutes to this meeting, but stated that she did not concede to the accusations.
60. Sweata, Murage and the Claimant convened again on 29<sup>th</sup> March 2018. Sweata informed the meeting that the Respondent did not wish to continue working with the Claimant, in light of her unsatisfactory performance. It is recorded that both parties agreed, to end the contract immediately. They signed the minutes.
61. The Court does not have evidence, to establish that termination of the contract was not consensual. There is no evidence that the Claimant was compelled to sign the minutes.
62. There was documented evidence preceding the minutes of 29<sup>th</sup> March 2018, through which the Respondent's dissatisfaction with the Claimant's work, was consistently shown. The minutes of 29<sup>th</sup> March 2018, did not come up abruptly; they were the culmination of other meetings and communications, on the same subject.
63. The Claimant's letter to the Respondent's Managing Director, dated 3<sup>rd</sup> April 2018, referred to the minutes of 29<sup>th</sup> March 2018. The Claimant did not make any allegations in this letter, about being compelled to sign the minutes of 29<sup>th</sup> March 2018. She asked to be paid certain benefits, and reassured the Respondent, that it had been good working with the Respondent. She did not fault the consensual termination of her contract, which took place on 29<sup>th</sup> March 2018.
64. Parties appear to the Court to have reached a conclusion, that they could no longer work together. The Respondent had its patients to protect, in a complex medical field of assisted reproduction. The Court does not doubt that the Claimant was eminently educated and qualified in the rarefied area of embryology. But there was lapses, and recorded incidences of professional inattention, which would affect the Respondent's business negatively. Dr. Shah highlighted the harm, that the Claimant's inattention to detail, would have on the IVF process. It was important for the parties to disengage, to protect each other's professional reputation. The Claimant herself, needed to have her professional reputation protected, which would not have been possible, if she continued working for the Respondent. Mutual separation was the prudent way out.
65. The Court is satisfied that termination was consensual. It was not instigated by the Respondent. It was not unfair or unlawful.
66. Remedies. There is no basis for the prayer for compensation for unfair termination, pleaded at Kshs. 1,260,000. Termination was consensual.
67. The contract was terminated on 29<sup>th</sup> March 2018. The Claimant did not justify her prayer for salary for the month of April 2018, pleaded at Kshs. 105,000.



68. Although her contract provided for a notice period of 3 months, or payment of 3 months' salary in lieu of notice, the Parties agreed on 29<sup>th</sup> March 2018, to waive the 3 months' notice period, and the resultant 3 months' salary, in lieu of notice. The Claimant is not entitled to claim, what she waived.
69. She claims overtime at Kshs. 3,793,125. She was not able to establish in her evidence, how she arrived at this colossal overtime pay. Her annual salary was Kshs. 1,260,000 and over a period of 2 years, would be about Kshs. 2,520,000. It is not plausible that she earned more by way of excess hours, that what she was entitled to, by way of normal hours of work. She was a habitual latecomer, and did not establish her claim for overtime pay. Her prayer on overtime is inexplicably merged with prayers for gratuity and service. What is the relationship between overtime pay and gratuity/service?
70. Clause 10.3 of the contract stated that the Claimant would receive a guaranteed gross bonus of Kshs. 270,000, after the first 18 months of service. She would receive another Kshs. 270,000 for the remainder of the 18 months. She was not paid bonus.
71. The Claimant worked from 5<sup>th</sup> September 2016 to 29<sup>th</sup> March 2018. She had completed 18 months by the time she left. She ought to have been paid guaranteed bonus for the first 18 months of service. The Respondent did not establish why the benefit was not paid.
72. She is allowed the prayer for bonus at Kshs. 270,000.
73. Certificate of Service to issue.
74. No order on the costs.
75. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

In Sum, It Is Ordered: -

- a. The Respondent shall pay to the Claimant bonus at Kshs. 270,000.
- b. Certificate of Service to issue.
- c. No order on the costs.
- d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**JAMES RIKA**

**JUDGE**

