

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU
CAUSE NO. E040 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

MERCY ADOYO KOSURI.....
CLAIMANT

VERSUS

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE &
TECHNOLOGY..**

.....RESPONDENT

JUDGMENT

The claimant commenced this suit on 5th June 2025 claiming unpaid acting allowance.

The claimant's case is that by letter dated 24th June 2020 the respondent appointed her to act in the capacity of UBJ Human Resource & Training Manager replacing one Mr. Andrew Barno who had been suspended and performed his duties in the acting position from 24th June 2022 to 30th December 2022 but was not paid for the services rendered, Kshs.253,749.00.

The claimant also prayed for outstanding dues from 1st March 2025 to 30th May 2025 as per the fixed term contract, Kshs.851,679.00 and gratuity of Kshs.155,041.00.

The claimant prayed for:

- (i) *Declaration that the respondent's failure to pay acting allowance was unlawful.*
- (ii) *Kshs.253,749.00*
- (iii) *Certificate of service*
- (iv) *Kshs.851,679.00*
- (v) *Interest*
- (vi) *Costs of the suit*
- (vii) *Any other or further relief that the court may deem fit to grant.*

Respondent's case

The respondent admitted that the claimant was its employee effective 9th December, 2021 as a Human Resource Officer at Kshs.188,439 per month.

It denied having appointed the claimant to act as Human Resource & Training Manager to replace Mr. Barno who was on suspension.

Equally, it denied having issued a letter or appointed the claimant in an acting capacity or that the claimant performed duties and responsibilities of the alleged acting position from 24th June 2022 to 30th December 2022, or having refused to pay acting allowance and prayed for dismissal of the suit with costs.

On cross-examination, the claimant confirmed that the letter dated 24th June 2022, on the suspension of Mr. Barno was copied to her and Mr. Barno handed over to her in accord with the letter of suspension which was the instruction of the author and had no indication that she would act in the vacant position.

The claimant admitted that the letter dated 1st October, 2022 was an offer of appointment which she accepted and made no reference to her acting in any position and the same applied to the memo.

The witness admitted that she cleared on 21st July 2025 after filing the instant suit and further confirmed that the UBJ engaged her from 1st March 2025 to 30th May 2025 after the project ended for purposes of close out.

The by an email dated 31st May 2025 the claimant notified Dr. Orero (RWI) that she was neither ready to

clear nor handover until her concerns were addressed and denied having received communication from UBJ on a close out report, but returned the keys and equipment as Ordered by the court on 15th July 2025.

The claimant confirmed that she was one of the employees appraised by the committee on 29th September 2022 as a Human Resource Officer.

CWI maintained that although she had no letter of appointment to act, it was implied and during the close out period of 90 days she was paid DSA but was claiming the sum of Kshs.851,679.00 for the period and gratuity at Kshs.155,041.00 for the fixed term contract which the respondent issued on 28th May, 2025 after services had been rendered and the claimant refused to sign the same as she needed clarity on the acting allowance. CWI testified that her computation of gratuity was based gross salary.

On re-examination, the claimant testified that Mr. Barno handed over to her.

Respondent's evidence

RWI, Dr. Solomon Orero who was the UBJ's Chief of Party and the overall team leader confirmed having employed the claimant and admitted having received the claimant's email dated 26th August 2022 but did not respond to it.

RWI confirmed that after Mr. Barno's suspension, the office remained vacant and the office had two Human Resource Officers and no re-allocation of duties was effected.

He testified that the handover was to be made to the claimant by choice of the author of the letter.

That payroll was being prepared by one Sarah, a Human Resource Officer, but had no evidence to that effect.

RWI further confirmed that he attended the appraisal meeting held on 29th September 2022 and the claimant was in charge of Human Resource docket.

The witness admitted that the letters dated 20th May 2025 and 28th February 2025 had identical references. He admitted not having been the author of the letter dated 24th June 2022 and that those who worked up to the end of February 2025 were paid all their dues and further that

the respondent had not paid for the 3 months fixed term contract, Kshs.851,679.00 and gratuity and the contractual document was issued on 20th May 2025 and the claimant had worked for the duration of 3 months.

The witness admitted that the payroll on record was prepared by the claimant on 21st May 2025 and she declined to sign the contract dated 20th May 2025 on account of outstanding acting allowances.

On re-examination, RWI testified that Mr. Barno was to hand over to the claimant as a Human Resource Officer and the minutes dated 29th September 2022 referred to the claimant as the in-charge.

That the claimant had no letter appointing her to act and no payment was made and had not submitted a hand over report.

RWII, Elizabeth Omondi confirmed that the claimant was the respondent's Human Resource Officer reporting to Mr. Barno before he was suspended on 24th June 2022 and the claimant and one Sarah were Human Resource Officers. That after Mr. Barno left no replacement was appointed as the program was coming to an end.

The witness testified that one Sarah was in charge of the payroll and the close out contract was for 90 days and the claimant worked until 30th May 2025 but the contractual document was issued on 20th May 2025.

Although RWII initially denied that the respondent's letter could not have identical references, she admitted that two letters from the respondent had identical reference numbers.

It was her testimony that the letter dated 24th June 2022 stated that it was authored by the Vice-Chancellor of the respondent. That DSA was paid but had no evidence of the fact of payment.

RWII, also confirmed having attended the appraisal meeting on 29th September 2022 which resolved that the claimant was in-charge of the docket and the claimant was appraised as a Human Resource Officer.

That the issue of acting came up after the contract ended.

Claimant's submissions

Concerning the claimant's entitlement to acting allowance, counsel urged that the claimant served as the Human Resource & Training Manager from 24th June to 30th December 2022 after suspension of Mr. Barno and although the respondent disputed the acting appointment letter it did not avail evidence to show that the letter was forged and the claimant performed the duties of the higher office.

According to counsel, payment of acting allowance flowed from the work performed as opposed to a formal appointment citing Section 18(1)(b) of the Employment Act and the claimant's computation of acting allowance was based on her gross salary of Kshs.253,749 and the respondent had not offered an alternative computation.

Counsel submitted that refusal to pay acting allowance was a breach of Article 41 of the Constitution of Kenya on fair labour practices.

Reliance was placed on the decision in **Peter Ng'ang'a V Kenya Revenue Authority [2017] eKLR** to urge that performance of higher duties entitled an employee an allowance even without a formal appointment.

On terminal dues under the 90 days close out contract, counsel submitted that although the claimant did not sign the contract, she was entitled to terminal dues under the contract and the respondent had not revoked it or found that the claimant was undeserving of the dues and both witnesses confirmed that the contract was issued towards the tail end of the close out contract.

According to counsel the claimant was entitled to salary for 3 months Kshs.851,679.00 and gratuity Kshs.155,041. As regards Certificate of Service counsel relied on Section 5 of the Employment Act and the decision in **Bernard Wanjohi Muriuki V Kirinyaga Water and Sanitation co. Ltd & another** [2012] eKLR, to urge that it was the claimant's right.

Finally, counsel submitted that the claimant was entitled to interest and costs of the suit and placed reliance on the decision in **Kenya Union of Commercial Food and Allied Workers V Mombasa Sports Club** [2013] eKLR.

Respondent's submissions

As to whether the claimant could use illegally procured documents to prove her case, counsel submitted she would not that the letter dated 24th June, 2022 and the

minutes dated 29th September 2022 were not addressed to her in her individual capacity and ought to be disregarded.

Reliance was placed on the decisions in **Simon Mwangi Gitata & Others V Nairobi County Government** [2022] KEELC 3885 (KLR) and persuasive decisions in **Cape Metropolitan Council V Metro Inspection Services Western Cape & Others** [2001] 2ASCA 56 and **Unitas Hospital V Van Wijk & another** 231/5 [2006] 2ASCA 34 on access to information.

Concerning acting allowance, counsel contended that the claimant did not adduce evidence to prove that she performed additional roles from June 2022 to December 2022.

Reliance was placed on the decision in **Evans Otieno Nyakwana V Cleophas Bwana Ongaro** [2015] eKLR on the burden of proof.

Counsel urged that the claim for acting allowance was an afterthought as Mr. Barno only handed over to her.

On entitlement of salary under the fixed term contract, counsel submitted that the claimant did not submit a report to clear with the respondent.

That the claimant was paid Kshs.140,000.00 under this claim and any award ought to take account of the payment.

However, counsel did not explain what the amount covered or why it was paid.

Analysis and determination

It is common ground that the claimant was employed by the respondent in December 2021 as a Human Resource Officer under the UBJ Project and served until 30th May 2025 after an appraisal was conducted on 29th September 2022 which found her suitable for retention as an employee, after the subsequent appointment dated 1st October 2022 and another dated 1st October 2024, scheduled to end on 30th September 2025, but the project ended in early 2025 following a change of government policy in the United States of America and all employees were paid their dues up to and including 28th February 2025.

However, some employees including the claimant were offered close out contracts for 90 days effective 1st March 2025 to 30th May 2025.

Strangely, none of the parties availed a copy of the contract for the court's perusal. For the claimant, she declined to sign the same because it was handed over at the end of the contractual period, on 28th May 2025 as she had concerns about her acting allowance which, in the court's view was unrelated and she ought to have signed the contract.

Admittedly, all witnesses were in agreement that the claimant performed her duties and responsibilities for the entire duration and was thus legally entitled to be remunerated.

Equally, the respondent's witness confirmed that payment had not been effected and was outstanding. Both parties were in agreement on the claimant's entitlement to payment for the 3 months of service.

In the court's view, the only contentious issue and on which the case turns is whether the claimant was appointed as Acting Manager Human Resource and

Training by the respondent and acted from 24th June 2022 to December 30th 2022.

Although counsel for the respondent submitted that the claimant had obtained and produced documents not addressed to her, counsel did not allege that they were obtained illegally or that they were not genuine.

The documents were about the claimant and his employer and she had the right to know their contents and the respondent cannot disown them.

Similarly, if the respondent's counsel had concerns about the documents nothing prevented her from making an application oral/or in writing for their expunction from the record and the court would have disposed of the matter before the hearing.

The court is not satisfied that the respondent's counsel has demonstrated why the documents ought to be expunged from the record or ignored or disregarded at this stage.

While the respondent's witnesses testified that no appointment or acting took place and the claimant

remained a Human Resource Officer/Administrator, the claimant testified and counsel submitted that she was appointed to act and acted for 6 months and was entitled to Kshs.253,749.00 as acting allowance.

For unexplained reasons, the claimant never raised the issue when she signed the appointment letter dated 1st October 2022, which offered the position of Human Resource Officer/Administration a fact she admitted on cross-examination.

It is common ground that the claimant availed a copy of a letter dated 24th June 2022 signed by the Vice-Chancellor of the respondent University, Professor Stephen G. Agong' addressed to the Chief of Party UBJ copied to the Chief Finance Officer Registrar (PA) and the Human Resource Office informing Dr. Orero that the claimant was to take up the acting roles for Human Resource and Finance Departments effective 24th June 2022 until the two positions were filled up. The letter acknowledged that Mr. Barno, Human Resource & Training Manager and George Rachuonyo, Finance Manager were on suspension.

Mr. Antony Kimani would act as the Finance Manager.

From the tenor of the letter, whose contents were not contested, nor the author, it is clear that the appointing authority had already made a decision on what would happen following the suspension of the two officers.

Equally, the letters sent to Mr. Andrew Barno and George Rachuonyo dated 24th June 2022 by the Vice-Chancellor advised the Chief of Party to ensure that the changes took effect immediately.

A closer reading of the letters and the letter to RWI on the acting clearly shows that the changes referred to by the Vice-Chancellor were the suspensions of the two officers and the elevation of the claimant and Mr. Anthony Kimani to acting positions.

Regrettably, neither of the respondent's witnesses authored the letters on record and could not contest their contents without controverting evidence and the author was not called as a witness to testify as to whether he authorised the letters or not.

Thus, the hand over letter by Mr. Barno and the notification of the acting appointment to Dr. Orero by the Vice-Chancellor constituted the bedrock or cornerstone of

the claimant's case on appointment to act. This explains why counsel for the respondent submitted that they be disregarded.

By either default or design, the Vice-Chancellors letter to RWI, Dr. Orero informing him of the changes did not make reference to any other appointment letter. RWI was advised to effectuate the changes and perhaps in concurrence, Dr. Orero took no other steps.

As the chief of Party RWI ought to have engaged the Vice-Chancellor on the issue to ensure that the UBJ Human Resource Policies and Procedures manual was complied with but did not.

As to why Mr. Barno was directed to hand over to the claimant as opposed to Sarah, the Vice-Chancellor must have been aware of the letter to Dr. Orero on the acting appointment he had made.

Intriguingly, RWI testified that Mr. Barno's position remained vacant because the program was nearing its end, which was not borne by facts. A replacement was appointed after 6 months as did the Finance Manager.

Intriguingly, RWI could not explain who was discharging the duties of the office for the 6 months the claimant was in-charge of the docket, a fact he admitted on cross-examination.

In her email dated 31st May 2025 to Dr. Orero, RWI, the claimant maintained that the Chief of Party RWI had allegedly suppressed the acting allowance issue by not responding to her email.

The second limbs of the claimant's case on acting allowance was the rendering of services in the position.

The claimant availed a document of more than 500 pages of email communication and activities undertaken by the claimant such as meeting between UBJ and USAID in July 2022 and a visit by USAID in November 2022 where the claimant submitted the Human Resource input, medical cover for staff, which involved substantial communication between the claimant and RWI.

A sample of the emails reveals that there was substantial communication between the claimant and Dr. Orero, the Chief of Party in the 2nd half of 2022 on many serious matters about the project, including a payment that had

gone to wrong numbers when Mr. Barno was the Manager. The email by the claimant to RWII was dated 30th September 2022.

Also attached was a copy of the claimant's letter to the Vice-Chancellor of the respondent through the Chief of Party, dated 13th July 2022 seeking approval to hire Sub-County Monitoring Evaluation and Learning Officers and Prevention Officer and key priority populations.

Equally, minutes of the appraisal meeting dated 29th September 2022, which both RWI and RWII admitted having attended insisting that the claimant was appraised as the Human Resource Officer which was factual, did not mean that she had no acting responsibilities and could only be retained as a Human Resource Officer as that was her substantive position and the meeting resolved that the claimant was in-charge of the Human Resource docket and no other officer was designated as being in-charge.

Finally, although RWI and RWII testified that payroll was prepared by one Sarah, and both confirmed that they had no verifiable evidence of that fact, documents availed by the respondent revealed that the budget for UBJ for May

2025 was prepared by the claimant. This did not advance the claimant's case owing to the date of the payroll.

In court's view, the claimant's evidence on record establishes beyond peradventure that she was appointed as Acting Human Resource and Training Manager for the JOUST/USAID/UBJ program by the Vice-Chancellor of the respondent University and discharged the duties and responsibilities of the office for 6 months, the absence of a formal letter of appointment notwithstanding. The fact that the accounting officer informed the Chief of Party that the two officers had been elevated to acting positions, it behooved the Chief of Party to effect the changes and make the necessary payments.

The respondent cannot hide its face by alleging that there was no formal letter of appointment, yet its accounting officer had made the appointments. The Chief of Party ought to have taken subsequent steps.

The foregoing is consistent with the equitable maxim that equity considers as done that which ought to have been done and thus cannot allow the respondent to benefit from its failures.

Contrary to the claimant's counsel submission that Section 18(1)(b) of the Employment Act applied to this case, it does not. This is because this provision addresses tasks or piecework and the claimant's contract of service was not based on task or piecework. It was based on a monthly salary and thus entitled to a salary at the end of the month including an acting allowance for work done by dint of Section 17 of the Employment Act, which provides: **Subject to this Act, an employer shall pay the entire amount of wages earned or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly in the currency of Kenya—**

On acting appointments, Section 34 of the Public Commission Act provides:

(1) Acting appointments shall be—

**(a) made by the lawful appointing authority;
and**

(b) subject to the prescribed regulations and procedures which apply to appointments.

(2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

(3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.

Paragraph 7.2.12 of the respondent's Human Resources Policies and Procedure Manual May, 2022 provided that acting allowance was payable to a member of staff who performed supervisory duties and is formally appointed to act in a higher graded position and the employee recommended to act will, unless there is justifiable reason for supersession, also be the senior most employee in rank in the unit of operation and when an officer qualified to undertake the duties of a higher post which has been temporarily or permanently vacated for a minimum period of 30 days an acting allowances will be paid at the rate of 20% of his/her gross salary until the post is substantially filled.

Evidently, the claimant was appointed to act by the Vice-Chancellor, the appointing authority of the respondent and notified the Chief of Party who was the overall in charge of the program but did not forward a formal letter to the claimant in accord with the respondent's Human Resources Policies and Procedures Manual 2022.

The fact that the letter was addressed to the Chief of Party and copied to Human Resource was significant as it was for information and implementation by the Chief of Party, Human Resource and Finance.

The respondent cannot depend on the formalities it refused, failed or neglected to comply with to escape liability after the fact.

For the foregoing reasons the court finds that the claimant was appointed by the respondent's Vice-Chancellor to act as Human Resource & Training Manager for the UBJ Program effective 24th June 2022 until the position was substantively filled and was thus entitled to an acting allowance of the rate of 20% of her gross salary as computed by the counsel, Kshs.253,749.00.

Strangely, the respondent did not avail an alternative figure.

As regards salary and gratuity for the fixed term contract of 90 days, the respondent's witnesses testified that the same remained unpaid despite the claimant having rendered services on account of her refusal to sign the contract which the witness admitted was availed towards

the end of the contractual period, and as adverted to elsewhere in this judgment, the claimant ought to have signed the contract on account that her claim for acting allowance was not grounded on that contract and her signature was necessary to formalise the relationship albeit belatedly for purposes of accountability.

Be that as it may, the claimant is still entitled to the salary due and payable to her and gratuity for services rendered from 1st March 2025 to 30th May 2025, which the respondents neither contested nor availed alternative figures.

A certificate of service is a statutory right by dint of the provisions of Section 51 of the Employment Act.

The upshot of the foregoing is that the court is satisfied that the claimant has proved her case against the respondent and judgment is entered in favour of the claimant against the respondent in the following terms:

- (a) *Declaration that the respondent's failure to pay acting allowance was unlawful.*
- (b) **Kshs.253,749.00** as acting allowance.
- (c) **Kshs.851,679** salary and gratuity of **Kshs.155,041.00**
- (d) *Costs of the suit at half scale.*

(e) *Certificate of service.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 6TH DAY OF NOVEMBER, 2025.**

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

ORIGINAL