REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E045 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

RACHEL KAVISA…………………………………………… CLAIMANT

VERSUS

JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE & TECHNOLOGY.. ……………………………………….RESPONDENT

JUDGMENT

The claimant commenced this suit on 10th June 2025 claiming that she had worked for the respondent for 3 months but was not paid.

The claimant's case was that after her employment ws terminated on 28th February 2025, she started working again on 1st march 2025 based on instructions from the respondents but was not paid and prayed for:

(i) A declaration that the respondent's failure to pay acting allowance was unlawful.

(ii) Kshs.1,006,720 comprising three month's salary and gratuity

(iii) Certificate of service.

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(iv) *Costs.*

(v) *Gratuity Kshs.155,041.*

(vi) *Costs of the suit and any other relief the court deemed fit to grant.*

The respondent's case was that the claimant was its employee and after her employment was terminated on 28th February 2025 guidelines on close out were received on 13th March 2025 and it was conducted under a committee comprising USAID and the respondent and the claimant and other Program Officers were accorded a 14 days fixed term contract for purposes of close out but did not hand over a report after the close out period and had not been appointed in an acting position.

The respondent sought the dismissal of the suit with costs.

On cross-examination, the claimant confirmed that on termination of her employment, she was paid salary in *lieu* of notice, the salary for February 2025 and further confirmed having signed the 14 days fixed term contract dated 1st April 2025, without any duress or coercion.

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It was her testimony that her work from March 2025 was grounded on instructions from management but admitted that since the UBJ project was terminated abruptly, unpaid claims had to be paid for purposes of clearance and the witness had no specific letter on resumption of duty.

CWI testified that she did not file a copy of the report forwarded to the management but thereafter testified that she filed the report by one Oranjah Elijah which was neither authenticated nor dated.

That although Mercy Koruri was her witness, she could not tell when Mercy Kosuri received her close out contract from the respondent.

That her email to the Vice Chancellor of the respondent University dated 19th June 2025 was on clearance and the report was filed on 28th May 2025 and close out was for 90 days.

Finally, the claimant testified that she was a technical person and her report was supposed to be escalated to the management and submitted it on 28th May 2025.

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The respondent's witness Dr. Elizabeth Omondi testified that although she had not filed her appointment letter, the emails on record showed that she was the supervisor of the Program Officers.

According to **RWI,** the close out contracts recalled the employees back to work and had a job description and the work of the Program Officers was to generate data from the field.

The witness, however, could not tell the number of days given to different categories of employees for purposes of the close out but testified that the Grant and Co-operation Agreement had a criteria based on responsibility and need.

That although the senior management compiled the report, neither the report nor the minutes of the senior management meeting were availed.

RWI confirmed that the claimant was not paid for the 14 days contract because she did not file the requisite report within the prescribed period but was paid *per diem* in May 2025 and further confirmed that she did not receive

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any concerns from the claimant but received the email dated 21st May 2025 and did not respond.

On re-examination, the witness testified that the 14 days contract was to enable the claimant prepare the requisite report and the email dated 15th April 2025 requested for the same but it was not submitted.

Claimant's submissions

On whether the claimant was employed and worked from March to May 2025, counsel cited emails, reporting template and instructions from supervisors, Mercy Kosuri's evidence and the decision in **Kenya Airways Ltd V Aviation and Allied workers Union Kenya & 3 others** [2014] eKLR as well as **G4S Security Services (K) Ltd V Joseph Kamau & 468 others** [2018] to urge that since the claimant continued rendering services with the respondents knowledge she was entitled to compensation fro work done.

As to whether the respondent unlawful withheld the claimant's contractual salary for 90 days, counsel cited the provisions of Section 18(1)(b) of the Employment Act on payment of wages promptly for work done. Reliance was placed on the decisions in the **G4S Security**

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Services (K) Ltd Case (supra) and **Kenya Plantation & Agricultural Workers Union V James Finlay (K) Ltd** [2018] eKLR to urge the court to find that the respondent unlawfully withheld.

On alleged violations of the Employment Act and Article 41 of the Constitution of Kenya, reliance was placed on the provisions of Section 10(1) and (2) and 18(1)(b) of the Employment Act on particulars of employment and payment of wages respectively to submit that the belated issuance of the 14 days contract was unlawful.

Counsel, further submitted that the claimant was discriminated.

Reliance was placed on the decisions cited on other issues.

On entitlement to the reliefs sought, counsel submitted respondent’s response comprised bare denials, which according to counsel, were contradicted by emails and reporting templates.

That Dr. Elizabeth Omondi’s evidence could not disprove the fact that the claimant rendered services and the

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respondent's insistence on clearance before issuance of the certificate of service was contrary to Section 51 of the Employment Act.

Counsel urged the court to find that the respondents defence and evidence could not defeat the claimant's claim.

Finally, on costs, counsel relied on the provisions of Section 12 of the Employment and Labour Relations Court Act and Section 26 of the Civil Procedure Act on the court's discretion to award costs and interest.

Respondent's submissions

As to whether the claimant was engaged by the respondent for 90 days, counsel cited the sentiments of Majanja J in **Evans Otieno Nyakwana V Cleophas Bwana Ogaro** [2015] eKLR on the burden of proof as provided for under Section 107 of the Evidence Act. Also cited was the foreign decision in **Sibanda V Mwonzora & 4 others** on the same principle of law.

Counsel urged that the claimant had with other Program Officers requested for a 14 days contract and *per diem* and received the latter as admitted in court.

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According to counsel, documents availed by the claimant showed that she worked for 14 days and had not proved that she worked or was engaged by the respondent for 90 days.

On discrimination based on the 14 days contract, counsel submitted that Mercy Kosuri whose 90 days contract was availed as evidence was in charge of Human Resource and Administration and Mr. Warren Sule was the Finance Officer whose roles were different from the claimant's who was a Program Officer.

Counsel submitted that the 90 days close out period for the Grant and Co-operation Agreement was to enable the recipient of the award to submit any unpaid costs on incomplete milestones and was not intended to accord every employee of the respondent a 90 days contract of employment.

Counsel urged that under the law, the duty of courts was to enforce contracts, not to rewrite them citing **Mugo V Equity bank Ltd** [2023] KEHC 24167 (KLR) and **National Bank of Kenya Ltd V Pipelastic Samkolit (K) Ltd** [2011] eKLR to submit that the claimant signed the 14 days contract freely and willingly.

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On payment for 14 days counsel submitted that the claimant was not paid because she did not submit the final report citing the email by Cornel Ongoro on 21st May 2025 to the effect that Program Officers would not share final reports until their concerns were addressed.

Counsel urged that USAID had strict timelines which the claimant did not meet.

Finally, counsel submitted that the claimant had not the claim against the respondent.

Analysis and determination

It is common ground that the claimant was employed by the respondent as a Program Officer for 12 months effective 1st October 2024 to 30th September 2025 but the contract of employment was terminated on 28th February 2025 following a stop-work order issued on 26th February 2025 by USAID, the sponsor of the UBJ Project. The notice ordered cessation of all activities and termination of all sub-awards and contracts and no more obligations were to be incurred and further instructions were received on 13th March 2025.

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The claimant availed no evidence of instructions to continue working from 1st March 2025 and the email communication between her and Mr. Warren Sule could only have been on clearance as Mr. Warren Sule was not the claimant's supervisor.

Also attached as evidence of work was an email from Dr. Maureen Mabiria to Dr. Solomon Orero dated 1st March 2025 informing him that they would be evacuating the Kakamega office that week and staff were requested to retrieve personal belongings from the office and process pending paper work by 4th March 2025.

Similarly, an email from Mr. Oranjah to Dr. Maureen Mabiria of even date on necessary approvals. Copies of other emails attached from Dr. Solomon Orero dated 11th February 2025, 10th March 2025, a reminder of the earlier deliverables on liquidation of imprests, submission of time sheets for January 2025, activities accomplished up to January 2025 as detailed in Q2 Work Plan what was to be done in February 2025, recommended activities for counties and arranging clearance.

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In addition, Human Resource, Procurement, IT, Senior Management team and Finance were to report to Kisumu on 14th March 2025.

The gist of Dr. Solomon Orero's email was for staff to hasten clearance of the project and the emails were followed up by another dated 28th May 2025 on the motor vehicle in the garage, double cabin, registers schedule of distribution of branding materials to Counties and time sheets for January 2025 for effective clearance.

Evidently, none of the emails on record requested staff to continue their normal routine, such as filed work activities or complete pending tasks other than germane to clearance, reporting and processing of payments.

What appeared to have followed was back and for the between the Program Officers and the respondent.

For instance by letter dated 28th April 2025, the Program Officers including the claimant confirmed that they had received a token arising out of savings from exchange rate and they had moved on to hustle to make ends meet but urged that since they had relocated any travel had to be facilitated. They also confirmed that they had no

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active contract of service and *per diem* for 14 days promised the week earlier had not been paid, were eager to sign off, final dues, guidance of report writing was given late.

By email dated 5th May 2025, Dr. Elizabeth Omondi requested Program Officers to forward their reports for purposes of close out.

Strangely, a write up by Program Officers to the respondent on the 14 days fixed term contracts, relocation to residences, threats among others was neither dated nor authenticated by any one (page 25 & 28 of the claimant's documents).

The claimant led no evidence to show that she reported to the Kisumu office by 14th April 2025 to compile reports as requested by Dr. Solomon Orero.

From the foregoing, it is discernible that contrary to the claimant's allegation that she started working on 1st March 2025, before further instructions had been given to the respondent by the USA Government and in the absence of any instructions by Dr. Orero or Dr. Omondi or anyone else and her explicit acknowledgement on 28th

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April that she had no active contract, it follows that a contractual arrangement between the claimant and the respondent could only lie in the realm of implication based on the conduct of the parties.

It is trite that a contract is a legally binding agreement between two or more parties and a contract of employment may be in writing, by word of mouth or implied from conduct of the parties.

As a general rule, when a contract of employment is terminated by agreement as it happened in this case, the parties are discharged from further performance bilaterally by the mutual promises made and for the parties to have another contractual relationship, it must be proved that they agreed or the same could be implied from their conduct.

In the instant case, the claimant relied on emails as evidence of the continued employment relationship but as noted, none of the emails from the respondent directed the claimant to engage in activities other than those in furtherance of clearance and eventual separation, namely processing of payments and

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preparation of reports of tasks handled until termination of employment on 28th February 2025.

Documentary evidence on record also revealed that Program Officers had dispersed to their residences owing to want of communication from the respondent and absence of a contract of employment.

Although the claimant prayed for 3 months salary, the written witness statement dated 8th June 2025 made no reference to the tasks undertaken or accomplished within the 90 days. The alleged instructions were not identified or when the requests were acted upon and finalised.

Since the respondent denied having employed the claimant after her employment was terminated, save for the 14 days fixed term contract, which the claimant voluntary accepted and signed, it was incumbent upon the claimant to adduce credible evidence of the relationship for the court to make the inescapable inference. Ninety (90) days is a long time and neither attendance registers nor log-ins or schedule activities or output were availed as supportive evidence.

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In the court's view, absence of an attendance register or log-in, evidence of the tasks accomplished or the outcome with clear timelines would have established the existence of a relationship. Similarly, evidence of a promise to pay or actual payment would have affirmed the relationship.

The operative principle is that he who alleges any fact or facts bears the burden of proof as encapsulated by the provisions of Section 107, 108 and 109 of the Evidence Act.

Under Section 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.

Under Section 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.

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In this case, the claimant bore the burden of proof and although the claimant testified that she submitted a report on 28th May 2025, she admitted that the report attached to her documents was submitted by one Mr. Oranjah Elijah and it was neither dated nor signed for purposes of authorship and no other clearance document was filed.

The totality of the email communication on record, which the court has careful considered is that the claimant analogous to fellow Program Officers undertook no tasks or responsibilities outside those that were necessary for purpose of closing out the Program and the 14 days fixed term contract given by the respondent, which the claimant readily signed was, in the court's view sufficient as no other extra or additional tasks were demonstrated.

The absence of credible evidence of full-time engagement by the respondent shows that the tasks discharged by the claimant were intermittent at most and the claimant lacked evidence to prove that she actually earned the salary claimed or it was payable to her on account of services rendered under a contract of service as by law required under Section 17(1) of the Employment Act.

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Relatedly, because this was a claim for salary, it was undoubtedly a claim for special damages which in law must be specifically pleaded and strictly proved as held in **Hahn V Singh** [1985] KLR 716, **Gershom Ouma V Nairobi City Council** [1976] KEHC 3 (KLR), **David Baine V Martin Bundi** [1997] KECA 54 (KLR), **Securicor (K) Ltd V Esther Oliech** [1996] KECA 89 (KLR), **Minam Maghema Ali V Jackson M. Nyambo t/a Sisera Store** Civil Appeal No. 50 of 1990 among others.

Neither the Memorandum of Claim nor the written witness statement or the oral evidence adduced in court enumerated or highlighted the necessary particulars as required by law. See **Coast Bus Service Ltd V Sisco and Murunga Danii & 3 others** Civil Appeal No. 192 of 1992 and **Mwita V Wood Venture (K) Ltd & another** [2022] KECA 628 (KLR).

Finally on this issue, the claimant on cross-examination, testified that close out was for 90 days. Although the claimant did not state the source of the 90 days, it may have been based on the Grant and Co-operation Agreement which provided for a 90 days period for submission of claims after termination of the agreement

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and one Mercy Adoyo Kosuri of Human Resource was accorded a 90 days close out contract.

Clearly, the Grant and Co-operation Agreement was between the USAID and the respondent, which was the implementing partner.

The claimant was not privy to that contract and was a 3rd Party to it and her contractual rights and duties were not based on that contract.

The contract permitted the respondent to file claims for payment within 90 days of termination of the agreement.

The respondent was not obligated to accord the claimant a similar number of days as it would defeat the purpose of the dispensation, which was intended to ensure that all pending payments were considered and paid or rejected.

Equally, the claimant could not rely on Mercy Adoyo Kosuri's contract because Mercy Adoyo Kosuri was not a technical person in the Program but in Human Resource, which deals with all employees and as confirmed by RWI, the duration was dictated by responsibilities to be discharged and need.

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It is trite that in a project similar to the one in this case, data obtained in the field is supplied to another section for consolidation and eventual reporting and thus some aspects of project the close out before others and Human Resource and Finance may be among the last to close out on account that they clear other processes.
To the issue whether the claimant had proved that she rendered services for 3 months without payment, the court returns that the claimant failed to adduce sufficient evidence to demonstrate having been in employment for the 90 days claimed.

Be that as it may, as adverted to elsewhere in this judgment, the claimant accepted and voluntarily signed the 14 days fixed term contract dated 1st April 2025.

At common law, signature, *prima facie* means acceptance and unless the signature was vitiated by misrepresentation, mistake, duress or undue influence, the signatory is bound by the terms of the document signed. See **L'Estrange V Graucob Ltd** [1934] 2 KB 394 and **Parker V South Eastern Railway Co.** [1877] 2 CPD 416.

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The principles that govern fixed term contracts are well settled by several decisions of the Court of Appeal including **Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho** [2017] eKLR where the court *held*

"Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry…

Since the respondents contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained".

See also **Registered Trustees De La Salle Christian Brothers T/A St. Marys Boys Secondary School V Julius D. M. Baini** [2017] eKLR, **Francis Chire Chachi V Amalsi Water Services Co. Ltd** [2012] eKLR.

Finally, in **Transparency International Kenya V Teresa Carlo Omondi** [2023] KECA 174 (KLR), the court held:

"The court is in agreement with these sentiments. We dare say an automatically renewable fixed term contract is a contradiction in terms as it would subject the parties to an indeterminate employment contract. The

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respondent was under a fixed contract with a definite commencement dated and termination date…"

Other than the 14 days fixed term contract, the claimant tendered no credible evidence of having worked from 1st March 2025 to 30th May 2025.

The claimant's contention that others were given 90 days contracts or that the Award contract provided for a 90 days close could not avail the claimant on account that Program Officers, Human Resource and Finance Officers performed different and distinct roles in order to make the project successful and the implementing partner had the discretion to determine the number of days different categories of employees would have for purposes of close out.

It is trite that employees whose role involved provision of inputs into other processes would generally close out first to facilitate completion of those other processes such as provision of data or claims for purposes of payment.

According to the claimant, all employees had the same number of days which would have suggested that all

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employees were to conclude their roles at the same time, which would be impracticable.

It requires no gainsaying that Human Resource and Finance are tend to be the last to clear in most instances on account of their roles. They manage the rest. All employees must be paid what is due to them. While the Human Resource is responsible for the payroll, Finance concludes the process by paying the amount due to employees and other creditors of the organization.

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Appropriate Reliefs

(i) Declaration

The claimant tendered no scintilla of evidence of having been appointed to act in any position and neither the Memorandum of Claim nor the written witness statement made any reference to an acting appointment and/or non-payment of acting allowance.

The prayer was not proved and it is accordingly dismissed.

(ii) Kshs.1,006,720

Having found that the claimant failed to prove that she was employed and rendered services for 90 days or 3 months, the sum of Kshs.1,006,720 was unproved.

However, having also found that the claimant signed the 14 days fixed term contract but was not paid the salary and gratuity payable, as confirmed by RWI, the claimant is entitled to the sum of Kshs.132,483.30 as gross salary and Kshs.24,117.50 as gratuity as per the contract dated 1st April 2025.

(iii) Certificate of service

The claimant is entitled to a certificate by dint of Section 51 of the Employment Act.

The claimant is awarded costs at ½ scale.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF FEBRUARY 2026.

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

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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

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