

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU
CAUSE NO. E047 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

NANCY ANN KHATENJA.....
CLAIMANT

VERSUS

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

.....**RESPONDENT**

JUDGMENT

The claimant filed the instant suit on 10th June 2025 claiming unpaid days.

The claimant's case is that after the respondent terminated her employment contract effective 28th February 2025, it allocated her work in March, April and May 2025 but a 14 days fixed term contract was issued leaving out 74 days unpaid for.

The claimant prayed for:

- (i) *A declaration that failure to pay acting allowance was unlawful and breach of the contract.*

- (ii) Sum of Kshs.1,006,720 comprising 3 months salary and gratuity at 31%.*
- (iii) Certificate of service.*
- (iv) Interest on (ii) above from March 2025 till payment in full.*
- (v) Any other or further relief the court may deem fit and just to grant.*

The respondent admitted having terminated the claimant's

contract of employment on 28th February 2025 but denied having allocated any work to the claimant thereafter save for the 14 days for which the claimant was compensated.

That the alleged close out period of 90 days was not captured in the 14 days contract of employment.

On cross-examination, the claimant confirmed that the respondent paid her up to 28th February 2025 and notice pay.

The claimant admitted having accepted and signed the fixed term contract dated 1st April 2025, which was for 14 days and further admitted that he raised concerns for the

unpaid days vide letter by the Program Officers dated 28th April 2025 requesting for *per diem* for 2 weeks and a 14 days contract.

The claimant admitted that she had no contract to continue working after 28th February 2026.

The witness admitted that she was aware of the email from Dr. Solomon Orero dated 11th February 2025 which informed employees about clearance of pending matters and further testified that the report by one Mr. Oranjah Elijah was her final report stating that it was a template and Mr. Oranja's name was on the cover page and the claimant's name did not feature anywhere in the report.

It was the claimant's testimony that as evidenced by Dr. Solomon Orero's email dated 28th March 2025, the Program Officers had not cleared pending work but they had not documented the pending work.

The witness readily admitted that the job descriptions of Program Officers and those others, who were senior to them were different.

The witness confirmed that although the programme had 90 days close out period, it did not communicate to all and sundry that close out was for 90 days.

Respondent's evidence

Dr. Elizabeth Omondi testified that she was the claimant's supervisor although she had filed neither her contract of employment nor stated so in her written statement.

It was her evidence that the emails on record showed that she was the supervisor.

The witness confirmed that the close-out contract had a job description as it recalled the employee back to work.

It was her testimony that Program Officers generated data from the field.

The witness could not tell the court how many days each category of employees was accorded for purposes of the close out, but testified that it depended on the responsibilities and need.

That the senior management filed neither the report nor the minutes of the meeting at which the report was prepared.

The witness confirmed that the Program Officers refused to file their reports within the 14 days and were therefore not paid.

RWI testified that any work done after termination of employment was based on instructions and evidence based.

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

The witness testified that Daily Subsistence Allowance (DSA) was paid after termination of the contract.

On re-examination, the witness maintained that the claimant was not paid for the fixed term contract because she did not submit the report within the prescribed timelines.

It was her testimony that the 90 days close out period was in the award and Program Officers were given 14 days as their work was technical.

Claimant's submissions

As to whether the respondent engaged the claimant after termination of employment notice dated 28th February 2025, counsel submitted that documentary evidence comprising emails, reports and assignments showed that there was active engagement after termination of employment and in any case any variation of employment terms must be in writing.

Reliance was placed on the decisions in **Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others** [2014] eKLR and **G4S Security Services Ltd V Joseph Kamau & 468 others** [2018] eKLR for the proposition that where an employee continued working after termination of employment, with the employer's knowledge, an implied contract arose and that an employee ought to be paid for work done respectively.

Counsel submitted that issuance of the 14 days fixed term contract was the respondent's admission of continued engagement of the claimant.

It was further submitted that the claimant discharged the burden of proof of continued rendering of services and the court ought to find that employment continued after service of the notice of termination of employment.

As to whether the claimant was entitled to payment for 90 days, counsel urged that since the claimant continued rendering services in March, April and May 2025, remuneration was due and payable as mandated by Section 18(4) of the Employment Act as held in **G4S Security Services (K) Ltd V Joseph Kamau & 468 others** (supra).

Counsel submitted that the 14 days fixed term contract failed to capture the entire duration worked and cited the provisions of Article 41 of the Constitution on the right to fair remuneration and urge that the claimant stood to suffer irreparable prejudice.

Reliance was also placed on the decision in **Kenya Union of Commercial Food & Allied Workers V Water Resources Management Authority [2015] eKLR**, for the proposition that failure to pay for services rendered constituted an unfair labour practice.

As to whether the respondent violated the provisions of Article 41 of the Constitution, counsel relied on the decisions in **Kenya Union of Commercial Food & Allied Workers V Water Resources Management**

Authority (supra) and **G4S Security Services (K) Ltd V Joseph Kamau & 468 others** (supra) to urge that the failure by the respondent to pay for the 90 days period violated the Constitution of Kenya.

Finally, counsel submitted that the claimant was entitled to a certificate of service, costs of the suit and interest.

Respondent's submissions

As to whether the claimant was engaged by the respondent for 90 days as claimed, counsel cited the Evidence Act and the sentiments of Majanja J in **Evans Otieno Nyakwana V Cleophas Bwana Ongaro** [2015] eKLR on the mantra that one who asserts bears the burden of proof, as were those of the court in **Sibanda V Mwonzora** 2020 ZWEHC 713, to submit that the claimant voluntarily signed the 14 days fixed term contract and the Program Officers had requested the same including *per diem* for 14 days which the claimant admitted having received and had already worked by 29th April 2025 and relocated.

That the emails from Dr. Solomon Orero were meant to facilitate clearance and close out activities were to start concurrently and the claimant had not proved that she

worked and/or was engaged by the respondent for 90 days.

On the alleged discrimination on account of the 14 days contract as opposed to 90 days, relying on the letter to one Mary Kosuri who was accorded 90 days, counsel submitted that Mercy Kosuri was in charge of Human Resource and Administration and the claimant was a Program Officer and Warren Ouma Sule was a Finance Officer and having availed no evidence of having worked for 90 days the allegation of discrimination was unproven. Moreover, the claimant provided no evidence to prove that other Program Officers were treated differently.

That the 90 days provided by the Grand and Co-operative Agreement related to submission of costs incurred and unpaid in the course of performance and the claimant could not hang on that clause.

Counsel submitted that the role of courts was to interpret contracts not to rewrite them as held in **Mugo V Equity Bank Ltd** [2023] KEHC 24167 (KLR) and **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd** [2011] eKLR.

That the claimant never alleged fraud, coercion or undue influence when she signed the 14 days contract.

On entitlement to pay for 14 days counsel submitted that the claimant was not paid because she did not submit the final report, within the timelines required of Program Officers, provided no evidence of having submitted any report and admitted that a report was required at the end of the contract period.

Counsel further submitted that a copy of the report she had attached was not hers but that of Oranjah Elijah. According to counsel, the late submission of the report disentitled the claimant any pay.

Counsel urged the court to find that no payment was due, and if any, the 14 days contract exclusively.

Analysis and determination

Documents on record revealed that the respondent and the United States Agency for International Development (U.S.A.I.D) entered into a Grant and Co-operative

Agreement in 2023 styled as USAID Boresha Jamii (UBJ) and the respondent was the Implementing Partner.

The claimant was offered the position of Programme Officer (Community WASH), Grade 12 for 12 months on 1st October 2024 and accepted the offer on even date and was based in Kakamega County.

It is common ground that the claimant's employment was terminated effective 28th February 2025 following the termination of the Program by the Government of the United States of America vide letter dated 26th February 2025.

The termination notice directed the respondent to terminate all sub-awards and contracts with immediate effect.

This act of the US Government frustrated all contracts entered into by the respondent with 3rd parties and the parties were discharged from further performance.

The claimant admitted that all her dues were paid including salary in *lieu* of notice and gratuity.

Strangely, neither the claimant nor the respondent filed the letters of termination of the claimant's employment dated 28th February 2025.

However, according to the claimant she continued rendering services as before for a period of 90 days effective 1st March 2025 and handed in a draft report and final report.

The claimant's case was based on the fact that the Grant and Co-operation Agreement provided for a close out period of 90 days, notwithstanding the fact that the claimant had no contract of service nor a detailed or comprehensive record of the tasks to be accomplished and the dates on which they were accomplished and the outcome, if any.

In opposition to the claim, the respondent averred and testified that although the Grant and Co-operation Agreement had a 90 days close out period it gave different categories of employees, different numbers of days based on their responsibilities, and Program Officers were accorded 14 days and the claimant voluntarily accepted and signed the fixed term contract dated 1st

April 2025, a fact the claimant confirmed on cross-examination.

Strangely, the claimant had no verifiable evidence to demonstrate what she was actually doing for the 90 days or part of it as all activities other than clearance were to cease.

Relatedly, the claimant was supposed to hand in a report for purposes of compilation of the entire report, a fact the claimant admitted on cross-examination.

Puzzlingly, the claimant did not avail a copy of any report under her name or signature but contended that the report at page 52-75 of the claimant's List of Documents dated 8th June 2025 entitled Kakamega County Child-health close out report period 2021 - January 2025 submitted by Oranjah Elijah Child health Kakamega was hers as well in that her report was part of the report on record. However, the claimant but had no evidence of having authored nor submitted any part of the report to Mr. Oranjah Elijah or anyone else for compilation of the report.

Equally, the copy of the report on record was neither dated nor authenticated by any person.

The claimant would have effortlessly demonstrated that she prepared a report and submitted the same as required by availing a copy of the document together with the forwarding email. From the email communication on record, it is clear that even as late as 21st May 2025, none of the Programme Officers had forwarded their report to Dr. Elizabeth Omondi, the supervisor.

The claimant's failure to avail a copy of the report she was expected to submit to the supervisor, a fact she admitted in court or a schedule of activities/or tasks accomplished rendered her claim of having worked for 90 days a mere allegation bearing in mind that no payment had been promised and even if there was a promise, it had to be reduced into writing.

In order for the court to infer that the claimant rendered services for 90 day as alleged, the court's inference must be based on credible evidence of the tasks accomplished and/or discharged over the entire duration bearing in mind that the claimant was a Programme Officer in the

field. A copy of the report prepared and submitted was an important piece of evidence.

The absence of a report prepared or authored by the claimant or the portion thereof submitted to the supervisor or Mr. Oranjah Elijah or any other person or the tasks accomplished diminished the foundation of the claimant's case of having rendered services continuously for 90 days.

No doubt some work was done, the absence of verifiable evidence notwithstanding.

Notably, the emails from Dr. Solomon Orero revealed that preparation for clearance commenced before the formal communication of termination of the Program was communicated on 26th January 2025.

By an email dated 11th March 2025 Dr. Solomon Orero directed all employees to clear and no new tasks were given to employees.

Similarly, by their letter dated 28th April 2025, the Programme Officers including the claimant indicated that they had moved on and urged Dr. Elizabeth Omondi to

consider payment of Daily Subsistence Allowance for 14 days as promised, signing of close out contracts and the only task pending was report writing as they needed to sign off.

This was the second month after termination of their employment contract and the Program Officers were not demanding any salary for work done but close out contracts and DSA for 14 days.

The court also noted that the clearance process took long owing to uncertainty of the way forward and the confusion occasioned by the unexpected termination of the UBJ Program.

Section 17 of the Employment Act provides that:

(1) Subject to this Act, an employer shall pay the entire amount of the wages earned by 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—

(a) in cash;

(b) into an account at a bank, or building society, designated by the employee;

- (c) by cheque, postal order or money order in favour of the employee; or**
- (d) in the absence of an employee, to a person other than the employee, if the person is duly authorised by the employee in writing to receive the wages on the employees behalf.**

The foregoing provision leaves no doubt that salary or wages must be earned by the employee or become payable to the employee in respect of work done.

See **Benard Nyakina Nyanguki & 7 others V Polysack Ltd** [2019] eKLR.

The court is at a loss on what the claimant actually did for 90 days bearing in mind that she was previously a full-time employee. Without a schedule or table of tasks accomplished and when including the outcome, the court's hands are tied by the absence of evidence.

Relatedly, having admitted that she signed and accepted the 14 days fixed term contract provided by the respondent, the contract lapsed after 14 days of execution.

The principles that govern fixed term contracts are well settled by the Court of Appeal in several decisions 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 Amatsi 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

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 contention that other employees were given 90 days contract 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 be accorded 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

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

It requires no gainsaying that Human Resource and Finance tend to be the last to clear in most cases 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 and general administration, Finance concludes the process by paying the amount due to employees and other creditors of the organization.

Appropriate Relief

Having found that the claimant failed to demonstrate that she had an employment contract with the respondent from 1st March 2025 or rendered services for 90 days from 1st March 2025 to 30th May 2025, the only contractual relationship the claimant had with the respondent was the 14 days fixed term contract which she voluntarily signed, a fact she admitted on cross-examination.

The claimant is thus entitled to salary and gratuity for 14 days computed by the respondent as follows: Salary

Kshs.132,483.30 and gratuity Kshs.24,117.50, Total Kshs.156,600.80.

The claimant adduced no evidence of having appointed to act or acted in any position. The claim is dismissed.

The claimant is entitled to a certificate of service by dint of the provisions of Section 51 of the Employment Act within 30 days from the date hereof.

The claimant shall have costs of the suit at $\frac{1}{2}$ 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 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