



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E028 OF 2025

NASHON OMINDO.....

.....**CLAIMANT**

VERSUS

KENDU ADVENTIST HOSPITAL.....**RESPONDENT**

JUDGMENT

1. The Claimant instituted this suit via a Memorandum of Claim dated 14th April 2025 alleging unlawful and unfair termination of his employment. It is his case that he was employed by the Respondent sometime in 2016 as an HIV Service Lead at the Comprehensive Care Centre, earning a basic monthly salary of Kshs. 106,050/-. He avers that during

his tenure, he served diligently and contributed significantly to the Respondent's programmes, for which he was recognized as a top-performing employee within the Homa Bay region. The Claimant avers that on 8th January 2025, he was suspended from duty for one month on allegations of gross misconduct, the particulars of which were not disclosed to him. Subsequently, on 14th January 2025, he was invited to attend a disciplinary hearing scheduled for 16th January 2025. He contends that despite requesting for details of the allegations and supporting evidence to enable him prepare his defence, none were provided, and he was afforded less than 48 hours to prepare for the hearing. It is the Claimant's further case that the disciplinary process was procedurally flawed and conducted in breach of the law. He avers that he was neither issued with a notice to show cause nor informed of the specific charges against him, and was not advised of his right to be accompanied by a fellow employee or union representative as required under section 41 of the Employment Act. He contends that the hearing was conducted in a hostile and opaque manner, with vague allegations and undisclosed evidence. The Claimant further

avers that his employment was terminated by a letter dated 31st January 2025, which was served upon him on 6th February 2025, and that the termination was backdated and effected without notice or payment in lieu thereof. It is his further contention that his subsequent appeal against the decision was not considered. In addition, the Claimant alleges that during the course of his employment, he was denied annual leave from 2018 to 2024 and was underpaid house allowance, having received less than the statutory entitlement. Consequently, he urged the Court to:

- a. Declare that he was unlawfully terminated from employment;
- b. Award him a total of Kshs 3,204,180/- comprising pay in lieu of notice, compensation for unfair termination of employment, leave allowance and unpaid house allowance.

2. Opposing the claim the Respondent filed a response dated 20th June 2025. It averred that the Claimant was engaged on a fixed-term contract for a period of one year running from 1st October 2024 to 30th September 2025, and that the said

contract was terminated after due process and in line with its express provisions. It further asserts that the Claimant utilized all his leave days during the subsistence of his contract. With regard to house allowance the Respondent avers that the Claimant was remunerated in accordance with the terms of the contract. As for the claim for dues the Respondent denied responsibility maintaining that the termination complied with statute. Accordingly, the Respondent urges that the Claimant's suit be dismissed with costs.

3. At the hearing the Claimant testified on his own behalf while the Respondent called two witnesses. The Claimant adopted his witness statement dated 14th April 2025 as his evidence in chief and produced the documents in the list of documents of the same date. He stated that the reason for termination was not apparent either in the termination letter or after he was dismissed from employment. He also stated that he worked for 9 years without leave. He acknowledged getting the circular suspending funding from the United States Government. At this point the Claimant's case was closed.

4. On the Respondent's side RW1 was Pastor Philip Gai the Respondent's Chief Executive Officer. He adopted his witness statement dated 6th October 2025 as his evidence in chief. Likewise, he produced the documents in the Respondent's list of documents of even date. He testified that the programme under which the Claimant was employed was affected by an executive order issued by President Donald Trump upon assuming office, which led to the withdrawal of funding and eventual cancellation of the programme. Consequently, the Respondent was constrained to release all affected employees. He further testified that the Claimant was subjected to due process prior to termination from employment. Additionally, RW1 stated that employees were consistently encouraged during staff meetings to utilize their leave days, as unused leave would not be compensated due to the constraints of donor-funded budgets. He maintained that the Claimant utilized all his leave days. However, during cross-examination, RW1 conceded that the Respondent did not follow the redundancy procedure after the donor funding was withdrawn. He also admitted that the suspension letter

did not specify the alleged misconduct and that no notice to show cause was issued to the Claimant.

5. The 2nd witness for the Respondent was Mr. Kennedy Odhiambo Onyango (RW2) the Respondent's Human Resource Officer. He also adopted his statement dated 6th October 2025 as his evidence in chief. He stated that, as the custodian of the Respondent's records, the Claimant had utilized all his leave days. He further testified that the Claimant had been notified of the allegations against him prior to the disciplinary hearing.
6. However, on cross-examination, RW2 acknowledged that he did not have documentary evidence to demonstrate that the Claimant had been notified of the allegations. He also conceded that the Claimant's request for particulars of the allegations was not responded to. With that, the Respondent's case was closed and the parties proceeded to file written submissions.

Claimant's Submissions

7. The Claimant identified three issues for determination, namely:

- (i) whether he was unfairly and unlawfully terminated from employment;
- (ii) whether he is entitled to the reliefs sought and
- (iii) who should bear costs of the suit.

8. On the first issue the Claimant submitted that his dismissal was both substantively and procedurally unfair. With regard to substantive justification, he submitted that the Respondent did not elaborate the reasons for termination neither did it disclose the particulars of the allegations against him. For this reason, he asserted that the Respondent had failed to discharge its burden under section 43 of the Employment Act, rendering the dismissal unfair under section 45 of the same act. In support of his position, he relied on the case of **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**, where it was held that:

“In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was

taken... what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street standing in the same position as the employer to reach a similar decision as him/her regarding the termination..."

9. Turning to the issue of procedural fairness, the Claimant submitted that the requirements of section 41 of the Employment Act were not complied with. In particular, he submitted that he was not issued with a notice to show cause, was not furnished with the allegations against him, and was not accorded sufficient time to prepare his defence. In support of its position the Claimant relied on the case of **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, which underscored that for the disciplinary process to pass the fairness test under section 41 of the Employment Act, the charges must be clear and the employee must be accorded sufficient time to prepare their defense. Additionally, the employee is entitled to documents in the employer's possession vital in preparation of the defense,

and to call witnesses. On the remedies sought, the Claimant submitted that he is entitled to maximum compensation for unfair termination, citing his nine years of continuous service.

10. With respect to pay in lieu of notice the Claimant submitted that he was entitled to the same as the termination was without notice. With regard to house allowance, he submitted that he was underpaid, having received only Kshs. 6,000/-, which was below the statutory threshold of 15% of his basic salary as provided under Regulation 4 of the Regulation of Wages (General) Order, 1982. He also emphasized that he was not provided with housing. On leave allowance, the Claimant maintained that he never proceeded on leave. He asserted that the leave schedule was not concrete proof that he actually proceeded on leave. Accordingly, he urged the Court to allow the claim with costs.

Respondent's Submissions

11. From the outset the Respondent urged the Court to strike any of the any claims that were time-barred. It identified the issues for determination as:

- a. Whether the Claimant is entitled to pay in lieu of notice;
- b. Whether the Claimant is entitled to damages for wrongful dismissal;
- c. Whether the Claimant is entitled to unpaid leave; and
- d. Whether the Claimant is entitled to additional house allowance.

12. On the first issue the Respondent submitted that the full salary paid for the month of January 2025 while the Claimant was on suspension constituted notice pay. It drew attention to the fact that he was suspended on 8th January 2025 and was paid full salary despite not working. On the second issue the Respondent submitted that the Claimant was not entitled to any damages as the termination was both substantively and procedurally fair. It asserted that the Claimant was duly informed of the allegations against him by the Human Resource Manager, Mr. Kennedy Odhiambo Onyango the Respondent's second witness (RW2). It further submitted

that upon conclusion of investigations, the Claimant was invited to attend a disciplinary hearing scheduled for 16th January 2025 through an email dated 14th January 2025, which invitation he acknowledged. The Respondent maintained that the Claimant was accorded adequate time to prepare his defence and was furnished with all relevant materials, including minutes of the disciplinary proceedings and statements from affected staff members. Moreover, the Respondent submitted that during the disciplinary hearing, the Claimant was notified of the allegations and given an opportunity to respond thereto. The Respondent submitted that the Claimant did not present any rebuttal evidence but instead admitted to the allegations and tendered an apology, which was reflected in the minutes of the disciplinary hearing. The Respondent contended that the Claimant's apology demonstrated awareness and admission of the misconduct, thereby negating any assertion that he was denied a fair opportunity to prepare or defend himself. It was further submitted that the evidence adduced from staff members during the disciplinary process sufficiently established gross misconduct on the part of the Claimant.

Regarding unpaid leave, the Respondent submitted that the Claimant was not entitled to any payment for accrued leave. It asserted that the Claimant, in his capacity as HIV Service Lead under the Kenya AIDS Response Program, was responsible for organizing leave schedules, including his own. It contended that the Respondent had, through letters dated 22nd June 2022 and 2nd September 2023, reminded the Claimant to utilize his accrued leave days, with a clear indication that any unutilized leave, by personal choice, would be deemed forfeited and not subject to compensation. The Respondent maintained that the Claimant had, in any event, exhausted all his leave days prior to the end of each contract period.

13. On entitlement to additional house allowance, the Respondent submitted that the terms of remuneration were expressly set out in the employment contracts executed between the parties from 2021 to 2025, under which the Claimant was entitled to a house allowance of Kshs. 6,000/-. It averred that the Claimant voluntarily entered into these agreements and was bound by their terms. The Respondent

rejected the Claimant's assertion that he signed the contracts under compulsion, submitting that such a claim would render the contract void and unenforceable, and that the Claimant could not approbate and reprobate by seeking to benefit from a contract he alleged to be invalid. The Respondent maintained that all dues, including house allowance, were duly paid and that no outstanding amounts were owed to the Claimant. In conclusion, the Respondent submitted that the Claimant had failed to prove his case on a balance of probabilities and urged the Court to dismiss the entire claim with costs.

Disposition

14. The issues distilled for determination are
 - a. Whether the Claimant was unfairly and unlawfully terminated from employment and is thus entitled to damages for wrongful dismissal;
 - b. Whether the Claimant is entitled to unpaid leave; and
 - c. Whether the Claimant is entitled to additional house allowance.

15. On the first issue, it is asserted that when Joseph Robinette Biden Jr. the 46th President of the United States left office, the incoming President upon assumption of office cut back funding for entities like USAID. This, as the Respondent argues, is what led to the cutbacks in employment that somewhat affected the Claimant. It is also asserted there was misconduct by the Claimant which he allegedly owned up to at a meeting held by the Respondent.

16. Under section 41 of the Employment Act, the law provides for a hearing as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under

section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

[Emphasis supplied]

17. The evidence adduced did not reveal any notice to show cause to bring to the attention of the Claimant particulars of the alleged misdeeds of the employee. In addition, there was no compliance in terms of section 41 wherein the Claimant was required to be given an opportunity to offer an explanation. In the suspension letter, there were no specifics regarding the alleged misconduct. In sum, it is evident the Respondent did not accord the Claimant the safeguards as required by section 41. It mattered not that the Claimant is alleged to have admitted to some misdeeds at a meeting called by the Respondent.

18. An employer contemplating termination on account of factors amounting to redundancy is required to follow the procedure under section 40 of the Employment Act. The said

section provides for termination on account of redundancy as follows:

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*
- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

19. The evidence before me does not show any adherence to the provisions of section 40 in respect of the Claimant. It is clear that the Respondent herein did not follow the redundancy procedure after the donor funding was withdrawn. The Claimant would have been entitled to payment of notice which he must receive being one month's salary in lieu of notice.

20. The issue as to whether the Claimant was unfairly and unlawfully terminated from employment, the Court is of the firm view that he was unfairly and unlawfully terminated from employment. As to whether the Claimant is entitled to damages for wrongful dismissal, the Court returns that he is entitled to 3 month's salary as compensation under section 49 of the Employment Act.
21. As to whether the Claimant is entitled to unpaid leave, the Court finds the Claimant had utilized all his leave days and therefore was not entitled to any. He did not specify the dates he never took leave thus leaving this aspect in doubt.
22. As to whether the Claimant is entitled to additional house allowance. Under the provisions of section 31 of the Employment Act, an employer is required to avail housing for the employees it engages at the premises or nearby. Alternatively, an allowance is payable to allow the employee secure housing. Under section 31(1) and (2), the law provides that:-

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;

(b)...

23. The Claimant received house allowance of Kshs. 6,000/- a month. The Court therefore returns that the Claimant was paid an amount that was in the aggregate sufficient to cater for housing. Having acquiesced to the sum without a murmur, the Claimant ought not have sought it upon termination yet he received housing allowance for the period

he served the Respondent. This aspect of the claim is unsuccessful.

24. In the final analysis the Court enters judgment for the Claimant against the Respondent for

- (a) One month's salary as notice - Kshs. 139,050/-
- (b) Three month's salary as compensation - Kshs. 417,150/-
- (c) Interest at court rates on the sums in (a) and (b) above from the date of judgment till payment in full.
- (d) Costs of the suit.

It is so ordered.

Dated and delivered at Kisumu this 18th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**