Gathuya v Registered Trustees of Gertrude Garden t/a Gertrude Children's Home (Cause 1000 of 2017) [2025] KEELRC 585 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 585 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1000 OF 2017

B ONGAYA, J

FEBRUARY 27, 2025

BETWEEN

DR ZIPPORAH GATHUYA ..... CLAIMANT

AND

REGISTERED TRUSTEES OF GERTRUDE GARDEN T/A GERTRUDE CHILDREN'S HOME ..... RESPONDENT

JUDGMENT

1. The Claimant filed the memorandum of claim dated 30.05.2017 and through Kilonzo & Company Advocates and learned Counsel Kethi D. Kilonzo Advocate appeared in that behalf. The claimant prayed for orders against the respondent as follows:
    a. Reinstatement.
    b. Loss of earnings from January 2016.
    c. General damages.
    d. Interest at Court rates on (b) above from January 2016 until payment in full.
    e. Interest at Court rates on (c) above from the date of judgment until payment in full.
    f. Costs and interest thereon.
2. The claimant pleaded as follows:
    a. The respondent engaged the claimant as a consultant pediatric anesthetist in 2007.
    b. The claimant received the respondent's letter dated 22.01.2016 informing her that she had been suspended due to cases of 7 patients listed in the letter. The letter indicated that the 7 cases would be referred to the Kenya Society of Anesthesiologists for peer review. She replied

the letter by letter dated 09.02.2016 requesting for a hearing at administrative level of the respondent prior to the cases being submitted to the Kenya Society of Anesthesiologists for peer review. She also requested for the Root Cause Analyses for the 7 patients.

c. By letter dated 09.02.2016 the respondent informed the claimant that the Root Cause Analyses would be conducted on 12.02.2016 and the request for peer review of the 7 cases by the Kenya Society of Anesthesiologists would be put on hold pending the outcome of the Root Cause Analyses.

d. The Root Cause Analyses was conducted in the absence of the claimant thereby denying her an important chance to defend herself. No reason was given for the denial of her request for the deferral of the Root Cause Analyses so that she could present her case. After conclusion of the Root Cause Analyses, the claimant was not given the results thereof.

e. The respondent's letter of 10.03.2016 was sent to the Kenya Society of Anesthesiologists to conduct a peer review of three cases. The letter was delivered prior to the claimant being given feedback on the Root Cause Analyses of the 7 cases and the letter was not copied to the claimant. The claimant's case was that the letter was sent in breach of the respondent's written undertaking to the claimant in the letter of 09.02.2016 that the peer review process through the Kenya Society of Anesthesiologists would be put on hold until she had been heard internally.

f. The letter of 10.03.2016 was for a peer review of 7 cases meaning that the claimant had been cleared in 4 cases of the 7 cases in issue. Such information was not communicated to her. She received a copy of the letter of 10.03.2016 on 01.07.2016 after the respondent had terminated her on 06.06.2016.

g. The claimant was not given a chance to be heard in her defence by the respondent before the 3 cases were referred to the Kenya Society of Anesthesiologists.

h. The letter by the respondent dated 10.03.2016 referred to the letter by the Kenya Society of Anesthesiologists dated 02.03.2016 meaning the respondent had communicated to the Society in February 2016 and the Society's response in the letter of 02.03.2016 had not been disclosed to the claimant by the respondent.

i. Both Root Cause Analyses and the peer review were conducted in the absence of the claimant without hearing her and both cleared her of any wrong doing. Nevertheless her suspension was not lifted and instead she was terminated.

j. The claimant received the letter dated 09.05.2016 requesting her to appear for a panel hearing on 13.05.2016. The Claimant's case was that the notice was short and allowing her only 3 days. The claimant wrote to the respondent the letter dated 10.05.2016 requesting to be informed the purpose of the hearing given that the 3 Root Cause Analyses had cleared her of any wrong doing. The respondent did not respond or acknowledge receipt of the claimant's letter.

k. At the panel hearing of 13.05.2016 the claimant was not aware of the purpose of the hearing or charges levelled against her. Due to a short notice, she did not attend with a peer.

l. The claimant received the letter dated 06.06.2016 permanently terminating her and which partly stated thus, "On 1st April, the Board of Trustees took the action to reinstate your practice privileges at Gertrude's Children Hospital following suspension with specific requirement and expectation that you were to improve with regard to quality and safety. The reinstatement provided a remedial opportunity for your improvement. The cases under discussion indicate that such improvement with regard to your documentation, communication, adequate

consideration and mitigation of risks associated with Anesthesia has not happened." The letter therefore referred to the letter of 01.04.2014 that put the claimant under performance management supervision for 6 months. The letter of 01.04.2014 concerned a patient ZAM, and not any of the patients in the 7 cases named in the letter of 22.01.2016. It the claimant's case that she was suspended upon the letter of 22.01.2016 but terminated upon the letter of 01.04.2014 which had been overtaken with the lapsing of the 6 months of performance management supervision.

m. The claimant's request for minutes of the panel hearing of 13.05.2016 was rejected without any reason being given to her.

3. It is the claimant's case that the respondent terminated her in breach of rules of natural justice by denying her the right to be heard and adequate resources and opportunity to defend herself particularized as follows:

a. She was not given notice of the charges.

b. She was not given adequate time and facilities to defend herself.

c. She was denied an opportunity to participate in the Root Cause Analyses and the letter dated 09.03.2016 by the respondent to the Kenya Society of Anesthesiologists was not copied to the claimant.

d. The respondent received the letter dated 29.03.2016 from the Kenya Society of Anesthesiologists but did not give a copy to the claimant until after the panel hearing on 13.05.2016.

e. The claimant was terminated upon charges she was never given a notice of or an opportunity to defend herself.

f. By letter dated 15.06.2016 the claimant requested for minutes of the panel hearing of 13.05.2016 and by letter dated 01.07.2016, the respondent refused to give the claimant the minutes and no reasons for refusal were given.

g. She lodged an appeal against termination by letter dated 11.07.2016 to the respondent Board upon grounds that the termination was not supported with evidence; no evidence of professional misconduct or negligence had been established; process leading to her termination was unfair; and, the letter dated 16.06.2016 with generalized conclusions had the effect of permanently tainting her past, present and future medical records and practice. The appeal was heard on 16.11.2016 and the respondent's letter of 24.11.2016 advised her that the appeal had been dismissed for similar reasons as in the letter of 06.06.2016.

h. The claimant requested for the minutes of the appeal hearing and the respondent refused to provide the same and no reason was given.

4. The claimant's case is that the procedure and reasons for her termination were unfair. Further, the letters of 22.01.2016; 10.03.2016; 06.06.2016; and, 24.11.2016 imputed professional incompetency in her practice and suggested her unsuitability to continue in such practice. It is her further case that she suffered loss and damage and claimed and prayed for orders accordingly.

5. The respondent filed the memorandum of defence dated 22.11.2018 through the Federation of Kenya Employers and learned Counsel Mr. Dickens Ouma appeared in that behalf. The respondent prayed that the claimant's suit be dismissed with costs to the respondent. The respondent further pleaded as follows:

a. The claimant was not an employee of the respondent but was first engaged by the respondent on a 2-years' contract as a consultant per the service contract agreement of 14.05.2007 at a retainer of Kshs.50, 000.00 per month and an additional conditional fee of Kshs. 10,000.00 per month if nominated as team leader.

b. The claimant worked as a consultant for hire in several other medical institutions and was not engaged on a sole consultancy basis. She was required to comply with Admitting Doctors Association Guidelines and the respondent's Management of Medical Malpractice Policy and Procedures duly exhibited.

c. It is admitted the respondent suspended the claimant by the letter dated 22.01.2016 suspending her rights to continue practicing in the respondent's hospital. She was advised that full determination of her continued practice at the respondent hospital would be made after a peer review process through the laid down procedures.

d. On 05.02.2016 the respondent reported the matter the the Chairperson of the Kenya Society of Anesthesiologists and requested the Chairperson to nominate two members of the Society to sit in the peer review hearing fixed for 11.02.2016.

e. It is admitted that by letter dated 09.02.2016 the claimant requested the respondent to carry out a Root Cause Analyses of the cases complained of prior to reporting the matter to the Society and the responded replied accepting the claimant's request, suspended the peer review hearing but did not reinstate the claimant's practice privilege and the same would be communicated at a later date. The parties exchanged the letters of 9th and 10th February 2016 (also as pleaded for the claimant).

f. The Root Cause Analyses was scheduled for 12. 02.2016 but the claimant did not attend as it proceeded in her absence. On 25.02.20 16 was afforded a hearing before the Credentialing Committee.

g. By letter dated 10.03.2016 the respondent requested the Society the review the practice of the claimant. By letter dated 29.03.2016 the Kenya Society of Anesthesiologists responded to each of the cases and pointed out that the record keeping was not contemporaneous or accurate and found that the complaints could not constitute a malpractice suit, it would be prudent to have a separate individual do the cannulation.

h. The claimant was heard before the Credentialing Committee on 25.02.2016 and peer reviewed by the peers at the Kenya Society of Anesthesiologists and her practice rights reinstated on 01.04.2016 with expectation she would improve in keeping documentation, communication, adequate consideration and mitigating risks associated with anesthesia, the claimant failed to improve and the respondent permanently terminated her practicing privileges at the hospital by letter of 06.06.2016.

i. The claimant's appeal was declined and as pleaded for the claimant.

6. The respondent urged as follows on the remedies as prayed:

a. Reinstatement was not available as parties were not in a contract of employment.

b. Claimant not entitled to loss of earnings from January 2016 because while on suspension she did not work for the respondent.

c. The respondent did not breach the contract and general damages are not due.

d. Costs and interest not due as there was no termination.

7. The claimant testified to support her case and the respondent's witness (RW) was Dr. Thomas Ngwiri, Medical Pediatrician and Head of Clinical Services at the respondent Hospital. Final submissions were filed for parties and their respective Counsel made oral highlights of the submissions in that respect. The Court has considered the submissions and returns as follows.

8. The 1st issue is whether the parties were in a contract for service or in employment relationship and therefore a contract of service. In the ruling delivered herein by Onyango J on 22.02.2019 the Court found that the issue could only be determined upon taking evidence at the full hearing. In that ruling the Court held that to resolve the issue consideration must be made of all the circumstances and facts of the relationship and not merely the terminologies used by the parties in their formal contractual instrument or agreement. Those are the considerations the parties counsel have submitted upon.

9. RW testified as follows:

a. As at 2016 the claimant offered service per theater listing based on availability of surgeons and anesthetists.

b. The claimant used the respondent's equipment and not her own equipment.

c. She was at liberty to take any case and to decline any case.

d. Service was run upon call roster prepared by one of the anesthetist.

e. She billed some patients directly (and paid directly) and other bills could be through the hospital. She earned all money for patients billed directly without sharing with the hospital.

f. Hospital maintained records of the patients the claimant attended to.

g. The claimant claims termination of her admission privileges in 2016.

h. The contract of 2007 between parties lapsed sometimes in 2011. It was a service contract agreement. Its terms included the following:

i. Claimant be paid monthly professional fees of Kshs.50, 000.00 for 24 months ending on 28.02.2009.

ii. The consultant engaged to conduct daily teaching ICU rounds during her week on call each teaching ward round to last 1-2 hours incorporating tutorials and presentations.

iii. She shall be 3rd on call in ICU for one week in a month and to be available for all and any form of consultation as and when required.

iv. To participate and assist in the formulation of ICU clinical protocols within the Hospital and oversee implementation of the same for enhanced quality improvement processes and quality management at ward level.

v. To participate in research activities and one hour of CME per two months.

vi. To promote teamwork and help improve hospital corporate image.

vii. To coordinate all activities of other team members and to earn a further Kshs.10, 000.00 per month for being a team leader for duration of contract.

viii. To hold every three months a meeting with other team members to discuss ICU maters.

ix. Is bound by Hospital code of conduct and admitting doctors' association guidelines.

x. Is subject to the performance management and appraisals system as designed by the hospital.

xi. Shall abide by instructions given by Chief Pediatrician or person duly authorized by the hospital.

i. After 2016 the respondent still referred cases to the claimant and paid her accordingly.

j. The claimant was a Pediatric Anesthesiologist and the respondent's was only specialized pediatric hospital in Kenya at material time and is currently the number 1 pediatric hospital in Kenya so that the action taken against the claimant had a direct impact on her career.

10. The claimant testified that as at employment by the respondent in 2007 she was the only pediatric anesthesiologist in Kenya. She testified that the termination denied her practicing at the respondent hospital where she had invested all her time. The respondent had continued to refer its patients to her at Nairobi Hospital with which the respondent has entered some arrangements.

11. The court has considered the testimonies and material on record. The respondent acknowledges that initial employment was by the service contract agreement of 14.05.2007 which was running for two years. Both parties say plead little as to the terms of their relationship after the lapsing of the two years. RW testified that the initial arrangement lapsed sometimes in 2011. The claimant offered no pleading on the terms of service and testified that she was claiming unfair termination of her practicing rights. The Court finds that as submitted for the claimant parties were in a contract of service. It is that the respondent controlled the claimant's performance standards, the claimant was integrated in the respondent's operational system through imposed performance standards and systems; and the claimant earned per work done either directly from patients she attended to or through the respondent hospital. In Stanley Ominde Khainga v Nairobi Hospital [2018] KEELRC 669 (KLR) the Court held thus, "The Court has carefully considered the arrangement between the parties and the highlighted evidence. It is clear that the petitioner as a Courtesy Staff Member with admitting rights conferred by the respondent does not work for himself but under the respondent's regulatory control. The Court finds that the use of the word "consultant" describes the petitioner's qualification as "Consultant Plastic & Reconstructive Surgeon" but does not describe the relationship between the respondent and the petitioner. The Court returns that the relationship between the petitioner and the respondent is that of employee-employer and the petitioner is clearly paid out of funds paid to or collected by the respondent from the patients within the agreed arrangements. Nowhere has it been said that the petitioner worked for himself and while in the respondent's service, he used his own facilities accounting for his own losses and profits. Far from that, the respondent employed the petitioner within the framework of conferment of admitting rights with strict regulations and rules prescribing what the petitioner could do or not do, how to administratively discharge the work, and to work using the respondent's facilities and not the petitioner's own facilities. The Court finds that applying the multiple-test, the parties satisfied the criteria for a contract of service and not a contract for service as it were. The Court therefore returns that the parties are in employer-employee relationship with a clear contract of service."

12. While making that finding the Court has as well considered the submission for the claimant that in Uber BV and Others –Versus- Aslam and Others [2021] UKSC 5, the Supreme Court held that in deciding who is in an employment relationship, one must examine the control exercised by the employer over working conditions and remuneration and the dependency on the part of the worker. In that consideration, it appears to the Court that doctors generally and particularly those designated

as consulting doctors wholly or largely depend on the admission rights to practice in hospitals. Their livelihoods wholly or largely depend upon the continued enjoyment of the admission rights and use of the hospital equipment, resources, support hospital's human resource teams, and without which such doctors cannot work and will suffer loss of livelihoods.

13. It was submitted for the respondent that the claimant was not an employee and could not have been terminated within the context of the *Employment Act*, 2007. It was submitted that per Kenya Hotels and Allied Workers Union –Versus- Alfajiri Villas (Magufa) (2014)eKLR it was held by Radido J thus, "An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on" While citing the holding, the Court considers that the hallmarks of a contract for service have not been established in the instant case looking at the pleadings and the evidence on record.

14. The respondent also cited Anthony Njuguna v Afri-Cina International Co.Ltd & another [2022] KEELRC 509 (KLR) where Marete J held thus,"15. There was no employment relationship between the parties as defined under section 2 of the *Employment Act*, 2007 to justify the claims made. In the case of Ready-Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, 1968 2 QB the court made a distinction between a contract of service and contract for service where the courts held as follows "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

15. The Court has found that the claimant did not work for herself, she was subject to respondent's control, she had to comply with operational requirements, and she worked with respondent's equipment. The control was subsequently manifested in the suspension and then termination and upholding of the termination after the administrative appeal.

16. In Havi v *Judicial Service Commission & another (Petition E039 of 2024)* [2024] KEELRC 798 (KLR) (8 April 2024) (Ruling)Neutral citation: [2024] KEELRC 798 (KLR), the Court considered the International Labour Organization (ILO) Recommendation 198 (R198 - Employment Relationship Recommendation, 2006 (No. 198) and the need to curb against disguised employment. The Court stated thus, "17.R 198 further states that for the purpose of facilitating the determination of the existence of an employment relationship, members should, within the framework of the national policy referred to in the recommendation, consider the possibility of the following:

    (a) allowing a broad range of means for determining the existence of an employment relationship;

    (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and,

    (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

R198 further provides that members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

17. Accordingly, for the stated findings and view of guidance under ILO R.198, the Court has found that looking at the initial contract and then the prevailing arrangements in 2016 per RW's testimony, the parties were in a contract of employment.

18. The Court has considered the pay arrangements as at termination. The Court returns that the pay arrangements per RW's testimony were that the claimant was paid through the respondent or directly by the patient based on the patients she attended to. The Court finds that the arrangement was not alien to a contract of service but was consistent with piece rate payment based on work done as recognized in the *Employment Act*, 2007. Section 18 (1) of the Act states:

18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled——

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.

19. In that consideration, it appears to the Court that the claimant earned per piece of work done being number of patients she attended to and which payment arrangement was not alien to the *Employment Act* or an employment relationship.

20. The Court returns that parties were in a contract of service in employer and employee relationship as defined in the *Employment Act* and as found by the Court.

21. To answer the 2nd issue the Court finds that the procedure adopted to terminate the employment relationship was unfair. The claimant has established that the respondent was not open and failed to facilitate her involvement in the Root Cause Analyses and then the subsequent peer review by the Kenya Society of Anesthesiologists. The Court finds that as pleaded and submitted for the claimant, the claimant was exculpated of culpability with respect to the seven cases that lead to the suspension and further, the termination was not in respect of the seven cases or allegations that had been levelled.

The purported disciplinary hearing was opaque without due notice and particularized allegations and the respondent failed to disclose that it was a disciplinary hearing and despite the claimant having requested for the Agenda. The respondent allowed an appeal while denying the claimants the minutes of the purported disciplinary hearing and subsequently the minutes of the appeal hearing. The Court finds that the procedure adopted to terminate the employment was unfair and the reasons were unfair as they did not relate to the claimant's capacity, conduct or respondent's operational requirements.as per section 45 of the Act.

22. The 3rd issue is on remedies. The Court finds as follows:

    a. No submissions were made for the claimant to guide the Court on the award of general damages as claimed and prayed for. It appears to the court that the prayer was abandoned. While making that finding the Court has considered that the arrangement was one of piece work based on patients the claimant attended to. Her monthly income must have varied from time to time and the employment relationship was inconsistent with an award of compensation as per section 49 of the Act. Thus correctly so, no claims and prayer was made in that regard.

    b. The prayer for reinstatement is not available because three years limitation period attached per section 12 of the *Employment and Labour Relations Court Act* has since lapsed. It appears to the Court that in the special circumstances of the case where the parties have continued in a relationship but without the claimant enjoying the rights to directly practice at the respondent's hospital, a declaration should issue defining the parties rights that the claimant is entitled to the respondent permitting the claimant to continue enjoying the practicing rights at the respondent's hospital.

    c. The pay from the date of suspension is not due as is unjustified considering that the claimed amounts could not be computed as the claimant earned based on patients attended to, the piece work and piece rate payment arrangement. The claimant appears to have correctly abandoned that claim and prayer as no submissions were made in that regard.

    d. It is notable that being a piecework arrangement and involving multiple players such as the professional peer association and other professional regulatory systems, not all rights and obligations under the *Employment Act*, 2007 accrue. Thus leave and other rights attaching based on tenure of the contract of service may not accrue in the instant employment relationship that is disguised to appear as not being employment. It would appear that other rights such as the right to associate and collectively bargain would accrue. It is for the players in the industry to better formalize their employment relationship in the best interests of the parties.

    e. The parties have continued in work relationship and looking at the unique circumstances of the case, each party to bear own costs of the suit.

23. In conclusion the suit is hereby determined and judgment entered for the parties with orders as follows:

    1. The declaration that parties are entitled to continue in the employment relationship by the respondent permitting the claimant to continue enjoying the practicing rights at the respondent's hospital and upon such terms and conditions as the parties may agree upon.

    2. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 27TH FEBRUARY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE