



**Githinji v Topcare Lands Investment Limited (Cause E844 of 2022)
[2025] KEELRC 2295 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E844 OF 2022**

**L NDOLO, J
JULY 31, 2025**

BETWEEN

LYDIAH WANJIKU GITHINJI CLAIMANT

AND

TOPCARE LANDS INVESTMENT LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim against the Respondent, as documented by a Statement of Claim dated 18th November 2022, is for compensation for unlawful termination of employment and payment of terminal dues.
2. The Respondent's defence to the claim is stated in a Response dated 6th January 2023.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Chief Executive Officer, James Macharia Gichane. Both parties also filed written submissions.

The Claimant's Case

4. The Claimant states that she was employed by the Respondent on 3rd January 2022, in the position of General Manager, earning a monthly salary of Kshs. 200,000. She claims to have worked until 6th February 2022, when she was suspended indefinitely without pay and without cause.
5. According to the Claimant, she was employed by oral contract and her suspension was communicated by a Short Message Service (SMS) text sent by the Chief Executive Officer, James Macharia Gichane, through his mobile phone number to the Claimant's mobile phone number.
6. The Claimant, through her Advocates, sent two demand letters to the Respondent but there was no response.



7. The Claimant lays a claim of unlawful termination of employment and therefore claims monthly salary at Kshs. 200,000 from February 2022 to November 2022 and thereafter at the same rate for as long as the employment has not been terminated or in the alternative:
 - a. A declaration that the Respondent unlawfully and unfairly terminated the Claimant's employment;
 - b. Notice pay.....Kshs. 200,000
 - c. Unpaid salaries to the time of termination in July 2022.....1,200,000
 - d. 12 months' salary in compensation.....2,400,000
 - e. Special damages (official search CR 12).....600
 - f. Costs plus interest

The Respondent's Case

8. In its Response dated 6th January 2023, the Respondent denies offering the Claimant an employment opportunity but states that the Claimant was on probation with it. The Respondent adds that it could not issue the Claimant with an employment contract because she was not in employment.
9. The Respondent further denies having suspended the Claimant indefinitely without cause.
10. According to the Respondent, the Claimant did not leave her previous employment where she continued to work while under probation with the Respondent. The Respondent adds that as a result, the Claimant was unable to perform effectively due to lack of concentration.
11. The Respondent avers that during the one month that the Claimant was on probation, she only reported at the Respondent's premises for eleven (11) days, and not always for a full day.
12. Regarding the amount of Kshs. 200,000 paid to the Claimant, the Respondent denies that this was the Claimant's salary and states that Kshs. 100,000 was one month pay for the period the Claimant was on probation and Kshs. 100,000 was one month pay in lieu of notice.
13. The Respondent maintains that there was no employment relationship between it and the Claimant, and denies receiving any demand letter from the Claimant.

Findings and Determination

14. There are three (3) issues for determination in this case:
 - a. Whether there was an employment relationship between the parties;
 - b. Whether the Claimant has proved a case of unlawful termination of employment;
 - c. Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

15. In its defence against the Claimant's claim, the Respondent states that there was no employment relationship between the parties. In the same breath, the Respondent avers that the Claimant was on probation.



16. Section 2 of the *Employment Act* defines a probationary contract as:
- “a contract of employment, which is not of more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”
17. The Claimant states that she was employed by oral contract and the Respondent did not adduce any evidence to the contrary. The Claimant adds that her request for a formal contract of employment was not responded to. The Respondent chose not to document the Claimant’s employment and the tale about a probationary appointment therefore collapses.
18. In her written submissions dated 28th March 2025, the Claimant referred to the decision in *Obonyo v Britam Life Assurance Co (K) Ltd [2023] KEELRC 1133 (KLR)* where factors pointing to the existence of an employment relationship were summarised as; the extent of the employer’s control over the employee, integration into the business, obligation on the employer to provide tools of trade and remuneration.
19. There is evidence that the Claimant was paid a salary of Kshs. 200,000 for the month of January 2022. The Respondent’s averment that this payment was for a probationary appointment and notice pay was not supported by any evidence. Additionally, the position of General Manager, held by the Claimant cannot be said to have been peripheral in the Respondent’s business. The Claimant had a definite job to do and there was no room for deviation.
20. In light of the foregoing, I have no hesitation in reaching the conclusion that there was indeed an employment relationship between the Claimant and the Respondent, capable of enforcement by this Court.
21. In reaching this conclusion, I have ignored the concept of sales commission introduced by the Respondent in final submissions, which was not mentioned at all in the Respondent’s pleadings. As held in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR)* parties are bound by their pleadings.

Unlawful Termination?

22. I will now address the issue of the lawfulness of the termination. The Claimant’s employment was terminated by a text message sent to her by the Chief Executive Officer, on 6th February 2022.
23. A loose translation of this message, which was penned in a mixture of slang English and Kiswahili, is that the Claimant’s salary was not commensurate with the work she was performing and the Respondent was unable to maintain her. The message advised the Claimant not to report to work the following day, until further notice.
24. The Respondent’s Chief Executive Officer, James Macharia Gichane told the Court he did not contact the Claimant after this message. If indeed the Claimant’s performance was unsatisfactory, she ought to have been notified and given time to improve.
25. The procedure for dealing with cases of poor performance was established in *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010)* as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”



26. In the subsequent case of Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR my sister Mbaru J held that an employer alleging poor performance by an employee must demonstrate the existence of an objective performance evaluation system, as a benchmark for assessing the performance and providing support for improvement.
27. From the evidence on record, the Respondent did not subject the Claimant to either a performance review or capability hearing as an objective criterion to gauge her performance.
28. Flowing from the foregoing findings and conclusions, I find and hold that the Claimant has proved a case of unlawful termination of employment against the Respondent.

Remedies

29. Consequently, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's short stint in employment but also the Respondent's unlawful conduct in ending the employment relationship prematurely. I have further considered the Respondent's failure to issue the Claimant with a formal employment contract and termination letter.
30. I further award the Claimant one (1) month's salary in lieu of notice.
31. The claims for salaries to time of termination and special damages were not proved and are disallowed.
32. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 3 months' salary in compensation.....Kshs. 600,000
 - b. 1 month's salary in lieu of notice.....200,000Total.....800,000
33. This amount will attract interest at court rates from the date of judgment until payment in full.
34. The Claimant will have the costs of the case.
35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2025

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JUDGE

Appearance:

Mr. Mbuthia for the Claimant

Mr. Kamonjo for the Respondent

