



**Guha v Shah & 6 others (As office bearers of the Oshwal Education & Relief Board (OERB))  
(Cause E506 of 2023) [2024] KEELRC 2358 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2358 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E506 OF 2023  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**ANJANA GUHA ..... CLAIMANT**

**AND**

**SUHASH RATILAL SHAH ..... 1<sup>ST</sup> RESPONDENT**

**MUKESH VELJI SAVLA ..... 2<sup>ND</sup> RESPONDENT**

**NIRMAL KIRIT SHAH ..... 3<sup>RD</sup> RESPONDENT**

**VIMAL NEMCHAND GALA ..... 4<sup>TH</sup> RESPONDENT**

**SHITAL SHANTILAL HARIA ..... 5<sup>TH</sup> RESPONDENT**

**SACHIN MANSUKHLAL VISARIYA ..... 6<sup>TH</sup> RESPONDENT**

**NITIN PRAVINCHANDRA MALDE ..... 7<sup>TH</sup> RESPONDENT**

**AS OFFICE BEARERS OF THE OSHWAL EDUCATION & RELIEF BOARD  
(OERB)**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim dated 22<sup>nd</sup> June, 2023 alleging unfair and unlawful termination of employment and non-payment of terminal dues.
2. The Claimant avers that she was employed by the Respondent vide a contract dated 13<sup>th</sup> October, 2022 as the School's Operations Manager effective 3<sup>rd</sup> January, 2023 and the duty station was Nairobi, Kenya at a salary of Kshs.315,000.00 during probation and Kshs.375,000.00 after probation.
3. It is the Claimant's case that the contract of employment provided for performance reviews based on the objectives.



4. The Claimant avers that she relocated from India in January 2023 and commenced probation on 1<sup>st</sup> February, 2023 and her employment was terminated one (1) month later without notice.
5. The Claimant characterises the termination as malicious and prays for;
  - a. A declaration that termination of employment by the Respondent was unfair.
  - b. Terminal dues as follows;
    - i. 4 months' pay for the outstanding probation period.
    - ii. 9 months' pay on the outstanding contractual period.
    - iii. 12 months' salary as compensation.
  - c. Costs of this suit and interest at court rates.
  - d. Any other relief that the court may deem fit to grant.

### **Respondent's case**

6. Vide a statement of response dated 30<sup>th</sup> August, 2023, the Respondent admits that the Claimant was its employee as alleged and was aware that she re-located from India to Kenya to take up employment.
7. It is the Respondent's case that the Claimant had a meeting with the Academic Consultant on 28<sup>th</sup> February, 2023 and her performance was reviewed and a further meeting with the Board Secretary and the Academic Consultant on 2<sup>nd</sup> March, 2023.
8. The Respondent avers that it had a valid reason to terminate the Claimant's employment and paid all terminal dues as she was serving on probationary terms.
9. The Respondent prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

10. On cross-examination, the Claimant confirmed that the employment contract provided for a 6 months probationary period and admitted having met the Academic Consultant on 28<sup>th</sup> February, 2023 who informed her of the feedback received from senior management inter alia that she did not use a power point presentation as she was unfamiliar with the topic and stated as much, as it related to finance.
11. The witness admitted that another meeting took place on 2<sup>nd</sup> March, 2023 to discuss the issue of dismissal.
12. It was the Claimant's testimony that she had complained about not being in the WhatsApp group or email.
13. That the Respondent paid one (1) month's salary and offered to pay for a ticket to India.
14. The witness admitted that she worked for one (1) month only and did not complete the probationary period and signed the letter on final dues dated 14<sup>th</sup> April, 2023.
15. On re-examination, the witness testified that she was dismissed on 28<sup>th</sup> February, 2023 when she was informed that the Respondent's board of directors had intimated that they were not interested in retaining her and the meeting on 2<sup>nd</sup> March, 2023 was convened at her instigation.
16. That she accepted payment to survive and wanted to extend her VISA for at least 2 months.



17. That finance was not her area of expertise.

### **Respondent's evidence**

18. RWI, Mr. Brian Odhiambo confirmed that the Claimant signed the contract of employment.
19. That he had no evidence of the two meetings held and no notice on the Claimant's performance had been given on the alleged below per performance and reason for termination of employment.
20. That the Claimant was given feedback by word of mouth and was not accorded an opportunity to improve performance.
21. That statutory deductions are compulsory and on the flight ticket, it was the company's policy.
22. Finally, on re-examination, RWI testified that the Claimant was accorded 2 meetings on the review and termination respectively.

### **Claimant's submissions**

23. Counsel for the Claimant submits that the provisions of Section 41 of the *Employment Act* apply during probation and cited the decisions in Joseph Kareko Gikonyo v County Government of Lamu & 2 others [2022] eKLR as well as Monica Munira Kibuchi & 6 others v Mount Kenya University [2021] eKLR to reinforce the submission.
24. As to whether termination of the Claimant's employment was unfair, counsel for the Claimant submits that it was unfair as the provisions of Section 41 of the *Employment Act* were not complied with as no reason was given and the procedure was not complied with.
25. Counsel submits that RWI admitted that he had no evidence of any feedback or meeting for performance review and the Claimant was not accorded an opportunity to correct any performance gaps and no member of the Respondent's board of directors testified on the evaluation process.
26. Reliance was made on the sentiments of Mbaru J. in Jane Samba Mukalla V Ol Tukai Lodge Ltd cited in Otieno v Sameer Agriculture & Livestock Kenya Ltd [2024] KEELRC 1157 (KLR) as were those in Jane Wairimu Machira v Mugo Waweru & Associates [2012] eKLR and Njoroge v Cold Solutions Kiambu Sez Ltd [2023] KEELRC 2686 (KLR) on the period of performance improvement and assessment process where poor performance is noted.
27. On reliefs, counsel urges that the Claimant is entitled to the outstanding 4 months of the probationary period and 18 months outstanding contract period and 12 months compensation for unfair termination of employment as well as damages for discrimination which was neither pleaded nor prayed for.

### **Respondent's submissions**

28. On 7<sup>th</sup> May, 2024, both parties were accorded 21 days to file and exchange submissions and on 24<sup>th</sup> July, 2024, the Respondent had filed. The Court accorded the Respondent 14 days to do so but did not file until 2<sup>nd</sup> September, 2024 after this judgement had been written and thus late.

### **Analysis and determination**

29. It is common ground that the Claimant was employed by the Respondent effective 1<sup>st</sup> February, 2023 and served for only one (1) month.



30. As adverted to elsewhere in this judgment, the contract of employment dated 13<sup>th</sup> October, 2022 provided for a 6 months probationary period which was extendable by the Respondent for a further period of 6 months and successful completion of probation entitled the Claimant to a two (2) years contract and a Work Permit was necessary.
31. It is equally not in contest that the contract was terminable by a one (1) month's written notice by either party or payment in lieu of notice.
32. It is also not in dispute that the Claimant signed a detailed job description on 7<sup>th</sup> February, 2023.
33. The Respondent has not contradicted the Claimant's testimony of the termination of employment on the ground of poor performance and RWI confirmed on cross-examination that he had neither evidence of the Claimant's evaluation or assessment or minutes of the meetings held on 28<sup>th</sup> February, 2023 or 2<sup>nd</sup> March, 2023.
34. Finally, it is not in dispute that the Claimant was paid one (1) month's salary.
35. The issues for determination are;
  - i. Whether termination of the Claimant's employment by the Respondent was unfair.
  - ii. Whether the Claimant waived her right to pursue further claims against the Respondent.
  - iii. Whether the Claimant is entitled to the reliefs sought.
36. On the 1<sup>st</sup> issue, while the Claimant alleges and testified that the termination of her employment was unfair, the Respondent's case is that the termination was fair as the Claimant was accorded an opportunity to discuss her performance review and probation.
37. It requires no gainsaying that for a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair procedure.
38. The reason for termination of employment must relate to the employee's conduct, capacity or compatibility or operational requirements of the employer.
39. Put in the alternative, it must be proved that the employer had a substantive justification for the termination of employment and conducted the termination in manner that was procedurally fair as aptly captured by Linnet Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR. See also *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR where the Court of Appeal elaborated on the difference between substantively and procedurally unfair termination of employment.

### **Reason for termination**

40. In the instant case, it is common ground that the Respondent terminated the Claimant's employment on the ground of below per performance, having worked for only one (1) month.
41. It is also not in contest that no termination letter was issued but the Claimant was paid and accepted one (1) month's salary and a certificate of service dated 14<sup>th</sup> April, 2024.
42. In *Jane Samba Mukala V Ol Tukai Lodge Ltd* (Supra), cited by the Claimant's counsel, Mbaru J. provided a very detailed rendition on termination of employment on account of poor performance.
43. In the words of the learned judge;



- a. “Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in Section 8 of the [Employment Act, 2007](#). The employer must show that in arriving at the decision of noting the poor performance of an employee they had put in place an employment policy or practice on how to measure good performance as against poor performance.
  - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
  - c. Beyond having such an evaluation measure and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
  - d. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee”.
44. The court expressed similar sentiments in Samuel Nguru Mutonya v National Bank of Kenya Ltd.
  45. Evidently, the Respondent adduced no evidence of having had a policy or practice on performance evaluation or appraisal and RWI confirmed as much.
  46. The witness also confirmed as mentioned above, that he had no evidence of the Claimant’s performance review or assessment or minutes of the meetings held on 28<sup>th</sup> February, 2023 and 2<sup>nd</sup> March, 2023.
  47. Plainly, the Respondent adduced no evidence of how the Claimant was rated, by who and when the appraisal took place bearing in mind that the 1<sup>st</sup> meeting with the Academic Consultant took place on 28<sup>th</sup> February, 2023 and no evidence was availed to show that the Academic Consultant evaluated or assessed the Claimant.
  48. The Claimant’s uncontroverted evidence is clear that on 28<sup>th</sup> February, 2023, the Academic Consultant verbally informed her that her employment had been terminated and on inquiry was informed that her services were no longer required as the Respondent could not find a vacancy for her to fit in which is perplexing because the Claimant was competitively recruited.
  49. Although the Claimant admitted that she did not use the power point presentation on one occasion during a training, the Claimant testified that she had indicated that she was not familiar with the topic on finance and the incident was not captured as the basis in which the Claimant’s employment was terminated and arguably cannot avail the Respondent.
  50. In the absence of verifiable evidence to show that the Respondent had institutionalized a performance management system or practice to assess good from poor performance and in fact evaluated the Claimant’s performance and found it wanting, it is the finding of the court that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment.



## Procedure

51. As correctly submitted by the Claimant's counsel, the provisions of Section 41 of the [Employment Act](#), 2007 apply to employees on probation as well as those not on probation as held by the Three-judge Bench in *Monica Munira Kibuchi & 6 others v Mount Kenya University* (Supra), which declared Section 42(1) of the [Employment Act](#) unconstitutional.
52. The decision in *Joseph Kareko Gikonyo v County Government of Lamu & 2 others* is of a similar persuasion.
53. Although the essence of probation is to enable the employer assess the on-the job suitability of the new employee, the person is no longer a candidate for the position but an employee of the organization or person and ought to be notified of the outcome of the assessment and the same discussed with the supervisor to determine whether the situation is capable of being salvaged and how to proceed.
54. In its wisdom, Parliament accorded employer up to 6 months of probation to accord them sufficient time to assess the suitability of a new employee and the duration may be extended with agreement of the employee.
55. Puzzlingly, in this case, it took the Respondent less than one (1) month to determine that the Claimant was unsuitable for employment.
56. Intriguingly, no performance appraisal, evaluation or review was availed, no notice or warning letter on the alleged poor performance was provided or letter of termination.
57. Although RWI confirmed on cross-examination that the Claimant's performance was below par, which was the reason for termination of employment, and the Claimant had been given feedback by word of mouth, none of these statements was verifiable and are of nominal probative value.
58. In the absence of verifiable evidence on what transpired during the meeting between the Academic Consultant and the Claimant on 28<sup>th</sup> February, 2023 or the meeting on 2<sup>nd</sup> March, 2023 after termination of employment, it is the finding of the court that the Respondent has failed to demonstrate that it terminated the Claimant's employment in accordance with a fair procedure.
59. For unexplained reasons, the Respondent made its decision too early in the probation, thus did not accord the Claimant time to familiarise herself with the new employment and environment or an opportunity to remedy her weaknesses which were never disclosed.
60. As clearly stated by Mbaru J. in *Jane Samba Mukala v Ol Tukai Lodge Ltd* (Supra), it is not enough to state that an employee's performance is poor. The employer must prove how it arrived at such a finding and a decision made to terminate employment.
61. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment and conducted it in accordance with a fair procedure.
62. As to whether the Claimant waived her right to pursue further claims against the Respondent, it is not in contest that the Claimant executed a Final Dues Discharge Notice dated 14<sup>th</sup> April, 2023 and admitted as much on cross-examination.
63. The Claimant further confirmed that she was aware of the import of the statement at the bottom of the Discharge Notice that she had no further claims against the Respondent.



64. In *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* [2017] eKLR, the Court of Appeal stated that the employer/employee relationship is ultimately a contractual relationship governed by principles of common law, equity, the *Employment Act* and other relevant statutes and parties are thus free to insert such terms as they may agree.
65. The principles that govern discharge vouchers, notices or settlement agreements are well settled by the Court of Appeal in several decisions.
66. For instance, in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court of Appeal was unambiguous that;
- “ . . . The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
67. Similarly, in *Coastal Bottlers Co. Ltd v Kimathi Mithika* [2018] eKLR, the Court of Appeal stated;
- “Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”
68. In the instant case and as mentioned elsewhere in this judgment, the Claimant signed the Final Dues Discharge Notice dated 14<sup>th</sup> April, 2014 more than one (1) month after termination of employment.
69. The Discharge Notice read;
- Our Ref:HR/B/008/2023 Date:14<sup>th</sup> April, 2023  
Re: Final Dues Discharge Notice  
Please find attached a cheque of your final dues payment computed as follows:-  
Basic pay – Kshs.315,000.00  
Less PAYE – Kshs.89,283.35  
Net Pay = Kshs.225,716.65  
The above has been paid to you through cheque No. 238546.  
Please acknowledge receipt below.  
Yours faithfully,  
signed  
Brian Ojiem  
Human Resource Manager  
I Anjana Guha of ID/Passport No. Z6541795 acknowledge that I have received my final dues as stated above and have no further claim with the Respondent.  
Signature: signed Date: 14/4/2023
70. The import of the Final Dues Discharge Notice in the court’s view is that the Claimant and the Respondent agreed that payment of the sum of Kshs.225,716.65 would effectively discharge the



Respondent from liability under the contract of employment between them and termination of employment and was binding on both parties.

71. Having admitted that she signed the Final Dues Discharge Notice dated 14<sup>th</sup> April, 2023 and understood its import, the Claimant is estopped from contending that she had a claim against the Respondent as she by the signature waived her right to pursue further claims against the Respondent.
72. The foregoing is fortified by the fact that the Claimant did not testify or contend that her signature was procured by duress, misrepresentation, undue influence, mistake or other vitiating element of a contract, and thus admitted its binding nature as a contract.
73. The argument that the Claimant accepted payment because she needed cash cannot avail her as she signed the document voluntarily while aware of its import.
74. See Coastal Bottlers Ltd v Kimathi Mithika (Supra).
75. As regards the reliefs sought, the Claimant prays for a declaration that termination of employment was unfair which as found elsewhere in this judgement is merited.
76. For the outstanding 4 months of the probationary contract and 9 months of the outstanding contract period, these claims relate to anticipatory earnings and no factual or legal justification has been provided for their award.
77. Even assuming that the Claimant's employment was not terminated after one month, there is no guarantee or assurance the Claimant would have remained an employee of the Respondent for the entire duration of probation or contract of employment as it was terminable at the instance of either party by a one (1) month's notice or salary in lieu of notice.
78. See D.K. Njagi Marete v Teachers Service Commission [2020] eKLR, Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR and Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR among others.
79. The claim is unsustainable.
80. Finally, on 12 months salary as compensation, having found that the termination of employment lacked a substantive justification or procedural fairness, the Claimant would have been entitled to compensation but for the waiver of actions against the Respondent signed on 14<sup>th</sup> April, 2023.
81. In the upshot, the Claimant's suit against the Respondent is unsustainable and it is accordingly dismissed.
82. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

**DRAFT**

