



**Midhune v Alfarooq Hospital Management Limited (Cause  
153 of 2018) [2022] KEELRC 1772 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1772 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 153 OF 2018  
B ONGAYA, J  
JULY 29, 2022**

**BETWEEN**

**RUTH MIDHUNE ..... CLAIMANT**

**AND**

**ALFAROOQ HOSPITAL MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on March 21, 2018 through Otieno B N & Associates Advocates. It is her case that she was employed by the respondent on October 01, 2015 with a starting salary of kshs 12,348.00 per month. Her further case is that on September 05, 2016 her employment was terminated without any warning or hearing notice. She claims terminal benefits, salary in lieu of notice and leave allowance. The claimant prays for judgment against the respondent for:
  - a. A declaration that the termination of the claimant's employment was unfair and unlawful under the *Employment Act*, 2007.
  - b. One month's pay in lieu of notice kshs 12,348.00.
  - c. Payment for annual leave for one year kshs 8,643.60.
  - d. 12 months' salaries for unlawful termination kshs 12,348 x 12 = kshs 148,176.00.
  - e. Total amount claimed kshs 169,167.60.
  - f. Costs of the suit.
2. The respondent filed the statement of response on April 05, 2018 through Khalid Salim & Company Advocates. The respondent's case is that the claimant was paid all her terminal benefits that were due to her and she is not entitled to the claims as made. The respondent's further case is that she was aware of the hospital policy that if she was not confirmed as a permanent employee then she continued to



serve on probation. Further, the respondent followed the due procedures before making a decision to terminate the claimant's contract of service. The respondent prayed that the suit be dismissed with costs.

3. The claimant testified to support her case and despite service, the respondent and its witness did not attend at the hearing on July 13, 2022.

To answer the 1st issue for determination, the court returns that parties were in a contract of service. The respondent employed the claimant by the letter dated October 01m 2015 as a healthcare assistant effective October 01, 2015. She was to serve for 3 months on probation and she was to be given a copy of the hospital policy, job description and terms and conditions of service. The agreed salary was a net of kshs 12,348.00 per month.

To answer the 2nd issue, the court returns that the respondent terminated the contract of service by the letter dated September 05, 2016. The termination was effective November 01, 2016. The reason for termination was that it had been noted that the claimant's work output did not meet the required standard of care the respondent had set in order to give quality healthcare.

4. The claimant testified that she reported at work on September 05, 2016 and was summoned at 1.00 p.m. and told that her job was over. Further she received the termination letter on September 05, 2016 and which required her to work upto November 01, 2016. She stated that she did not recall her last day at work and her last payment was on September 16, 2016. She further testified that on September 16, 2016 the Manager one Yusuf told her to go away to be recalled but she was never recalled.

5. The 3rd issue for determination is whether the termination was unfair. The claimant was employed effective October 01, 2015 and in absence of any other evidence, her service on probation of 3 months was ending on or about January 01, 2016. She was terminated on September 05, 2016 but effective November 01, 2016. Under section 42(2) of the *Employment Act*, 2007, a probationary period shall not be for more than 6 months but may be extended for a further period of not more than 6 months with the agreement of the employee. In the present case, there is no evidence that parties agreed to extend the period of probation. The court finds that the respondent was misconceived in stating that since there had been no express confirmation into permanent service, the claimant continued on probation service. Instead, the court returns that in absence of extension of service on probation as envisaged in section 42(2) of the Act, the service on probation lapsed on or about January 01, 2016. Further, the court returns that as at termination in September, 2016, the claimant was entitled to a notice and a hearing as provided in section 41 of the Act if at all the respondent desired to terminate her on account of unsatisfactory performance as alleged in the termination letter. The court returns that the termination was unfair in procedure and substance. In particular, the court returns that the respondent has failed to show the unsatisfactory performance as envisaged in sections 43, 45 and 47(5) of the Act.

To answer the 4th issue on remedies, the court returns as follows:

1. The claimant testified that on September 05, 2016 she was summoned and given the letter of termination dated September 01, 2016 and told her job was over. Her further testimony was that on September 15, 2016 she went back to the office as was required of her and the Manager, Yusuf, told her that her job was over. Her case was that she was terminated immediately despite the termination letter stating that she was to work upto November 01, 2016. The court finds that her evidence is not rebutted and she is awarded 1 month's salary in lieu of the termination notice kshs 12,348.00. She is also awarded 1 year leave payment kshs 8,643.60 as prayed for.
2. She prays for 12 months' salary for unlawful termination. The court has found that the termination was unfair and unlawful. However, the claimant had served for only about 1 year. She desired to continue in employment and considering the factors in section 49 of the Act and



the short period served, she is awarded 3 months' salaries for the unfair termination making kshs 37,044.00. She has succeeded in her claim and she is awarded the costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the contract of service was unlawful and unfair.
2. The respondent to pay the claimant a sum of kshs 58,035.00 by October 01, 2022 failing interest to be payable thereon at court rates from the date of this Judgment till full payment.
3. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH JULY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

