



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 1391 OF 2016

LYDIA MORAA OBARA.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The claim herein originates from a dismissal of the claimant from employment by the respondent. Holding the dismissal to be unfair, wrongful and without merit, she has sued the respondent seeking the reliefs put forth in her statement of claim dated 12th July 2016, namely;

(i) A declaration that the claimant's termination from her employment was unfair, wrongful and unmerited in the circumstances.

(ii) The Claimant be paid her terminal benefits as set out in paragraph 16 of the statement of claim totaling to Kshs. 2,349,905.

(iii) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

(iv) The respondent does pay the costs of this claim.

(v) Interest on the above at Court rates.

(vi) The respondent be ordered to give the Claimant a certificate of service in compliance with Section 51 of the Employment Act, 2007.

2. Upon being served with summons to enter appearance, the Respondent did enter appearance, and file a statement of response. In the statement it denied the Claimant's claim. Consequently, the matter got destined for hearing on merit.

3. When this matter came up for hearing on the **29th July, 2021** neither the respondent nor its advocate was in attendance of Court. Satisfied that a notice had been served upon the respondent's counsel for this day, the court allowed the matter to proceed in the absence of the Respondent.

4. The claimant did testify, adopting her witness statement as her evidence in chief. She briefly gave oral evidence on matters that she felt needed clarification.

THE CLAIMANT'S CASE.

5. The Claimant's case is encompassed in the, statement of claim filed herein, witness statement-statement that was adopted as her evidence in chief, brief oral evidence hereinabove mentioned, and the documents that she tendered as exhibits 1 to 10.

6. The claimant stated that she got employed as a cashier by the Respondent on the **1st day of March, 2015**. The engagement at this point was oral. Her starting salary was **Kenya Shillings Thirty Thousand**. Her first station of work was the Respondent's supermarket at Pioneer Branch. Later in the month of August 2015, by way of promotion, the Claimant rose to the rank of a cash office attendant. The Claimant testified that the letter of appointment dated **27th November 2015- EXH.1**, confirmed this.

7. According to the Claimant, it was a term[s] of employment *inter alia* that her employment was a fixed term contract of two years, with a monthly consolidated salary of **KSHS. 45,000**. The contract period was to run from 1st December, 2015 to 1st December 2017.

8. Barely five and half months into the contract period, what was otherwise a smooth employee-employer relationship, got into headwinds. In her evidence, the claimant attributed the origin of this situation to an act of theft by one of her colleagues- Mr. Jared Onsongo.

9. The claimant stated that on the 22nd day of April 2016, Jared came to the office in a manner that was to her usual. He found her with a trainee -Mr. Salim in the office. She left him and the trainee in the office and proceeded to pick money from cashiers for safe keeping. When she got back to the office she found her colleague, Jared, had left for the manager's office. After a short while, the colleague called her to the manager's office whereat he indicated to her that he was leaving for home. As he left, he handed over safe keys to the claimant. The claimant then got back to the cash office, deposited the cash that she had collected from cashiers into the sales safe. Since it was too late, she left for home.

10. The following morning, [23rd April 2016], the claimant got to the office and embarked on counting the cash, starting with the cash that she had deposited in the sales safe. She then proceeded to open the float safe so that she can count the cash that had been deposited therein. She got a surprise. The safe was not in the state that she had left it. It had been disturbed. When she counted the money that was in it, she discovered that the money was less by about Kshs. 600,000. She was doing all these in the presence of Mr. Salim. The claimant had immediately upon realizing the state of the safe, called the manager who instructed her to confirm the amounts therein with the trainee. Upon realizing the deficit, she called the manager to inform him, and requested him to get to the cash office and confirm. This he did. He confirmed the loss.

11. The claimant contended that she requested the manager to call Jared, and surprisingly it is at this point that the manager disclosed that Fred had been suspended the previous day. The claimant was not aware of the suspension. The head office had not informed her of it.

12. The manager informed the audit office, who eventually after an audit confirmed that **Kshs. 578,421** had been lost.

13. According to the claimant, she and Jared had access to the two safes. They could place the keys thereto at a common place for either of them to access them.

14. Through a show cause letter dated **5th May 2016, -EXH.3** the Respondent required the claimant to show cause why disciplinary action, including summary dismissal wouldn't be taken against her on an account that on the 22nd April 2016 while working as a cash office attendant at Imara branch, she negligently left the safe unsecured which led to a loss of Kshs.578,421.00. The letter required her to give an explanation in writing within two days of receipt of the same.

15. In writing, the claimant did give a detailed explanation on what happened and why she was of the view that she had not misconducted herself, and not at fault. The letter is undated. It was produced as EXH.4. Subsequently, through a letter dated 7th May 2016, the claimant was summoned to appear before a disciplinary committee on the **12th May 2016**. In honour of the invitation, the claimant did appear before the committee presenting her case against the accusation. Salim too gave his version on the events that led to the situation, the subject matter of those disciplinary proceedings. The minutes of the committee were tendered in evidence as EXH.6.

16. Through a letter dated 13th May 2016, the respondent dismissed the claimant from employment. The committee had found the claimant guilty of negligence, negligence the product of which was a substantial loss to the Respondent. She received the letter on 7th June 2016.

17. The claimant contended that this letter of termination was backdated in bad faith. She had on several occasions visited the Respondent's head office inquiring of her fate and all through she was informed that a determination had not been made. The last of such an occasion was on the 6th June 2016. On this date she was told that she'd be called the following day to be informed of the committee's decision.

18. The claimant contends that her dismissal was unfair, wrongful and unmerited. She took a position that there was no valid reason that would justify the heavy sanction that was handed down on her, by the Respondent.

19. According to the Claimant, the Respondent exhibited unwillingness to pay her full terminal dues and compensation for unfair termination. This constrained her to seek services of an advocate. Demand letters were done. Eventually the Respondent offered Kshs. 57,835 as full and final terminal dues, an amount the claimant found grossly miscalculated. This prompted her to decline the offer.

20. The claimant put before this Honourable Court evidence in fortification and justification of the reliefs specifically brought out in paragraph 19 of her statement of claim. I summarize the evidence hereunder.

I. One Month's salary in lieu of notice.

The claimant testified that she was not given any notice before the termination, entitling her to a one month's salary in the stead of notice.

II. Leave for one year [26 days].

The claimant testified that for the entire that period she was in the service of employment, she never proceeded for leave.

III. Overtime 6hrs per a day for 6 days per a week for 15 months.

It was the claimant's that it was routine for her to work daily from 6 A.M to 9:00 P.M. Therefore, working overtime for 6 hours. The respondent did not pay her for the overtime worked, at any time.

IV. Service Gratuity@ 20 days for each completed year.

The claimant anchored her claim under this head on clause 24 of the CBA that was between the Respondent and the Kenya Union of Commercial, Food and Allied Workers Union. She tendered the agreement in her evidence as exh.10.

V. 12 Months' salary compensation

The Claimant contended that the termination was without valid reason, and unfair. Accordingly, she is entitled to compensation to this extent.

VI. Remainder of the contractual period.

According to her, she was only five and half months into the contract period when the termination occurred. There was a remainder of 19 months on the contract therefor. The Respondent breached the contract, and as a result thereof it is bound to pay for the remainder of the contractual period.

VII. Salary for May 2016

The termination occurred at a time when the Claimant had not been paid for the month of May 2016, though she had worked during this month, she asserted.

VIII. Salary for 7days worked in June 2016

The Claimant stated that in the month of June she worked for 6 days and therefore entitled to Kshs.12,115.4 as salary thereof.

IX. 12 Public Holidays

On this, it was her case that though she was entitled to payment for those public holidays on which she worked during the currency of her employee-employer relationship with the Respondent, she was not.

X. 8 off days for September and October 2015.

XI. Leave travelling allowance.

In her testimony, the Claimant stated that her claim under this head was anchored on clause 19 of the CBA.

THE RESPONSE

21. As indicated hereinabove, the Respondent filed a response to the claim but as a result of the default in attendance of court, did not lead evidence towards establishing that which it had pleaded. Pleadings will never be a substitute for evidence. Section 3 of the Evidence Act Cap 80 Laws of Kenya defines Evidence as:

“Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disapproved, and without prejudice to the foregoing generally includes statements by the Accused persons, admission and observation by the Court in its judicial Capacity.”

22. In **CMC Aviation Ltd Vs. Cruise Air ltd [1] [1978] KLR 103, Madan – J.** stated:

“pleadings contain averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

23. This Court shall treat the respondent's pleading as such a pleading without more.

24. However, where it comes to the attention of Court that a pleading raises a point of law and more especially one that attacks the Court's jurisdiction on the matter, it will be an abdication of duty for the Court to fail to consider that point on an account that no evidence was led by the concerned party on the pleading. At paragraph 1. of the statement of response, the Respondent stated;

“1. The Respondent shall at the earliest possible opportunity raise a preliminary objection in limine for determination by this Honourable Court on the ground that the Claim herein is fatally defective in light of Section 45 [3] of the Employment Act,2007 which requires an employee complaining of “unfair termination” to have “been continually employed by his or her,[as is the case here] employer for a period not less than thirteen months immediately before the date of termination.”

25. The Respondent is assailing the Court's jurisdiction over this case. The Court shall shortly hereafter decide on whether or not it is clothed

with jurisdiction to entertain this claim in the context of the provision of the law cited.

ISSUES FOR DETERMINATION.

26. The following three broad issues emerge as the issues for determination in this matter;

I. Whether by dint of the provisions of Section 45[3] of the Employment Act,2007 this Honourable Court lacks Jurisdiction to entertain the suit herein?

II. Whether the dismissal of the Claimant from employment was procedurally fair.

III. Whether the dismissal was substantively fair.

IV. What remedies are available if any to the Claimant in the circumstances of this matter?

V. Who should bear the costs of this suit.

Whether by dint of the provisions of Section 45[3] of the Employment Act,2007, this Honourable Court has Jurisdiction to entertain this Claim.

27. As I did indicate hereinabove, the Respondent raises an issue that goes to the jurisdiction of this Court to entertain the Claimant's claim as presented. The Respondent has put reliance on the provisions of Section 45[3] of the Employment Act. The Section provides;

“An employee who has continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

28. In **Samuel G Momanyi v Attorney General and Another [2012]eKLR** the Court found that this provision was unreasonable and inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, and 48. I entirely agree with the holding.

29. Recently, a three Judge bench of the Employment and Labour Relations Court, in **Monica Munira Kibuchi and 6 Others VS- Mount Kenya University and Another, Petition No 94 of 2016 Nairobi** cited with this decision with approval.

30. The Respondent missed the point.

Whether the dismissal of the Claimant from employment was procedurally fair.

31. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45[2][c], provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.

32. The answer as to what fair procedure is, is found in the provisions of Section 41 of the Employment Act,2007 which provides;

“ [1]. Subject to section 42[1], an employer shall, before terminating the employment of an employee, on 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.”

33. This should be looked at, not in isolation from, but in conjunction with, the provisions of the Constitution of Kenya 2010, regarding the right to fair hearing, and the Fair Administrative Actions Act.

34. In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to, rebut the allegations of misconduct, or offer a representation on any ground[s] that the employer has indicated to be basis for his intention to terminate the employment, and bring to the attention of the employer any relevant information before a final decision is taken.

35. From the evidence placed before this Honorable Court, I note;

[a] That through its letter dated 5th May 2016 the respondent indicated to the Claimant the alleged misconduct that would form basis for a sanction against her.

[b] In the said letter, the Claimant was invited to make a representation on the allegation in writing.

[c] That through her letter [EXH.4], the Claimant in honour of the invitation, did give a detailed explanation.

[d] Further to these, through its letter dated 7th May 2016, the Respondent invited the Claimant to attend before its Disciplinary Committee, to give her representations on the allegations. The letter urged the Claimant to be off duty from the date of the letter to the date of the disciplinary hearing, to enable her adequately prepare. The rights available to her during the disciplinary hearing were brought forth therein, in detail.

[e] The minutes of the Disciplinary Committee [EXH.6] are indicative that the Claimant was given ample time to explain herself on the allegations. She was accompanied by a colleague who was also given a chance to explain what he knew about the events that culminated the situation that was at hand.

36. It is not difficult to conclude that the termination was

procedurally fair. I so find.

37. I do not agree therefore with the Claimant's submissions that fair procedure was absent. The submissions do not seem to draw a line between procedural fairness and substantive fairness.

Whether the termination was substantively Fair.

38. Section 45 of the Employment Act stipulates;

“[1] No employer shall terminate the employment of an employee unfairly.

[2] A termination of employment is unfair if the employer fails to prove-

[a] that the reason for termination is valid;

[b] that the reason for the termination for the termination is a fair reason-

[i] related to the employee's conduct, capacity or compatibility; or

[ii] based on the requirements of the employer, and

[c]”

39. Section 45[5] provides a platform for Courts to determine whether an employer's decision was just and equitable.

40. It is here that the need for substantive fairness in the termination process is supplied.

41. In determining the appropriateness of the dismissal, this Honourable Court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of fairness of the dismissal rests with the employer. In the persuasive decision, in **Theewaterskloof Municipality v SALGA [2010] 10 BLLR 1216[LC]1223**, South Africa Labour Court, Tip AJ aptly sums up this as follows:

“[T]he core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.”

42. The line of representation that was taken by the Claimant prior to, and in the course of, the disciplinary proceedings, has three notable threads, first that Jared and her at the material time worked in the same office, second that both of them had access to the strong room and the key to the safes, and lastly that the management failed to inform her of Jared's suspension in time, otherwise she wouldn't have allowed him to access the strong room and keys to the safes.

43. These threads are discernable in the material placed before this Honourable Court by the Claimant. I got her as saying, that the situation and the loss as a result therefrom, was created by the lapse on the part of the management, hence the loss should not have been visited on her. The Claimant asserted that the manager told her of the sanction that had been meted upon Jared, after the incident not before.

44. From the minutes of the Disciplinary Committee one cannot fail to note that the Claimant was given a chance to ask questions on matters that were of importance to her. At some point in the course of the proceedings she had a chance of asking one of the committee members a question [Page 7 of the proceedings 3rd last line], whereat she asked, “ why were we not informed that Jared had been suspended from work?” The member answered that they informed the branch manager. This prompted the Claimant to immediately tell the member that the manager didn't inform them.

45. Nothing can be noted from the disciplinary proceedings, demonstrating that the manager informed the Claimant of Jared's suspension earlier than after the incident. None was placed before this Honourable Court either.

46. The termination letter puts forth three grounds that formed basis for the Disciplinary Committee's determination that termination of

service was the most appropriate sanction to be handed down on the Claimant, thus;

(i) That during the disciplinary hearing, the Claimant confirmed to have not been interested to know the main reason for Jared's suspension which led to the fraud of the said amount.

(ii) That the committee was furnished with a statement from the management which confirmed that the Claimant allowed Jared Onsinjo to the Cash office without any authorization from the management. This showed high level of negligence on the part of the Claimant.

(iii) That the Claimant had an ample opportunity to perform her work properly including seeking for advice from her manager or supervisory team in the branch who were available to provide guidance but she chose to ignore.

47. These grounds cannot be deduced from the notice to show cause letter. The flow of the disciplinary proceeding doesn't suggest that they were put to the Claimant for her representation on them. For instance, the kind of negligence the Claimant was charged of, is not the kind of negligence that formed the basis for her dismissal as per the letter. Further, looking at the proceedings, the material therein looked at its totality suggest that Jared was a cash office attendant like the Claimant and that they had worked together in same office for a period of six months. One struggles to understand where the issue of authority arises from.

48. To condemn one on count[s] that was never the subject matter of a notice to show cause, or that are founded on no evidence emerging from the disciplinary proceedings, denotes unreasonableness and speaks to lack of validity on the grounds.

49. I am convinced that the situation that led to the loss of the Respondent's money was as a result of a lapse on the part of the management. They failed to in good time, inform the Claimant of the suspension of her colleague, otherwise had they, she wouldn't have allowed him access to the working station.

50. Section 45[5] of the Employment Act, gives Courts of Law a platform to determine whether the employer's decision to terminate was just and equitable. An adverse decision against an employee, that flows from a situation created by a systematic or any other lapse on the part of an employer cannot be said to be equitable or just. In the context of the situation that led to the loss, I have considered her conduct, it is one that cannot be said to be blemished.

51. Section 43 of the Employment Act places upon the employer an obligation to prove the reason or reasons for the termination, failing of which the termination shall be deemed to have been unfair within the meaning of section 45. The respondent never testified in this matter. It cannot be said that it discharged the obligation.

52. In the upshot, I have come to a conclusion that the termination was not substantively fair. It was not just and equitable. It was upon premise of reasons that were not valid. In the circumstances the respondent did not act in accordance with justice and equity in terminating the employment of the employee.

What Reliefs are available to the Claimant?

53. Having found that the termination was not substantively fair, I now turn to the reliefs sought by the Claimant to determine whether they are grantable in the circumstances of the matter.

(i) One month's pay in lieu of notice

54. The Claimant seeks to be given Kshs 45,000. There is no doubt that the contract was terminated without notice. Clause 10.3 of the letter of appointment (Exh.1) provides for payment in lieu of notice. Consequently, I award the Claimant Kshs.45000, under this head.

(ii) Leave for one year – 26 days

55. The Claimant testified that she did not take any leave during the time she was in the employment of the respondent. She cited the nature of her work that didn't allow her to be released by the respondent. Her evidence on this remained unchallenged. Clause 7 of the Letter of Appointment entitled the Claimant in addition to public holidays to 23 working days leave with pay, in each calendar year at such times as would be mutually agreed between the Respondent and her. As shall be demonstrated shortly hereinafter, for purposes of this matter, the Claimant worked for the Respondent for only five and half months. She did not place any evidence before this Court to establish otherwise. She can therefore only get leave pay calculated on the five and half months, not any longer period such as that which formed basis for computation she has done. The Claimant is awarded a sum of Kshs.20,625.

(iii) Salary for May 2016

56. The termination letter brought the employer-employee relationship to an end. The letter is dated 13th May 2016. The Claimant states that, prompted by bad faith the letter was backdated. She entertained this position upon the reason that on several occasions she visited the Respondent's head office to know her fate, and in all those occasions, she was told to continue waiting. She testified that on the 7th day of June 2016 that she was called to pick the Letter of termination. According to her the termination took effect on the date she picked the letter.

57. I am not convinced that the Respondent would have had reason to backdate the termination letter. Put in another way, the Claimant did not put forth any evidence establishing to requisite standards that the letter was backdated. The Claimant can only get salary for the month of May 2016, only up to the date of termination. Therefore Kshs. 19,499.90.

(iv) Salary for the 7 days worked in June 2016

58. By reason of the finding hereinabove regarding when the termination took effect, I am unable to award the Claimant any sum under this head.

(v) Public Holidays

59. According to the claimant, throughout the period she was in the employment of the Respondent, she worked on all the public holidays that fell within the period. She was not paid for the working. The claimant puts the total number of days arising from the holidays at 12 (twelve), and claims thereon Kshs. 41,539.200. Clause 7 of the appointment Letter provides the basis for the claimant's claim for this relief.

60. The Respondent did not place any evidence before this court to controvert the Claimant's on the aspect of non-payment for the public holidays worked. In the case of **Shaneebal Ltd vs. County Government of Machakos (2018) eKLR Justice Odunga citing the decision in Trust Bank Ltd vs. Paramount Universal Bank & Others Nairobi (Milimani) HCC. No. 12 43 of 2001** stated:

“25. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Ltd K& 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of the case, the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate the pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

61. However, employing the cautious approach that, the uncontroverted evidence should not be taken truthfully without interrogation for the reasons that they are uncontroverted, I seek to interrogate whether or not the public holidays between 1st December 2015 to 13th May 2016 totaled twelve (12) computable days. Public holidays are matters of public notoriety that a court of law can take judicial notice of. This Court takes judicial notice of the following public holidays during the period 1st December, 2015 to 13th May 2016,

(i) Jamhuri day – 12th December 2015

(ii) Christmas Holiday 25th December

(iii) 26th December, 2015

(iv) 1st January 2016,

(v) Good Friday of 2016,

(vi) Easter Monday of 2016, and

(vii) Labour day 1st May 2016.

62. The Claimant did not specifically name the public holidays that would give her the 12 days. I am therefore only inclined to give her 7 days and therefore Kshs. 24,231.20.

63. It is imperative to point out that the Claimant did not place forth any evidence to demonstrate that she worked for the Respondent prior to the date put forth in the letter of appointment namely, 1st December 2015.

(vi) 8 off duty days for September and October, 2015

64. Having taken the view as I have hereinabove that the Claimant did not prove that the employer – employee relationship started earlier than on the date in the Appointment Letter, the court declines to award the sum of Kshs. 27,692.80 sought by the Claimant.

(vii) Leave Travelling Allowance

65. This allowance would only become due when an employee is proceedings for leave. From her own evidence, the claimant never proceeded for leave. Entitlement for this allowance did not therefore crystallize.

(viii) Overtime 6 hours per day for 6 days per week (216.34) x 6 hours x 26 days x 15 months x 1.5).

66. The Claimant asserted that she used to work from 7.00 a.m. to 9.00 p.m. for six days with one rest day per week. She therefore worked overtime but was not paid for the extra hours worked. Using the format aforementioned, the claimant seeks for Kshs. 700,941.60.

67. At paragraph 18 of her statement of claim, the Claimant stated;

“the Claimant used to clock in the time of arrival at the Respondent's supermarket and also clock out if the Respondent disputes overtime worked it can avail the relevant printout when the claimant used to work.”

68. In the statement of Response, the Respondent does not specifically or at all deny the contents of this paragraph of the statement of claim and or paragraph 17 from which it flows. The contents thereof are admitted by the Respondent therefore. The Claimant's claim for unpaid overtime stands on solid ground.

69. Besides, the Respondent did not offer any evidence in defence. The Claimant's evidence is therefore not challenged and stand uncontroverted- **Drappers Empire vs. The Attorney General Nairobi HCC No. 2666 of 1996** per Rawal J (as she then was).

70. However, it has not escaped the court's sight that the sum sought under this head has been arrived at by the claimant employing 15 months as the total months worked. Hereinabove the court concluded that for purposes of this matter the only proved period worked is 5 ½ months (1st December 2015 to 13th May 2016). She can only get Kshs. 278,409.58.

(ix) Service gratuity @ 20 days for each completed year.

71. Clause 24 of the Collective Bargaining Agreement – Exh. 10 provided that where employment is terminated by either party, the company shall pay the employee gratuity at the rate of 20 days for each completed year. The Claimant only worked for 5 ½ years, on a pro rata basis, she is awarded Kshs. 15,865.70.

(x) 12 months' salary compensation

72. The Claimant, pursuant to this provision of section 49 The Employment Act, seeks to be compensated to an extent of the maximum allowed thereunder, 12 months gross salary. Therefore Kshs. 540,000.

73. This court is convinced that in the circumstances of this matter compensation in the nature contemplated in the Act is awardable to the Claimant. I have considered the fact that that Respondent did not act in accord with equity and fairness in the termination of the Claimant's employment. It visited its systemic and communication lapses' resultant situation, and loss on an innocent employee. The substantively unfair termination brought to a stop the fixed employment contract when it was only 5 ½ months old. The employer-employee relationship that had been created under this contract had 19 months remaining to live. This I have also considered.

74. By reason of these premises, I award the Claimant compensation pursuant to the provisions of section 49 of the Employment Act 2007 to an extent of 10 months gross salary therefore Kshs. 450,000.00.

(xi) Remainder of the Contractual Period

75. Having awarded the Claimant compensation pursuant to the provisions of section 49 of the Employment Act, I see no reason to form basis for an award of payment for the remainder of the period of the contract. In any event the legal position on this is certain, none of our statutes has opened a way for such an award. See **Alphonse Maghanga Mwachenya vs Operation 680 Ltd (2013)eKLR**.

(xii) Certificate of Service

76. The Claimant is entitled to a Certificate of Service pursuant to section 51 of the Employment Act. I so find.

Conclusion

77. In the upshot, this Court having found that the termination was substantively unfair and by reason of the premises hereinabove, the Respondent shall pay the Claimant:

(a) One month's salary.....Kshs.45,000 in lieu of notice

(b) Leave Pay Allowance arrived at upon 5½ months worked.....Kshs. 20,625

(c) Overtime pay.....Kshs.278,429.60

(d) Service gratuityKshs. 15,865.70

(e) Compensation 10 months Gross salary.....Kshs. 450,000

(f) Salary for the period worked in May –13 daysKshs. 19,500

(g) Payment for public holiday worked.....Kshs. 24, 231.20

Total.....Kshs. 853,651.50

(c) And the Respondent is directed to issue the Claimant with a Certificate of Service within 30 days of this judgment.

(d) Costs of this suit shall be shouldered by the Respondent.

(e) Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST, 2021.

KEBIRA OCHARO

JUDGE

Delivered in the presence of:

.....for the Claimant

.....for the Respondent

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

KEBIRA OCHARO

JUDGE