



**Mutunga v Safaricom Kenya Limited (Cause 133 of 2016)
[2024] KEELRC 2035 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2035 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 133 OF 2016
DN NDERITU, J
JULY 25, 2024**

BETWEEN

AGNES MUKONYO MUTUNGA CLAIMANT

AND

SAFARICOM KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. In an emended memorandum of claim dated 10th May, 2021 filed through Maragia Ogaro & Co. Advocates the claimant prays for -
 - a. Notice - Kshs85,000/=
 - b. 2 months' salary - Kshs85,000/=
 - c. Compensation under article 49(1) (c) - Kshs1,020,000/=Total - Kshs1,190,000/=
- d. Costs
2. Upon service the respondent entered appearance on 30th September, 2021 through Munyao, Muthama & Kashindi.
3. An amended statement of response was filed on 25th July, 2022 wherein the respondent denied liability for the claim and prayed that the claim be dismissed with costs for want of merits. A witness statement by Odhiambo Ooko (RW1) was filed on 2nd May, 2022.



4. The claimant filed a reply to the amended statement of response to the claim on 26th July, 2022. The claimant filed two lists of documents on 12th January, 2022 and on 19th August, 2022 respectfully. A witness statement by the claimant (CW1) was filed on 2nd September, 2022.
5. The cause came up for hearing in open court on 26th October, 2022 when the claimant testified and closed her case. The defence was heard on 27th February, 2023 when RW1 testified and the respondent's case was closed.
6. Counsel for both parties addressed the court through written submissions. Counsel for the claimant Mr. Maragia filed his submissions on 17th March, 2023 and Mr. Aringa for the respondent filed on 15th May, 2023. Mr. Maragia filed supplementary submissions on 19th June, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel.
8. In her amended memorandum of claim, the claimant pleaded that she was engaged by the respondent in November, 2011 as an Mpesa customer care attendant at a monthly gross salary of Kshs85,000/= until when she was allegedly unfairly and unlawfully terminated in June, 2013.
9. It is pleaded that the claimant was terminated on alleged complaint by a customer that the customer's Mpesa account had been swapped. The claimant was subsequently arraigned in court in Nakuru CMC Criminal Case No. 2416 of 2013 charged with the offence of unauthorized access to computer data contrary to Section 83(4)(1) of the *Kenya Communication (Amendment) Act*, 2008. Though initially convicted by the lower trial court, the claimant was subsequently acquitted of all the charges on appeal in Nakuru High Court Criminal Appeal No. 26 of 2016 in a judgment delivered on 24th October, 2019.
10. It is pleaded that the acquittal vindicated the claimant and hence the termination which was based on the alleged charges was thus rendered unfair and unlawful ab initio. Further, it is the claimant's plea that she was denied both substantive and procedural fairness rendering the entire process untenable in law.
11. In her testimony in court, the claimant adopted her filed statement as her evidence-in-chief. She also produced her listed documents as exhibits 1 to 8. She stated that she was employed by the respondent in January until June, 2013. She was suspended from April till her termination in June, 2013. She was subsequently charged and ultimately acquitted as stated above.
12. However, the claimant testified that she was not terminated but placed on suspension but never called back to work. She stated that she was denied access to her place of work. She stated that her last salary paid was that of March, 2013. She stated that she was denied due process and hence the unlimited suspension was unfair and unlawful.
13. She stated that her pay was based on an hourly rate of Kshs251/= and the pay was 50% more for all overtime worked. She stated that she was on a six-month contract.
14. In cross-examination, the claimant stated that she was engaged by the respondent on 5th January, 2012 as per a letter of employment of that date and the second contract commenced in July, 2012. The next contract was to run from January, 2013 but the claimant stated that she did not sign the contract but remained in the service of the respondent until April, 2013 when she was suspended.
15. She stated that her monthly pay varied from month to month due to overtime pay. She stated that she was denied access to the respondent's premises even after she was acquitted of the criminal charges. She



stated that no investigation report was availed to her by the respondent or any other adverse evidence collected.

16. Responding to a clarification sought by the court, the claimant stated that her monthly salary as claimed is based on multiplication of the hourly rate of Kshs251/= by a minimum of eight hours per day for 30 days.
17. The submissions by her counsel shall be considered in a subsequent part of this judgment.

III. The Respondent's Case

18. The respondent's case is expressed in the amended response to the claim and the oral evidence adduced through RW1, a senior manager - employee and labour relations, and the written submission by its counsel.
19. In his testimony in court RW1 relied on his filed written statement confirming that the claimant was an employee of the respondent on a contract wherein the pay was hourly. He stated that the allegation by the claimant that she was on a monthly pay of Kshs85,000/= is false and not supported with evidence. He gave an example of how the claimant's pay was calculated as provided for in the contract dated 16th August, 2013 which categorically provides for hourly pay.
20. He stated that the claim was filed five years after the termination but admitted that he had no documents confirming the dismissal or termination. He was categorical that the claimant was not permanent and pensionable but rather worked on a six-month renewable contract at any given time and that the last of those contracts is the one for the period of six months from January, 2013 which the claimant did not sign as per the copy availed by her in court. He alleged that the claimant did not go back to work after the acquittal in the criminal case.
21. He stated that the claimant was paid by way of a direct deposit into her bank account. However, the witness admitted to having no employment records for the claimant including pay-slips. In fact, no documents were filed by the respondent in the cause at all.
22. In cross-examination by counsel for the claimant, RW1 stated that while the respondent signed the last contract dated 16th January, 2013 the claimant did not sign the same. However, he admitted that the claimant worked for the respondent until April, 2013. He stated that going by the documents availed by the claimant she was paid a salary of Kshs24,327.70 for March and Kshs17,549.10 for April, 2013. He stated that as at the time the claimant was acquitted of the criminal charges there was no valid contract of employment between her and the respondent.
23. He conceded that no disciplinary hearing was held against the claimant or a review of her matter after she was acquitted of the criminal charges. He admitted that he did not know the circumstances under which the claimant left employment as there were no records in possession of the respondent directing him on that issue.
24. He stated that the claimant was not a casual but was on periodic contracts as stated above. He emphasized that the claimant was not permanent and pensionable as she alleged in her pleadings and evidence. He asserted that the claimant's pay was based on hours worked but at each given time the contract lasted for six months and as such the alleged monthly salary of Kshs85,000/= as pleaded by the claimant is false.
25. He stated that while the respondent was the complainant in the criminal case, it is the Director of Public Prosecutions (DPP) who instituted the charges and prosecuted the claimant. He reiterated that he is no aware of the circumstances under which the claimant left employment of the respondent.



He stated that even the bank statements availed by the claimant did not indicate or confirm that the claimant was on a monthly salary of Kshs85,000/= as alleged and claimed by the claimant.

IV. Submissions by Counsel

26. On the one hand, counsel for the claimant identified the following issues for determination by the court – Whether there existed an employment relationship between the claimant and the respondent and the terms thereof; Whether the termination was unfair and unlawful; and, Whether the claimant is entitled to the reliefs sought.
27. On the first issue, it is submitted that the contest is not whether the claimant was an employee of the respondent as both parties agree that she was. The contested issue is the nature, terms, and conditions of that employment relationship. It is submitted that the evidence on record is to the effect that the claimant started working for the respondent as from January, 2012.
28. It is submitted that while the respondent may have had the disciplinary powers to suspend the claimant on the allegations of fraud or unlawful access to a customer’s data, the claimant was placed on suspension and not dismissed or terminated. It is submitted that after the claimant was acquitted, the respondent ought to have reviewed the suspension of the claimant from work but no such action was taken.
29. It is submitted that by failing to subject the claimant to due process the respondent violated the provisions of Sections 35, 36, 41, & 43 of the Employment Act (the Act).
30. On reliefs, it is submitted that based on the hourly pay of Kshs251/= for eight hours and seven days a week, the claimant’s monthly pay comes to Kshs60,240/=. Counsel submitted that based on this pay the claimant be compensated for unfair and unlawful termination in the maximum award of 12 months amounting to Kshs722,880/=. It is further submitted that the claimant is entitled to salary arrears for the months of April and May, 2013 amounting to Kshs120,480/= and notice pay of equal amount.
31. On the other hand, counsel for the respondent submitted on the filed preliminary objection (PO) and the main cause as summarized hereunder. Counsel identified the following issues for determination –
 - a. Whether the claimant’s suit is fatally defective for abatement summons not having been served more than 5 years after filing and more than 9 years after the alleged accrual of the cause of action;
 - b. Whether there existed employment relationship between the claimant and the Respondent at the time of the alleged dismissal of the claimant;
 - c. Whether the claimant has demonstrated that her employment was unlawfully terminated;
 - d. The effect of the claimant’s acquittal by the High Court Criminal Appeal *No. 26 of 2016* to her alleged employment relationship with the Respondent;
 - e. Whether the claimant proved that she earned Kshs85,000 at the material time as alleged;
 - f. Whether the claimant entitled to the reliefs/prayers sought.
32. On issue (a) it is submitted that based on the provisions of Rule 11(2) & (3) of the Employment and Labour Relations Court (Procedure) Rules as read alongside Order 5 Rule 6 of the Civil Procedure Rules summons to enter appearance shall be served alongside the statement/memorandum of claim and, in any event, such summons shall be valid for six months and thereafter expire unless extended by the court. It is submitted that to this day the respondent has not been served with the summons and as



- such the claim and the proceedings are invalid null and void. It is submitted that this cause abated upon expiry of the period of service and that the PO is thus meritorious. In that regard counsel has cited [*Samuel Kabui Munyiri v Pioneer Plumbers Limited*](#) (2019) eKLR wherein M. Onyango J of this court (ELRC) cited several decisions arriving at the conclusion that where summons to enter appearance were not issued and served the suit had abated. Likewise, counsel cited Ongaya J in [*Zois \(EPZ\) Limited v Paul Mzee Malonza*](#) (2021) eKLR wherein the court held that the cause abated for failure by the claimant to serve summons within the time allowed in Order 5 Rule (6) of the [*Civil Procedure Rules*](#).
33. It is submitted that the respondent only came to have knowledge of this cause on 27th September, 2021 when the cause had been pending in court since 2016. It is submitted that the summons served upon the respondent were issued on 3rd August, 2021, over five years after the cause had been filed in court.
 34. It is submitted that as at the time the respondent was served with the amended memorandum of claim and new summons issued the cause had long abated. It is submitted that failure by the claimant to serve the respondent with summons as required in law highly prejudiced the respondent as Section 10(6) of the [*Act*](#) requires an employer to keep employment records for five years only after separation or termination of an employment relationship.
 35. It is submitted that between 2016 and 2021 the respondent was not aware of the claim. It is further submitted that since the cause of action is alleged to have accrued in 2013 the claimant was indolent for over nine years and as such the cause is stale and filed out of the three years set in Section 90 of the [*Act*](#).
 36. Without prejudice to the above, counsel for the respondent on issue (b) submitted that the claimant failed to prove that she was in employment of the respondent as of June, 2013. It is submitted that the contract availed in court allegedly for the period from 16th January to 23rd July, 2013 is not signed by the claimant. It is submitted that for lack of evidence the claimant was not in employment of respondent as of March, 2013 or in June, 2013.
 37. On issue (c), it is submitted that the claimant has failed to demonstrate that she was unlawfully terminated or dismissed. It is submitted that in the demand letter of 12th August, 2015 the claimant alleges that she was suspended in May, 2013 and later dismissed in July, 2013 while in the amended claim it is alleged that she was dismissed in June, 2013. It is submitted that the claimant's case is full of contradictions on the alleged date of suspension and or dismissal with no supporting documents availed. It is submitted that under Section 107 of the [*Evidence Act*](#) and Section 47(5) of the [*Employment Act*](#) the claimant has failed to prove her case to the required standard. Counsel cited [*Galgalo Jarso Jillo v Agricultural Finance Corporation*](#) (2021) eKLR in the support of the position that an employee is obligated in law to demonstrate and prove an unlawful termination or dismissal while an employer has the burden of justifying the termination or dismissal.
 38. Further, it is submitted that the claimant failed to prove employment relationship between her and the respondent and that if there was such a relationship, which is however denied by the respondent, that she was denied substantive and procedural fairness. Counsel has urged the court to adopt and be persuaded by the reasoning in [*Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia*](#) (2021) eKLR.
 39. On issue (d) on the effect of the claimant's acquittal of the criminal charges, it is submitted that the acquittal of itself did not insulate the claimant from disciplinary action by the employer, the respondent. Counsel cited the Court of Appeal in [*David O. Owino v Kenya Institute of Special Education*](#) (2013) eKLR wherein the court stated that the two processes are different and distinct and the standards of proof and procedure are distinct. Counsel also cited [*James Mugeria Igati v Public Service Commission*](#) (2014) eKLR on the same issue.



40. On issue (e) it is submitted that the contracts availed by the claimant in court confirm that she was on part-time engagement running for a maximum of six months at a time. It is submitted that the claimant was on a pay of Kshs251.25 for each hour worked and that the cumulative pay, only for the actual hours worked, was paid at the end of the month. It is thus submitted that the claimant was not on a fixed monthly pay as alleged and as such the court should disregard and dismiss the claim for a monthly salary of Kshs85,000/=. It is further submitted that even the bank statements produced by the claimant do not indicate that the claimant was at any point in time paid a monthly salary of Kshs85,000/=. The court is urged to stick to and go by the contracts availed to the effect that the claimant was on an hourly pay of Kshs251.25 only for actual hours worked payable at the end of each month during the period of the entire contract. It is submitted that at no time did the claimant work for the standard eight hours a day.
41. On the claim for overtime, it is submitted that the claimant has failed to prove the details and particulars of such overtime worked and the court is urged to disregard and dismiss that claim. Counsel has cited *Albert Ouma Akeyo v Maguna Andu Self Selection Stores Ltd* (2013) eKLR in that regard. It is submitted that the last pay to the claimant, based on the bank statement availed by the claimant, is for April, 2013 in the sum of Kshs17,549.10 which is not anywhere near the claimed salary of Kshs85,000/= per month. It is further submitted that the amount claimed from the bar, in the submissions by counsel for the claimant, of Kshs60,240/= is equally wrong and unlawful and not proved.
42. On issue (f), reliefs, it is submitted that the manner and the circumstances under which the claimant left employment have not been proved and as such no pay is due to her in lieu of notice as claimed. Further, the court is urged to dismiss the claim for 12 months salary in compensation as the claimant was not on any fixed monthly salary. It is further submitted that the claim for salary arrears is untenable as the claimant has failed to prove that she was either suspended or dismissed as alleged.
43. In supplementary submissions by counsel for the claimant, it is submitted that the claimant is not to blame for the court's failure to issue summons in 2016. It is submitted that the court record indicates that the matter was dormant for long as the original court file could not be traced in the registry for a prolonged period of time. In any event, it is submitted that the issue of summons was resolved when on 24th November, 2021 the court ordered and directed the respondent to file responses to the claim upon service of fresh summons. It is submitted that no prejudice was suffered by the respondent on the alleged failure by the court to issue and service of summons in 2016 as the respondent proceeded to file its responses and fully participated in the proceedings. The court is urged to decide the cause on merits rather than dwelling on a technicality for which the claimant is not to blame and which was rectified when fresh summons were issued and served upon the respondent who defended the cause and was heard on merits.
44. On the failure by the respondent to file employment records by invoking Section 10(b) of the *Act* it is submitted that the respondent promised the court to file such records but filed none. Counsel has cited the proceedings in court of 7th February, 14th June, and 26th July, 2022 when the respondent informed the court of its intention to file records and undertook to file the same but none were filed.
45. On whether the claim was filed after expiry of three years and hence time-barred, it is submitted that the claimant was terminated in June, 2013 and the cause filed in court on 13th April, 2016 well within the limited period.
46. On employment relationship, it is submitted that at no point did the respondent dispute the employment of the claimant as per the contracts filed. It is further submitted that although the copy of the last contract that was to last for six months from 16th January, 2013 is not signed by the claimant,



the respondent is in possession of the copy submitted which was duly signed by both parties. Further, it is submitted that the payments made to the claimant as per the bank statements filed are further proof of the employment relationship.

47. It is submitted that the response to the demand letter dated 26th October, 2015 by the respondent confirms the employment relationship. It is submitted that after the claimant was charged in the criminal court as alluded to elsewhere in this judgment the respondent suspended her and failed to call her back even after the acquittal. It is submitted that in those circumstances it is the respondent who terminated the employment without affording the claimant due process as required under Sections 35, 41, 43, 45, & 47 of the *Act*.
48. It is submitted that in view of the foregoing the claimant is entitled to the reliefs sought. The court is urged to allow the claim with costs.

V. Issues for Determination

49. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the claimant and the respondent through RW1, and the submissions by counsel for both parties, the court identifies the following issues for determination –
- a. Is the PO as raised by the respondent merited?
 - b. Was the claimant an employee of the respondent and on what terms?
 - c. Was the claimant unfairly and unlawfully terminated or wrongfully dismissed?
 - d. Is the claimant entitled to the reliefs sought in the claim?
 - e. Who meets the costs in this cause?

VI. The Preliminary Objection

50. While the respondent has established that it was not served with the initial summons to enter appearance that were issued upon the filing of the cause in May, 2016, I do not think that the respondent was prejudiced in that regard. The claimant explained that the court file went missing for a considerable amount of time. It is submitted that it is the court that failed to re-issue the summons for the foregoing reason. It is further submitted that subsequently the respondent was served with fresh summons and granted an opportunity to defend the claim on merits and as such no prejudice was suffered.
51. The court has considered the submissions for both parties on this issue. I find and hold that although the respondent was not served with the initial summons to enter appearance which ought to have been issued by the court in May, 2016 there is no record that such summons was issued as there is no copy of the same in the court. Counsel for the claimant explained that after the cause was filed the court file went missing for a lengthy period of time. It would be grossly unfair to punish the claimant for the mistakes of the court in failing to issue the summons.
52. In any event, when fresh summons was issued in August, 2021 the respondent was served and it responded to the claim and defended the same on merits. The court takes the view and holds that the respondent did not suffer any prejudice in the circumstances. Striking out the cause in the impugned circumstances, failure of service of summons when the cause was filed in may 2016, shall amount to the court falling in love with mere technicalities instead of dealing with the claim on merits. It is the court that failed to issue summons and such an omission should not be visited upon the claimant. The PO is thus rejected and the court shall determine the cause on merits.



VII. Employment

53. From the evidence on record, there is no doubt that the claimant and the respondent had an employment relationship. What is contested is the terms and conditions of the employment. The court takes this position based on the contracts availed by the claimant as executed by both parties; the fact that the claimant faced the criminal charges, alluded to in another part of this judgment, that arose on commissions or omissions arising in the course of executing her duties in the employment of the respondent; and in any event RW1 in his testimony admitted that the claimant was an employee of the respondent. The fact of employment of the claimant by the respondent is further admitted by the respondent in the response to the demand letter by the lawyer for the respondent dated 26th October, 2015. This makes the subject on whether the claimant was an employee of the respondent a non-issue.
54. In my view, the issue in contest is not the fact of employment but the terms and conditions thereof. And even then, this issue is not complicated to decipher as counsel for both parties seem to imply in their rather elaborate written submissions. In the supplementary and further lists and bundles of documents the claimant attached copies of contracts signed between herself and the respondent. The said contracts indicate and confirm that the claimant worked on periodic contracts each of six months at a time.
55. The last of those contracts is the one that was to run for a period of six months from 23rd January to end in July, 2013. Although the copy of the contract filed in court is not signed by the claimant, she confirmed that the copy duly signed by both parties should be in the possession of the respondent. There should be no debate as to whether the claimant was in employment as of March, 2013 when she was allegedly terminated as both sides agree that she was in employment and even earned some pay as per the bank statements availed in court.
56. Going by the terms of this last contract, the claimant was engaged as a customer experience assistant on part-time basis for a period of six months. She was to work on such hours as stated in a pre-determined and agreed schedule as per the stated hours of her availability in a shift at a customer care centre that operated 24 hours seven days a week. Her pay was pegged at Kshs251.25 per hour, less statutory deductions, payable at the end of the month. Overtime was payable for hours worked beyond the normal eight hours day shift. Those were the general terms applicable for the entire period of the employment relationship.
57. As per the terms of the contract and based on the evidence adduced by the claimant and that of the respondent through RW1 the claimant's pay was channeled monthly through her bank account.
58. The foregoing facts are established by both documentary and oral evidence adduced by both sides in court. Therefore, as far as the terms of employment are concerned, the claimant was a part-time employee, her salary/pay was based on an hourly rate of Kshs251.25, less statutory deductions, payable at the end of each worked month.
59. In the circumstances, the court finds and holds that the claimant was not on a fixed monthly pay of Kshs85,000/= as claimed and alleged. She also did not work on any fixed number of hours per month as she worked on a pre-determined schedule based on her pre-declared availability.
60. Those were the agreed and proved terms and conditions of employment and the others as per the contract alluded to above and it is on the basis thereof that the court shall determine the cause. The above answers to the first issue.
61. The parties did not agree on the circumstances that culminated in the dismissal or termination of the claimant from employment. The respondent argues that there are no records available as by the time



they were served with summons to enter appearance in 2021 five years had expired and as such the records had been discarded without offending the provisions of Section 10 of the *Employment Act*. The claimant alleged that she was suspended after she was arraigned in court as alluded to elsewhere in this judgment never to be recalled to work even upon acquittal.

62. Either way, as noted above, the claimant was on a fixed term contract of six months from January to July, 2013 as at the time she was allegedly suspended. There is no explanation from the respondent as to how the claimant left employment and, in my view, and I so find and hold, the claimant was either suspended and or dismissed upon her arraignment in court in connection with the criminal charges cited and alluded to in an earlier part of this judgment. That is the only logical and reasonable conclusion that the court can make from the evidence and the circumstances of the cause as presented from both sides.

VIII. Suspension/dismissal/termination

63. The issue that the court must confront is whether the alleged suspension and the subsequent termination or dismissal was fair and lawful. According to the claimant she was suspended and denied access to the place of work. As per the respondent, RW1 stated that the claimant left employment and failed to report back after she was confronted with the allegations of criminal conduct and the subsequent charges. No records were availed by the respondent.
64. In the obtaining circumstances, based on the evidence adduced from both sides, the court is inclined to believing the claimant that she was suspended in March, 2013 based on the allegations of criminal conduct against her and thereafter denied access to the place of work.
65. Further, the court finds that the respondent may have had good grounds in law for suspending and taking disciplinary action against the claimant based on Section 44(4)(d) of the *Act*. That said, however, there is no evidence that any disciplinary process was commenced or carried out against the claimant based on due process. For this reason, the termination of employment or in whatever form was unfair and unlawful at the very least for lack of procedural fairness.
66. By the time the claimant was convicted in the lower court and subsequently acquitted in the High Court the remainder of the contract period was long gone and this probably explains why the respondent did not contact the claimant thereafter. However, it is important to comment that the acquittal in the criminal court is not of itself an immunity or proof that the claimant was not guilty of misconduct and hence amenable to disciplinary process. Suffice to state here that by failing to subject the claimant to due process the respondent failed in justifying the dismissal or termination.
67. The above answers to the second issue and the court shall now consider the reliefs as hereunder.

IX. Reliefs

68. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed for lack of notice, substantive, and procedural fairness, this court shall now consider each of the reliefs sought as hereunder.
69. Prayer (a) is for notice pay. This is a valid request based on the fact that the claimant was not notified of her termination or dismissal. Actually, she was effectively dismissed without notice – See Section 41 of the *Act*. However, the question that arises is - what pay is reasonable in the circumstances? This is a valid question because the claimant's pay was not fixed but based on the number of hours worked in the particular month based at Kshs251.25 per hour less statutory deductions. And this is why the



above question is germane. There is no realistic or ideal way of assessing the number of hours that the claimant may have worked for each of the months that remained in her contract.

70. In my considered view, and I so find and hold, the only reasonable and logical way in arriving at a reasonable and fair, though not realistic or empirical assessment, is to apply the last known pay that was made to the claimant. From the bank statements availed by the claimant her pay fluctuated from month to month and in the month of March, 2013, her last working month, she was paid Kshs24,327.70. That is the figure that the court shall adopt in assessing and making any award to the claimant.
71. Therefore, in answer to prayer (a) the court awards to the claimant the sum of Kshs24,327.70 as notice pay.
72. Prayer (b) is for two month's salary in the sum of Kshs85,000/= based on half pay per month as the claimant was on suspension. This request does not make sense at all for two main reasons. Firstly, the claimant was not entitled to the fixed monthly pay of Kshs85,000/= as claimed and secondly, the remainder of the contract period as of March, 2013 was four months not two. There is therefore no basis for the court to grant this award and the same is hereby denied and dismissed.
73. Prayer (c) is for compensation for unfair and unlawful termination under Section 49(1)(c) of the *Act* and the claimant is seeking for the maximum award equivalent to 12 months gross pay in the sum of Kshs1,020,000/=. In my view, and I so find and hold, this claim is flawed and misguided for the following reasons. To re-emphasize for the umpteenth time, what an employee loses upon dismissal or termination is the earnings and other emoluments that such an employee should reasonably have earned bar the termination. An unlawful termination or dismissal does not present an occasion to an employee for unjust enrichment.
74. The claimant was on a fixed term contract which may or may not have been renewed after it expired. By the end of March, 2013, the claimant had four months left in her contract. That is the only period for which the claimant was to remain in employment with certainty, holding all other factors constant (*ceteris paribus*). In those circumstances, if any compensation is payable to the claimant the same should only entail the earnings lost for the four months of the premature termination of the contract. There is no logical, reasonable, or legal foundation for extending the imagination in assuming that the claimant would be entitled to compensation beyond the four months.
75. Therefore, the claimant is awarded the pay for the balance of the four months of the contract based on the last known pay as established and explained above made up as follows – Kshs24,327.40 * 4=Kshs97,309.60. This is the award made under this head. The same shall not be subject to any statutory deductions as the base was net pay.

X. Costs

76. Costs follow the event and therefore the claimant is awarded costs of this cause.

XI. Disposal & Orders

77. In disposal of this cause, the court issues the following orders: -
 - a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - b) The claimant is awarded a total of Kshs121638.50 made up as follows –
 - i. One month's salary in lieu of notice Kshs24,327.70



- ii. Compensation for wrongful,
unfair, and unlawful dismissal Kshs97,310.80
TotalKshs121,638.50

c) Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 25TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

