



Makenzi v Machakos Golf Club Ltd (Employment and Labour Relations Cause E001 of 2023) [2024] KEMC 33 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEMC 33 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2023**

CN ONDIEKI, PM

MAY 28, 2024

BETWEEN

JULIUS MUNYAO MAKENZI CLAIMANT

AND

MACHAKOS GOLF CLUB LTD RESPONDENT

JUDGMENT

Part i: Introduction

1. Whereas unfair termination involves breach of statutory law, wrongful dismissal involves breach of the employment contract. The employer may be armed with a (super) valid reason for summary dismissal of the employee on account of gross misconduct, yet if the summary dismissal process is messed, everything is messed for breach of statutory law. The pillars of fair termination entail not only the substance, but also the process. Unless the employer successfully secures accommodation in the doctrine de minimis non curat lex (of small things or minor deviations, the law knows no cure) offending the process is as unforgiving as offending the substance.
2. This is the crunch upon which this Judgment turns.

Part ii: The Claimant's Case

3. Vide a Memorandum of Claim dated 30th January 2023 and filed on 2nd February 2023, the Claimant brought this suit against the Respondent seeking Judgment for the following: (a) That the termination of the Claimant was unlawful and unfair. (b) Terminal dues as enumerated in 3(h) (a-d). (c) Interest on b) above at commercial rates as published by the Central Bank of Kenya from when they became due. (d) The Respondent does issue the Claimant with a Certificate of Service. (e) The Respondent to pay costs of the claim with interests at the Court rates.



4. The Claimant claims that from 2010, he was an employee of the Respondent charged with the role of a guard and grounds keeper, and that his employment was confirmed on a permanent basis vide a letter dated 3rd December 2010. The Claimant avers that he performed his duties as per the contract of service with diligence and dedication. He claims that on 22nd October 2022, the Claimant together with one Nicholas King'ola had repaired a water pump using a crow bar and a hacksaw which they obtained from the Respondent's store. It is claimed that the Claimant did not return to the store the said tools on the material day since they left them at the water pump. He claims that on 23rd October 2020, he reported to work and he decided to go and return the tools to the store and start the water pump to enable him water the ground. He claims that while on his way to return the tools, one night guard named Sammy Mbusia found him in possession of the tools and accused the Claimant of stealing them. He claims that he unsuccessfully offered the above explanation and consequently, the said security guard reported to the Manager and Human Resource Manager of the Respondent who took the Claimant to the police station and reported. The Claimant avers that he was subsequently charged with the offence of stealing the said tools in Machakos Magistrates' Court Criminal Case Number E122 of 2020. He avers that on 15th December 2020, he received a call from the said Manager who asked him to collect his letter inviting him to a disciplinary hearing scheduled on 18th December 2020. He avers that he collected the letter on 16th December 2020. He avers that on 18th December 2020, the Claimant attended the disciplinary hearing but he was only informed that he would receive a call if a vacancy arises. He avers that ultimately, on 28th March 2022, he was discharged under section 87(a) of the Criminal Procedure Code in Machakos Magistrates' Court Criminal Case Number E122 of 2020 since Sammy Mbusia who raised failed to attend Court several times to give his evidence.
5. The Claimant thus claims that he was summarily dismissed without a reason or being given an opportunity to be heard.
6. The Claimant thus seeks the following terminal dues: (i) one month's salary in lieu of notice in the sum of Kshs. 11,800; (ii) unpaid salary for the month of October 2020 in the sum of Kshs. 11,800; (iii) the maximum damages awardable for unfair termination in the sum of Kshs. 141,600; and (iv) a certificate of service.
7. At the hearing of the Claimant's case, the Claimant adopted his undated witness statement which was filed together with the Statement of Claim as his evidence-in-chief. In his said witness statement, the Claimant rehashes the facts in the Memorandum of Claim. I find it unnecessary to regurgitate. In addition, the Claimant asserted that he did not steal the stools.
8. In buttressing his claim, the Claimant exhibited the following documents: (i) the Claimant's identity card as the Claimant's Exhibit 1; (ii) the Claimant's letter of appointment dated 1st December 2010 as the Claimant's exhibit 2; (iii) the Claimant's letter of confirmation to permanent terms dated 3rd December 2010 as the Claimant's exhibit 3; (iv) a copy of the charge sheet in Machakos Magistrates' Court Criminal Case Number E122 of 2020 as the Claimant's exhibit 4; (v) a letter suspending the Claimant from duty dated 20th September 2019 as the Claimant's exhibit 5; (vi) a warning letter dated 28th November 2019 as the Claimant's exhibit 6; (vii) a disciplinary hearing letter dated 15th December 2020 as the Claimant's exhibit 7; (viii) a pay slip for May 2018 as the Claimant's exhibit 8; (ix) a copy of NSSF statement as the Claimant's exhibit 9; (x) a copy of the Claimant's bank statement as the Claimant's exhibit 10; (xi) another copy of a charge sheet as the Claimant's exhibit 11; (xii) Statements from Sammy Mbusi and Josephat Muia as the Claimant's exhibit 12; (xiii) a release order as the Claimant's exhibit 13; (xiv) proceedings in Machakos Magistrates' Court Criminal Case Number E122 of 2020 as the Claimant's exhibit 14; and (xv) a copy of a demand letter dated 6th December 2023 as the Claimant's exhibit 15.



9. In cross-examination of the Claimant, he stated that he was a guard cum grounds keeper. He stated that he was not given a separate appointment letter as a grounds keeper. He stated that Nicholas is a tractor driver. He stated that since it was late, he did not return the tools on the material repair day. He stated that although it was late, it was possible to return them on the material date but they did not. He was referred to his witness statement and he stated that there as a *typo of 2022* instead of 2020. He stated that Sammy Mbusia is the gatekeeper. He stated that Sammy falsely implicated him to the offence of stealing. He stated that he was supposed to report to duty at 6 am. He stated that on the material date, he reported at 7.30 am. He stated there was no sufficient of evidence to support the charge of stealing. He stated that he attended the disciplinary meeting. He stated that in the meeting, he was told that they will call if a vacancy arises. He was referred to the Claimant's Exhibit 1 and he stated that the recommendation was that his services be terminated. He was referred to the Claimant's Exhibit 4 and he stated that it was claimed that he stole 5 litres of petrol in 2019. He stated that he did not steal. He was referred to the suspension letter and he stated that he was accused of absconding duty. He stated that according to the payslip exhibited, his salary was Kshs. 10,400. He was referred to the bank statement and he stated that the salary reflected on 9th October 2020 is Kshs. 11,400. He stated that the salary paid on 9th October 2020 was for September 2020 and not October. He denied that he was ever paid the October 2020 salary. He stated that salaries were being paid in arrears model. He stated that he exhibited the bank statement for November 2020 (however it was not exhibited). He stated that he was discharged under section 87(a) of the CPC and stated that he is not aware that he can be charged afresh.
10. In his written Submissions dated 16th March 2024 and filed on 19th March 2024, learned Counsel Mr. Wambugu instructed by the Firm of Messieurs Philip Henry Associates representing the Claimant has proposed two questions for determination as follows: (a) Whether the Claimant's summary dismissal was unfair? (b) Whether the Claimant is entitled to compensation for unfair termination.
11. Relating to the first question whether the Claimant's summary dismissal was unfair, it is submitted that the Claimant was verbally dismissed from employment on 23rd October 2020 when he was being arrested and escorted to the Police station by the Respondent's Grounds Keeper. In this connection, it is submitted that the Respondent has not exhibited a letter in this regard but instead a summary dismissal letter dated 2nd January 2021, which was not issued to the Claimant. It is submitted that in the said letter, the Claimant purported to summarily dismiss the Claimant from employment with effect from 23rd October 2020, on account of purported theft by a servant.
12. It is urged that in accordance with section 45 (1) of the *Employment Act*, no employer is permitted to terminate the employment of an employee unfairly. In this connection, it is argued that an employer is obligated to prove that the reason for the termination is valid in accordance with section 43 thereof and that it followed the correct procedure while terminating services of the employee.
13. It is submitted that although the Respondent accused the Claimant of stealing by servant, the allegations were not proved on account that none of the witnesses saw the Claimant stealing the tools and they only based their allegations on mere suspicion. It is urged that no meaningful investigations were conducted by the Respondent. In this regard, this Court is urged to find that the cogent explanation of the Claimant was disregarded. It is further submitted that the Claimant was charged with the offence of stealing by servant in Machakos Chief Magistrate's Criminal Case Number E122 of 2020, but the Respondent failed to avail witnesses leading to the discharge of the Claimant. In this connection, reliance is placed upon the Court of Appeal rendition on the obligation of the employer to prove both a valid reason for termination and passing the procedural fairness test, in Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR. Further reliance is placed upon Kenya



Plantation & Agricultural Workers Union (KPAWU) vs. Finlays Tea (K) Limited [2022] eKLR; Dr Joseph Maingi vs. Permanent Secretary Ministry of Medical services; and Banking Insurance and Finance Union vs KCB Limited, speaking to the threshold of evidence required to prove a valid reason.

14. Besides, it is submitted that the procedure enacted for summary dismissal was not followed. In this connection, it is submitted that the Respondent summarily dismissed the Claimant from employment without following the correct procedure as laid out in Section 41 (2) of the *Employment Act*, 2007. It is argued that the Claimant was dismissed verbally on 23rd October 2020 but the summary dismissal letter by the Respondent is dated 2nd January 2020 with effect from 23rd October 2020. Further, it is submitted that the Respondent filed minutes of a disciplinary meeting of 18th December 2020 but the minutes do not indicate the attendance of the Claimant and representations made by the Claimant, if at all. It is thus argued that since there was no hearing, the termination was ipso facto unfair, relying on *Donald Odeke vs. Fidelity Security Limited* [2012] eKLR. Further, it is submitted that in *Chrispo Zachariah Ogugo vs. Airtel Networks Kenya Limited* [2018] eKLR, where it was held as follows: “However, it is envisaged that an employee be accorded minimum opportunity to state his case. This is a common principle of natural justice that a person should not be condemned unheard. This was the holding in *Mbaki and Others vs Macharia & Another* (2005) 2 EA 206. 62. The Claimant was never accorded an opportunity to state his case after the investigation by the Respondent and for this reason, I find that no due process was followed before his dismissal. 63. Having found that the Claimant was dismissed without valid reasons and without following due process. I find the dismissal unfair and unjustified.” Further reliance is placed upon *Banking Insurance and Finance Union vs. National Bank of Kenya Limited* [2020] eKLR where it was reasoned that “The Grievants testified that they were never issued with warning letters or notice to show cause. Neither were they subjected to a disciplinary process on account of poor performance. The Respondent did not adduce evidence to controvert this position as this was also the evidence of RW1 on cross examination. As such, I find that the Respondent has failed to justify the reasons for terminating the grievants’ employment as the reasons it avers were never tested through any disciplinary hearing. By dint of section 45 (2) (a), an employer must not only have a reason but the reason ought to be valid. I therefore find the termination of the employment of the grievants’ unfair both procedurally and substantively.”
15. On whether the Claimant is entitled to compensation for unfair termination, it is submitted that the Respondent has not filed any proof that the Claimant’s dues as at 23rd October 2020 were paid. In this connection, it is submitted that section 44 of the *Employment Act* lays out the mandatory procedure to be followed by each and every employer before summarily dismissal of an employee. In this regard, the Claimant relies on *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR.
16. Regarding the quantum of damages for unfair dismissal, it is submitted that in *Thierry Poussard vs. Bradley Limited* [2019] eKLR, the Court awarded the Claimant the equivalent of 6 months’ salary for unfair termination. Further, it is submitted that in *Chrispo Zachariah Ogugo vs. Airtel Networks Kenya Limited* [2018] eKLR, where the Court awarded the Claimant 12 month’s salary as compensation for the wrongful and unfair termination. And that in *Walter Ogal Anuro vs. Teachers Service Commission* [2013] eKLR, the Court awarded the Claimant 8 month’s salary as compensation for the unfair termination.

Part iii: The Respondent’s Case

17. In its Memorandum of Response dated 27th February 2023 and filed on even date, the Respondent denies all material facts except the fact that the Claimant was its employee.
18. In particular, the Respondent denies that the Claimant was employed on permanent basis as a grounds keeper on 3rd December 2010.



19. The Respondent avers that the Claimant's services were terminated on grounds on account of gross misconduct namely stealing by servant and that the due procedure as laid in sections 41 and 43 of the *Employment Act*, 20017, was followed in terminating his services.
20. At the hearing of the Respondent's case, RW1, Josephat Muia Mutaka, told this Court that he is a Security Officer who supervise other security guards and he adopted his witness statement dated 27th February 2023 which was filed together with the response as his evidence-in-chief. In his said witness statement, Mr. Mutaka has rehashed the substance of the Memorandum of Response. Mr. Mutaka primarily relies on the minutes of the disciplinary meeting, exhibited as the Respondent's Exhibit 1, in which a conclusion was reached that the services of the Claimant be terminated on account of theft of the Respondent's property.
21. In fortifying the response, RW1 exhibited the following: (i) minutes of the disciplinary Sub-Committee meeting as the Respondent's Exhibit 1; (ii) The Summary Dismissal letter as the Respondent's Exhibit 2; (iii) a notice for disciplinary hearing as the Respondent's Exhibit 3; (iv) a suspension letter as the Respondent's Exhibit 4; (v) a letter of abscondment as the Respondent's Exhibit 5; (vi) an apology letter by the Claimant as the Respondent's Exhibit 6; (vii) a witness statement which was recorded by Sammy Mbusa at Machakos police station as the Respondent's Exhibit 7; and (viii) a witness statement which was recorded by Josephat Mutaka at Machakos Police Station as the Respondent's Exhibit 8.
22. In cross-examination of RW1, he stated that he was informed by Mr. Sammy Mbusa of the incident. He stated that the Claimant was found in possession of the tools. He stated that the Claimant claimed that they were his tools of trade and that he came with them from home. He stated that the Claimant was unable to prove that they were his tools of trade. He stated that the said Manager alleged that the tools were stolen a week earlier. He stated that he did not know the outcome of investigations. He stated that he was lined up as a witness in Machakos Magistrates' Court Criminal Case Number E122 of 2020.
23. RW2, Sammy Mbusa, told this Court that he was the security guard who caught the Claimant. He adopted his witness statement dated 27th February 2023 which was filed together with the response as his evidence-in-chief. In his said witness statement, RW2 has rehashed the substance of the Memorandum of Response.
24. In cross-examination of RW2, he stated that he caught the Claimant with a clawbar and a hacksaw while in the Golf Course. He stated that when the Claimant saw him, he dropped them. He stated that he was supposed to report to work at 8 am but he reported at 6.40 am. He stated that the Claimant wanted to remove and steal the gate valve of the pump. He stated that he did not know the fate of the criminal case.
25. In his written Submissions dated 28th March 2024 and filed on even date, learned Counsel Ms. Muthoki instructed by the Firm of Stanley Nthiwa & Company Advocates representing the Respondent has proposed three issues for determination as follows: (i) whether there were valid reasons warranting the Claimant's dismissal from employment; (ii) whether the summary dismissal was procedurally and substantively fair; and (iii) whether the prayers sought by the Claimant are justifiable.
26. On the question whether there were valid reasons warranting the Claimant's dismissal from employment, it is submitted that the Respondent has proved that the Claimant stole tools from his employer, the Respondent. In this regard, it is submitted that while under cross-examination, the Claimant failed to prove that he was a grounds keeper. It is further submitted that upon investigations, there was evidence that he stole. Reliance is placed upon Prof. Macha Isunde vs. Lavington Security Guards Limited [2017] eKLR; Mckinley vs. BC Tel [2001] 2 SCR 161.



27. On the question whether the summary dismissal was procedurally and substantively fair, it is submitted that the Respondent has exhibited evidence that the dismissal was procedurally and substantively fair since the Claimant was invited to attend a disciplinary hearing and he actually did. It is further submitted that the Claimant exhibited evidence that he was in the past warned and even wrote an apology for stealing 5 litres of petrol. It is submitted that theft is one of the grounds of gross misconduct for which an employee can be summarily dismissed under section 45 of the *Employment Act*, 2007. It is submitted that all the requirements of sections 41, 43 and 44 were followed. Reliance is placed upon *Fredrick Saundu Amolo suing through the Executive Secretary KUPPET Kajiado County Branch vs. Principal Namanga Mixed Secondary School & 2 others* [2014] eKLR. It is submitted that the Claimant was granted sufficient opportunity to defend himself. In this connection, reliance is placed upon *Donald Odeke vs. Fidelity Security Ltd Cause No. 1998 of 2011*; and *Walter Ogal Anuro vs. Teachers Service Commission* [2013] eKLR.
28. Ultimately, this Court is urged to find that the prayers sought are unjustified.

Part iv: Points For Determination

29. The jurisdiction of this Court having not been brought into question. Further, it was not disputed that that the Claimant was an employee of the Respondent. In this connection, two questions are off the list of issues. Commending themselves for determination - gleaned from the Memorandum of Claim; Memorandum of Response and the rival written Submissions – are three questions as follows:
- i. First, whether the employment contract of the Claimant unfairly terminated and/or that the Claimant was wrongfully dismissed.
 - ii. Second, whether the Claimant has made a case for any relief and if yes, the appropriate reliefs.
 - iii. Third, which party should shoulder the costs of this claim?

Part v: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

30. It is instructive to underline at this stage that employment claims are sui generis on the plane of the burden of proof. In employment disputes, whereas the employee shoulders the burden of proving unfair termination of employment or wrongful dismissal, the employer shoulders the burden of justifying that the grounds of the termination of employment or dismissal were lawful. See section 47(5) of the *Employment Act*, 2007. Decisional law deems constructive dismissal an unfair labour practice and the burden to prove the ingredients thereof rests on the shoulder of the employee. In *Max Masoud Roshankar & another vs. Sky Aero Limited* [2015] eKLR, Mbaru, J. expressed a judicial view that “57. the Court further held that in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that indeed there were intolerable conditions, frustrations, breaches that trust and confidence supposed to be enjoyed in a conducive workplace environment dissipated and thus repudiation of the contract.”
31. This Court now embarks on analysis, interrogation, assessment, and evaluation of each of the three questions, in turn.



(i) Whether the employment contract of the Claimant unfairly terminated and/or that the Claimant was wrongfully dismissed

32. There are two grounds upon which an employee can challenge a termination. The first is unfair termination of the contract of employment and the second is wrongful dismissal. The two grounds can be invoked either alternatively or jointly.
33. Article 41(1) of *the Constitution* of Kenya provides that: “(1) Every person has the right to fair labour practices.” Article 47 (1) & (2) provides that “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
34. The law acknowledges that a contract of employment is terminable. However, the termination contemplated by the law is that which fits the four corners of *the Constitution* and *Employment Act*, 2007. And so, the law frowns on both unfair termination of a contract of employment or wrongful dismissal. See sections 41 – 50 of the *Employment Act*, 2007.
35. An employee whose contract of employment has been terminated therefore reserves a right to question the termination in a Court of law on grounds that either the termination was unlawful or unfair. Section 35 of the *Employment Act*, 2007 provides for termination of a contract of employment. Section 35 (4) of the *Employment Act*, 2007 provides that “Nothing in this section affects the right — (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.”
36. What is deemed unfair or unlawful termination of the contract of employment?
37. To understand this, perhaps it will be helpful to begin with highlighting the difference between unfair termination and wrongful dismissal and whether the discrepancy matters.
38. Through and through, the two grounds are enacted by the *Employment Act*, 2007, but the Act is silent about their respective meanings. See for instance section 47(1) & (5), 49, and 50 of the Act. In the premise, this Court resorts to secondary sources of law.
39. Section 47 of the *Employment Act*, 2007, provides the grounds and foundation of approaching a Court when an employee has been either wrongfully dismissed or his employment contract unfairly terminated. The section provides two trajectories of resolution either by the labour officer or the Court. See section 47(1), (2) & (3) thereof. The two grounds are prominently housed in sub-section (5) thereof which provides that “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” {Emphasis supplied}
40. Although the phraseology “wrongful dismissal” is not defined by the Black’s Law Dictionary (Black’s Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), the same dictionary defines a kindred term called “wrongful discharge” at page 530, to mean “A discharge for reasons that are illegal or that violate public policy.”
41. Although the phraseology “unfair termination” is not defined by the Black’s Law Dictionary (Black’s Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence,



- Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), the same dictionary defines a kindred term called “unfair labor practice” at page 1667, to mean “Any conduct prohibited by state or federal law governing the relations among employers, employees, and labor organizations. Examples of unfair labor practices by an employer include (1) interfering with protected employee rights, such as the right to self-organization, (2) discriminating against employees for union-related activities, (3) retaliating against employees who have invoked their rights, and (4) refusing to engage in collective bargaining. Examples of unfair labor practices by a labor organization include causing an employer to discriminate against an employee, engaging in an illegal strike or boycott, causing an employer to pay for work not to be performed (i.e., featherbedding), and refusing to engage in collective bargaining.”
42. Locally, in highlighting the difference between wrongful dismissal and unfair termination of the contract of employment in *CMC Aviation Limited vs. Mohammed Noor* [2015] eKLR, the Court of Appeal (Karanja, Musnga & Gatembu, JJA) stated at paragraph 36 that “... Unfair termination involves breach of statutory law... On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract...” This differentiation has been adopted by other superior Court decisions including *Monica Wanza Mbavu vs. Roofspect & Allied Works Co Ltd* [2021] eKLR, per M. Onyango, J.;
 43. Although it depicts a departure from the meaning of “wrongful dismissal” assigned by the said Black’s Law Dictionary, it follows that the state of the law in Kenya, gleaned from the said differentiation laid down in decisional law and notably the CMC case, is that whereas unfair termination involves breach of statutory law, wrongful dismissal involves breach of the employment contract.
 44. The differentiation is especially significant for among other reasons, the Claimant’s onus probandi in respect to unfair termination is lighter since the primary reference is statute but certainly heavier in relation to wrongful dismissal since the primary reference is the actual contract and the Claimant bears the onus of exhibiting the specific provisions of the contract breached.
 45. The indicators of an unfair termination are housed in sections 43, 45 and 46 of the [Employment Act, 2007](#). A termination of employment by an employer is unfair if it fails any of the substantive and/or procedural test.
 46. First, if the employer fails to prove in Court that the reason for the termination is not only valid but also fair, in the sense that it is related to the employee’s conduct, capacity or compatibility; based on the operational requirements of the employer and not prohibited by sections 45(4)(a) and 46 of the [Employment Act, 2007](#).
 47. Second, if the employer fails to demonstrate that the termination was done in accordance with fair procedure which entail but not limited to the following considerations: (i) if the reasons assigned in termination are part of the reasons prohibited by section 46 of the [Employment Act, 2007](#); (ii) if the employer did not act in accordance with justice and equity in terminating the employment of the employee, including but not limited to the procedure adopted by the employer in reaching the decision to dismiss the employee; (iii) whether there was communication of that decision to the employee; (iv) if there was an opportunity for appeal against the decision, if any; (v) the conduct and capability of the employee up to the date of termination; (vi) the extent to which the employer has complied with any statutory requirements connected with the termination including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (vii) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (viii) existence of any previous warning letters issued to the employee. See section 45(2) of the [Employment Act, 2007](#).



48. The reasons which are deemed to constitute unfair termination within section 45(4)(a) of the *Employment Act*, 2007 are pregnancy; taking leave or proposal for leave; membership or proposed membership of a trade union; participation or proposed participation in activities of a trade union outside working hours or with the consent within working hours; seeking of office as or acting or having acted in the capacity of an officer of a trade union or a workers' representative; refusal or proposed refusal to join or withdraw from a trade union; an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or an employee's participation in a lawful strike.
49. And so, termination of a contract of employment without a lawful, fair, and justifiable reason, is deemed unfair. Section 43 of the *Employment Act*, 2007 places a heavy burden on the shoulders of the employer, if a suit is filed, to prove lawful and justifiable reason(s) for termination failing which the termination is deemed unfair termination within the meaning assigned under section 45 of the *Employment Act*, 2007 (discussed supra). Section 43 aforesaid reads: "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." {Emphasis supplied}
50. What I discern from the Statement of Claim and evidence in support thereof is a claim of unfair termination of the Claimant's contract of employment and nothing about wrongful dismissal. The Claimant alleges that his contract of employment was terminated first, verbally; first, without inviting the Claimant to show cause why he should not be dismissed; third, although he was invited to attend a disciplinary hearing, the Claimant was not accorded an opportunity to make representations in the disciplinary hearing; and fourth, without a valid reason. In sum, it is the position of the Claimant that the said termination cannot pass both the substantive and procedural test of termination of employment contracts.
51. In response, the Respondent takes a firm position that the services of the Claimant was issued with a letter of termination after, first, investigations disclosed a valid reason for termination namely stealing by servant, which constitutes gross misconduct under section 45 of the *Employment Act*, and second, that the Claimant was summarily dismissed fairly after he was invited to a disciplinary hearing and found guilty of gross misconduct.
52. What are the grounds upon which an employee can be dismissed without notice in what is popularly known as summary dismissal? Although section 35 of the *Employment Act*, 2007 provides for notices before termination, section 35(4)(b) of the *Employment Act*, 2007 contemplates circumstances which may justify termination of a contract of employment without notice.
53. Section 44 of the *Employment Act*, 2007 provides gross misconduct - a conduct which fundamentally breaches the employment contract - as the overarching ground upon which such a draconian step can be taken. The acts which are deemed to constitute gross misconduct are absconding duty; being intoxicated during working hours; wilfully neglecting to perform duty or performing it carelessly or improperly; using abusive or insulting language; failing or refusal to obey lawful commands; being arrested for a cognizable offence punishable by imprisonment and is not released within 14 days; and committing or on reasonable and sufficient grounds being suspected to have committed a criminal offence against or to the substantial detriment of his employer or his employer's property.



54. However, Martin Luther once said that “morality cannot be legislated, but behaviour can be regulated.” In order to ring-fence this draconian action - of summarily dismissing an employee - the employer is obligated to strictly follow the procedure under section 41 of the *Employment Act*, 2007 in the manner elaborated below.
55. Before terminating the employment contract of an employee summarily - on grounds of gross misconduct - an employer is obligated to explain to the employee in a language he 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. An employer shall, in this regard, before summarily dismissing the employee under section 44(3) or (4), hear and consider any representations of the employee. In extenso, section 41 provides as follows: “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the 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.”
56. In Kenya, section 41 aforesaid codifies the principles of natural justice and applies them to employment law as more particularly construed by Lord Mustill in *R vs. Secretary of State for the Home Department Ex Parte Doody* (1993) UKHL 8 and Lord Reid in *Ridge vs. Baldwin* UKHL 2. In *R vs. Secretary of State for the Home Department Ex Parte Doody* (1993) UKHL 8, Lord Mustill said this as the correct reflection of the principles of natural justice: “Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.” In *Ridge vs. Baldwin* [1963] UKHL 2, a Chief Constable succeeded in having his dismissal from service found unfair having not been accorded an opportunity to make representations. And so was the case in *Chief Constable of the North Wales Police vs. Evans* (1982) UKHL 10; *Surinder Singh Kanda vs. Federation of Malaya* (1962) AC 322 at page 337; and *Secretary of State for the Home Department vs. AF* (2009) UKHL 28.
57. Section 41 aforesaid is couched in obligatory terms and Courts have times without number so held. See for instance *Kenya Revenue Authority vs. Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, per Waki JA (as he then was), Warsame and Sichale, JJA.
58. It follows that any termination under section 44 aforesaid which falls short of the said mandatory requisite, both procedurally (by adhering to the said process section 41) and substantively (by invoking a valid reason under sections 43, 45 and 46), is deemed unfair and thus unlawful. See *CMC Aviation Limited vs. Mohammed Noor* [2015] eKLR, where Karanja, Musinga & Gatembu, JJA, held that “36. ... Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination...” See also *Jared Aimba vs. Fina Bank Limited* [2016] eKLR, where Mwilu & Otieno-Odek, JJA (as they then were) & Makhandia JA, held as follows: “20. However, under section 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination.” Similarly, in *Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited* [2014] eKLR, Mbaru, J. construed



the said section 41 as follows: “18. Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair. The union must be involved at the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union. 19. In this case the Respondent did not argue or show compliance with the provisions of section 41 of the *Employment Act*. They have not pleaded to have alerted the Claimant union nor have they advanced the argument that they informed the union which failed to attend. There was only a copied notice to the Union. The union was simply ignored. This is not what is envisaged by the law noting the Claimant and the Respondent had a Recognition Agreement and a CBA. The outcome to terminate the Claimant is therefore flawed and unfair.” In this connection, in the event an employer departs from the obligatory duty enjoined by the said section 41, the termination is deemed unfair.

59. What is the test of fairness in termination of employment contracts? And what is the construction of ‘fair labour practice’ parlance in Article 41 of *the Constitution*? It has been held that the tenor of Article 41 is the basic fair treatment of employees and in this context, the conduct or action of an employer deemed fair goes beyond what is lawful and legal. See Samuel Owiti Obage vs. Kenya Revenue Authority [2020] eKLR; Joseph Maina Theuri vs. Gitonga Kabugi & 3 Others [2017] eKLR; Kenya County Government Workers’ Union vs. County Government of Nyeri & another [2015] eKLR, et alia.
60. For instance, it is fair that conduct or action which is equitable. It follows that a conduct may be lawful, yet unfair. In Amos Kitavi Kivite vs. Kenya Revenue Authority [2020] eKLR, the Court had this to say about the test thereof: “33. Section 45(2) of the *Employment Act* provides that termination of an employee’s contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer’s operational requirements; and that a fair procedure was followed. In Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR the Court held that: “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive 34. justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.” 34. Again in Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR Onyango J held that: - “What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this Court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.” 35. Further, in Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR this Court expressed itself as follows, and which was cited with approval by the Court of Appeal in the case of National Bank of Kenya v Anthony Njue John [2019] eKLR, thus: - “Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability



of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41...” Also, in *Elizabeth Washeke and 62 Others vs. Airtel Networks (K) Ltd & another* [2013] eKLR, M. Mbaru, J. had the following to say about the purport of fairness and unfair labour practices: “The Act or the Court has not defined what fairness is but we can borrow from other jurisdictions with similar results. In the South African Case of *Council of Mining Unions vs. Chamber of Mines of SA* (1985) 6 ILJ 293 (IC) held; When granted the its ‘unfair labour practice’ jurisdiction, the Court decided not to define precisely what it understood by the concept of ‘fairness’ or its acronym, ‘equity’. What it did say, however was that fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair. Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public... Even where there are good reasons for an employer to terminate an employee, the employer must demonstrate that it followed fair procedure. What is ‘fairness’ is that which would apply to both the employer and the employee based on the facts before Court. This finding was similar as in the case of *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*, 1996 (4) SA 577 (A), where the Court held; ... Fairness comprehends that regard must be given not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment... The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either... There are no underdogs.” Similarly, in *Walter Ogal Anoro vs. Teachers Service Commission* (2013) eKLR, the Industrial Court of Kenya (as it was known then) held “the employer had genuine reason for terminating the Claimant’s employment contract under Section 43 of the *Employment Act*. The Court further held that, however, a termination must pass the fairness test – that is – the employer must show substantive justification for termination and also procedural fairness.”

61. The fairness test has two sides of the same coin and thus dichotomized into substantive and procedural fairness. Whereas the substantive aspect concerns itself with the validity of the reasons assigned for termination, the procedural aspect interrogates the procedure adopted by the employer in effecting the termination. In *Amos Kitavi Kivite vs. Kenya Revenue Authority* [2020] eKLR, the Court had this to say about the test thereof: “33. Section 45(2) of the *Employment Act* provides that termination of an employee’s contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer’s operational requirements; and that a fair procedure was followed. In *Walter Ogal Anuro –v- Teachers Service Commission* (2013) eKLR the Court held that: “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive 34. justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.” 34. Again in *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR Onyango J held that: - “What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this Court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.” 35. Further, in *Janet Nyandiko versus Kenya Commercial Bank Limited* [2017] eKLR this Court expressed itself as follows, and which was cited with approval by the Court of Appeal in the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR, thus: - “Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be



unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41..."

62. In the above connection, there must be a valid reason under sections 43(2) and 45(2) of the *Employment Act*, 2007 (substantive fairness) and the procedure adopted must accord with section 41 of the *Employment Act*, 2007 (procedural fairness). In *Paul Ooko Okoth vs. Chemilil Sugar Co. Ltd* [2016] eKLR, the Court in entering a finding that the Claimant's dismissal from Employment was unfair and unlawful rendered itself as follows: "... The procedure through which an employee may be validly terminated or dismissed is now well settled in the numerous jurisprudence of this Court as affirmed by several decisions of the Court of Appeal. There must be valid reason as provided in Section 43 of the *Employment Act* and the procedure must be fair as provided in Section 41 of the Act. In the present case there was no compliance with Section 41. The reasons for termination though valid, were never proved through a fair hearing as the Claimant was never taken through any disciplinary process. He was arrested and arraigned in Court in a Criminal case in which the employer was the Complainant and was dismissed two days after being arraigned in Court for the very reasons that he was charged. The termination of his employment was therefore procedurally unfair. The Respondent failed to comply with even its own procedure as set out in the collective bargaining agreement..." Again, on the substantive prong of fairness, validity of the reason for termination is material and sections 43(2) and 45(2) of the *Employment Act*, 2007 are germane. In the said *Peter Wangai vs. Egerton University* [2019] eKLR, the Court went ahead to say that "86. It is also important to revisit the provisions of Section 43(2) of the Act which provides that; "(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." 87. The reasons leading to termination of employment must be what an employer genuinely believes to exist and upon giving the employee a fair chance to a hearing before a representative of his choice and upon considering the defence given, then the employer good basis to effect termination of employment. Without a genuine reason, the employer should give the employee the benefit of doubt and allow them in employment by taking any other sanction other than termination of employment. 88. The provisions of section 43 of the Act must also be weighed with those of section 45 where an employer is required to prove that; (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure. 89. Where there is no genuine reasons leading to termination of employment, to proceed and dismiss the employee such amounts to unfairness as there is no valid or fair reason existing to justify the same. Even where all procedural requirements are followed, such does not negate the lack of a substantive reasons leading to termination of employment. 90. A fair process in addressing any allegations against an employee does not sanitise the invalidity and unfairness of the reasons. Procedural safeguard are just the last element to section 45(2). Procedural fairness should only arise where there is a substantive reason to justify termination of employment and not the other way round. 91. A sham trial process does not sanitise an unfair termination of employment. 92. In this case, the allegations made against



the Claimant were without basis, they lacked material evidence and the findings by the Council to Dismiss the Claimant from service for gross misconduct was at variance with the findings and defences made. Such resulted in unfair termination of employment and contrary to section 43 and 45 of the *Employment Act, 2007*.”

63. And what amounts to a fair hearing and how is it met? In *Judicial Service Commission vs. Gladys Boss Shollei & Anor* (2014) eKLR, the Court of Appeal held that “Where an employer accuses her employee of misconduct by way of a query and allows them to respond to the same (before a decision is taken) satisfies the requirement of fair hearing or natural justice. The Court in that matter went on to find that the appellant was accorded a fair hearing on this basis.” See also *Rachael Wambere Mwangi vs. Teachers Service Commission* [2020] eKLR, which adopted this reasoning.
64. See also *Pius Machafu Isindu vs. Lavington Security Guards Limited* [2017] eKLR; *Kenya Plantation & Agricultural Workers Union (KPAWU) vs. Finlays Tea (K) Limited* [2022] eKLR; *Dr Joseph Maingi vs. Permanent Secretary Ministry of Medical services*; *Donald Odeke vs. Fidelity Security Limited* [2012] eKLR; *Chrispo Zachariah Ogugo vs. Airtel Networks Kenya Limited* [2018] eKLR; *Banking Insurance and Finance Union vs. National Bank of Kenya Limited* [2020] eKLR; *Prof. Macha Isunde vs. Lavington Security Guards Limited* [2017] eKLR; *Fredrick Saundu Amolo suing through the Executive Secretary KUPPET Kajjado County Branch vs. Principal Namanga Mixed Secondary School & 2 others* [2014] eKLR; and *Walter Ogal Anuro vs. Teachers Service Commission* [2013] eKLR, all of which have elaborately discussed the general principles on both substantive and procedural fairness.
65. In the above connection, the employer having failed both the substantive and procedural fairness in *Kenya Plantation & Agricultural Workers Union vs. Sotik Tea Kenya Ltd* [2017] eKLR, the Court held that “This is a display of a case of lawful termination. The Claimant case comes out as a demonstration of a botched-up termination with undue regard to substantive and procedural fairness. No effective disciplinary process was employed at the origins of dismissal. Further, the reason for termination is not justifiable in that this is not substantial to the satisfaction of the law as set out. The Respondent has failed to establish a concrete case for lawful termination of employment and if find as such.”
66. Having also failed to the substantive fairness test in *David Gichana Omuya vs. Mombasa Maize Millers Ltd* [2014] eKLR, the Court stated as follows: “... I believe I have discussed enough on this subject. My finding is that the Respondent has failed to prove the reason(s) outlined in the letter of termination and that the reason(s) were valid and fair reasons...”
67. However, the employer having complied with both the substantive and procedural fairness the Claimant having been issued with a notice to show cause and subjected to a disciplinary hearing leading to termination of employment in *Justus Mutahi Ihaji vs. Kenya Airways Limited* [2018] eKLR, the Court held that the Respondent had complied with procedural fairness and substantive justification and therefore the termination was both fair and procedural. And so was the case in *Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike* [2017] eKLR, where the Court of Appeal considered the fact that the Claimant was notified of the charge against him, invited to attend a hearing and advised of his right to have a representative present and ultimately, notified of the decision, holding that it was persuaded that there was substantial if not full compliance with the requirements for a hearing under Section 41 of the *Employment Act*.
68. Having carefully evaluated both the Claimant’s and the Respondent’s evidence, with specific emphasis – based on the Respondent’s obligations to keep records under section 10 and 74 of the Act – on the Respondent’s evidence presented vide Exhibits 1, 2, 3, 7 and 8, setting out the specific reason for termination, all considered in the context of section 44 of the *Employment Act, 2007*.



69. I gather and it is irrefutable – in the context of section 44 (1) & (4) (g) of the Act - that the Respondent was armed with a valid reason for dismissing the Claimant summarily on account of stealing by servant contrary to section 268 read with section 281 of the Penal Code. It follows that the Respondent has surmounted the substantive fairness test and cannot be faulted for taking that direction.
70. However, the Respondent’s waterloo lies in the procedure it adopted in terminating the Claimant’s services. The yardsticks of measuring unfair and inequitable termination, is largely housed in section 45(5) read with section 41 of the *Employment Act*, 2007, and of course as construed and elaborated in decisional laws discussed above videlicet: (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any pervious warning letters issued to the employee.
71. Any employer who takes the drastic step provided under section 44(3)(g) without affording the employee an opportunity to make any representations against the charge, and without demonstrating in the recorded proceedings how the decision was reached, and without informing the Claimant about his right of appeal and how, an appeal if any, will be handled, robs the employee of his/her constitutional right to a hearing, rendering the termination procedurally unfair within the meaning of section 45(2)(c) of the *Employment Act* and further setting up the termination against justice and equity, as contemplated under section 45(4) & (5) of the *Employment Act*, 2007.
72. It seems to me that Claimant having been charged with the offence of stealing by servant, the Respondent dropped the guard. Impractical as it may sound, it will be recalled that the Claimant was deemed and is still deemed innocent by nothing less than *the Constitution*. See Article 50(2)(a) of *the Constitution*. In any event, it matters not whether the employee's inequities paint the portrait of the vilest of offenders. Procedural fairness commands that all employees should be treated fairly and equitably. Perhaps it is timely at this stage to highlight that in CMC Aviation Limited vs. Mohammed Noor [2015] eKLR, the Court of Appeal (Karanja, Musinga & Gatembu, JJA) held at paragraph 36 that “... Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination...”
73. Applying the said yardsticks, this Court enters the following findings.
74. First, although it was evident that the Claimant was suspended from duty on 23rd October 2020, contrary to section 74 of the Act, the Respondent exhibited no letter of suspension, lending credence to the assertion by the Claimant that he was suspended verbally. Needless to underscore, having been employed in writing, this conduct amounts to an unfair labour practice frowned upon by Article 41 of *the Constitution*.
75. Second, gleaning from the minutes of the disciplinary Sub-Committee Meeting (exhibited by the Respondent as the Respondent’s Exhibit 1) the accusations are clearly captured plus the testimonies of two witnesses namely Sammy Mbusa and Julius Makenzi. However, contrary to the mandatory requirement of section 41(2) of the *Employment Act*, 2007, the minutes reflect no representations of the Claimant leading to the inevitable inference from the record (in the context of section 74 thereof) that the Claimant was granted no opportunity to make representations against the charge, and invoking section 45 (5) (a) & (c) of the same Act, therefore, the termination is deemed unfair. In this



regard, the Respondent's action depicts an erroneous view that actions termination under section 44, are self-governing, exempt from the procedural burden housed in the said section 41(2) of the same Act. It translates that contrary to the mandatory requirement of section 41(2) of the Act, the Respondent acted without hearing and considering representations of the Claimant. Put differently, the Claimant was condemned unheard and the disciplinary hearing was merely a window-dressing exercise. A sham.

76. Third, in the same minutes and contrary to the contemplation of section 45(5) (a) of the same Act, good sense, equity and fair hearing principles, it is not reflected at all how the representations, if any, were considered and how the conclusion was reached that the services of the Claimant must be terminated. On this account too, it translates that contrary to the mandatory requirement of section 41(2) of the Act, the Respondent acted without hearing and considering representations of the Claimant. This too fortifies the view taken by this Court that the disciplinary hearing was a sham.
77. Fourth, the sham process is fortified by the short period of two days the Claimant was granted to prepare for hearing and appear before the disciplinary committee. The period does not accord with the principles of natural justice and fair hearing.
78. Fifth, this Court gathers from the Summary Dismissal Letter (exhibited by the Respondent's Exhibit 2), the Respondent did not inform the Claimant about his right of appeal and how, an appeal if any, will be handled. Such a conduct is deemed by section 45(5) (a) of the Act, unfair.
79. Sixth, it is discernible from section 45(5) (c) that one of the yardsticks used to determine whether the termination was unfair is the extent to which the employer has complied with any statutory requirements connected with the termination, including but not limited to issuance of a certificate of service under section 51 and the procedural requirements set out in section 41 of the Act. It follows that an employer who fails to issue an employee whose services have been terminated a certificate of service, offends the mandatory provision of section 51 of the Act and thus deemed unfair by dint of section 45(5) (c) of the same Act.
80. The foregoing findings yield a firm conclusion that although there was a valid reason for terminating the Claimant's contract of employment, the procedure which was adopted by the Respondent did not conform with the mandatory provisions of the *Employment Act* highlighted in the foregoing six grounds, and thus tainted with procedural missteps. Consequently, the said conduct of the Respondent amounts to unfair termination.

(ii) Whether the Claimant has made a case for any relief and if yes, the appropriate reliefs

81. The Claimant seeks the following terminal benefits: The Claimant thus seeks the following terminal dues: (i) one month's salary in lieu of notice in the sum of Kshs. 11,800; (ii) unpaid salary for the month of October 2020 amounting to Kshs. 11,800; (iii) damages for unfair termination in the sum of Kshs. 141,600; and (iv) a certificate of service.
82. The remedies entitled to a Claimant in a claim of unfair termination or wrongful dismissal are provided under section 49 of the *Employment Act*, 2007. For ease of contextualization, I desire to reproduce the section in extenso. Section 49 of the *Employment Act*, 2007 provides as follows: "(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal



and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. (2) Any payments made by the employer under this section shall be subject to statutory deductions. (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage. (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following— (a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e) the employee's length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonably incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and (m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

83. The remedies set out under section 49 of the *Employment Act*, 2007, are awarded purely at the discretionary power of the Court. They are thus not obligatory. The exercise of this discretionary power of the Court varies from case-to-case dictated by the peculiar circumstances of each case. In its quest to settle the law on remedies available to a victim of unfair termination or wrongful dismissal, the Supreme Court of Kenya decision in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR, Mwilu (DCJ&VP), Ibrahim, Wanjala, Njoki, Lenaola, SCJJ provided the following broad guidelines: “[32] When giving an award under Section 49 of the *Employment Act*, a Court of law is expected to exercise judicial discretion on what is fair in the circumstances... [38] What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial Court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies... [41] Guided by the above analysis, we find that once a Court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m).”
84. Also, in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, Ginthinji JA (as he then was), Karanja and Warsame, JJA stated that “[19] The foregoing sets out the law and the



guiding principles which we are bound to apply in the determination of this appeal. The appellant’s main complaint is that the Respondent was awarded damages over and beyond what is prescribed under section 49 of the *Employment Act*. [20] On the conclusion that the Respondent was unfairly terminated from his employment, section 49 grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case. This is made clear by section 49 (4) which sets out some 13 considerations which the trial Court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement.”

85. The purpose served by the remedies provided under section 49 generally is restitutio in integrum. In *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, Ginthinji JA (as he then was), Karanja and Warsame, JJA took a judicial view that “[29] One of the guiding principles for the remedies under section 49 is that they are awarded to compensate the Claimant, not as punishment to the employer... This is based on the principle of “restitutio in integrum” which means that the injured party has to be restored as nearly as possible to a position he or she would have been in had the injury not occurred.”

(a) Payment of one month’s pay in lieu of notice of termination

86. The Claimant claims that his contract was terminated without notice of termination of the employment contract and thus entitled to pay equivalent to his pay for one month.
87. Section 44(1) formulates summary dismissal to be termination with no notice or with a shorter notice than is entitled. The text reads that “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”
88. Section 36 of the *Employment Act*, 2007 provides that “... Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section...”
89. Section 49 of the *Employment Act*, 2007, provides for remedies for wrongful dismissal and unfair termination. Relevant to this head, section 49(1)(a) thereof provides that “(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service...”
90. In summary dismissal, by dint of section 44(1) of the Act which empowers an employer to summarily dismiss without notice, the norm is that an employee is not entitled to this relief except where it is demonstrated that it was a term of the contract of employment. See *Wilberforce Kimungui vs. United Aryan (EPZ) Limited* [2022] eKLR; *Kenya Union of Domestic Workers, Hotels, Educational Institutions And Hospital Workers Union(KUDHEIHA) vs. BOM Lirbanda Girls High School (Employment and Labour Relations Cause 16 of 2023)* [2023] KEELRC 2519 (KLR) (18 October 2023) (Judgment), et alia.
91. In this case, the Claimant failed to bring himself within the exception by exhibiting evidence that it was a term of his employment contract. It follows that the norm applies.



92. Accordingly, I am impelled to reach the conclusion that the Claimant has failed to generate persuasion in the mind of this Court that he is entitled to this discretionary relief.

(b) Damages for unfair termination and wrongful dismissal

93. The Claimant claims damages for unfair termination of his contract of employment, equivalent to twelve (12) months' pay, amounting to Kshs. 141,600.

94. Section 49 of the [Employment Act](#), 2007, provides for remedies for wrongful dismissal and unfair termination. Relevant to this, section 49(1)(c) aforesaid provides that "(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following — ... (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

95. It has therefore been held that general damages as originally understood in common law cannot be lawfully awarded in unfair termination or wrongful dismissal cases. Instead, the Court should consider an award of damages equivalent to not more than 12 months' pay. In its quest to settle the law on this issue, the Supreme Court of Kenya decision in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR, Mwilu (DCJ&VP), Ibrahim, Wanjala, Njoki, Lenaola, SCJJ held that "[33] On an award on damages, the Act limits the award a Court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the [Employment Act](#). What then did the Court of Appeal do in addressing the above issue and as determined in [CMC Aviation Limited v Mohammed Noor; Civil Appeal No.199 of 2013](#), [2015] eKLR (the CMC Aviation Case)?" Further, in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, the ELRC awarded general damages for wrongful dismissal and in addition, damages equivalent to 12 months' pay. In finding that this was not supported by law, Githinji JA (as he then was), Karanja and Warsame, JJA held that "[25] We now come to the award of Ksh. 3,000,000 being general damages in lieu of reinstatement. It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice... See also the Court of Appeal decision in *Alfred Githinji vs. Mumias Sugar Company Ltd Civil Appeal No 194 of 1991*... [30] It is our view that the Respondent's legal entitlement for unlawful termination of employment was six (6) months' salary in lieu of notice. We find that in awarding the Respondent the sum of Kshs.3 million as general damages, the trial Judge acted contrary to the principles concerning wrongful dismissal as set down in *Central Bank of Kenya vs. Julius Nkonge* (supra) and *CMC Aviation vs. Mohamed Noor* (supra) and contrary to provisions of section 49 of the [Employment Act](#)."

96. When a Court is considering damages under this head, the Court should address its mind to the legal principle that the remedies set out under section 49 of the [Employment Act](#), 2007, are awarded purely at the discretionary power of the Court and the exercise of this discretionary power varies from case-to-case dictated by the peculiar circumstances of each case. In the Supreme Court of Kenya decision in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR, Mwilu (DCJ&VP), Ibrahim, Wanjala, Njoki, Lenaola, SCJJ stated that "[32] When giving an award under Section 49 of the [Employment Act](#), a Court of law is expected to exercise judicial discretion on what is fair in the circumstances... [38] What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the [Employment Act](#), we have no doubt that once a trial Court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is



the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies... [41] Guided by the above analysis, we find that once a Court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)." Also, in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, Ginthinji JA (as he then was), Karanja and Warsame, JJA stated that "[19] The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal. The appellant's main complaint is that the Respondent was awarded damages over and beyond what is prescribed under section 49 of the *Employment Act*. [20] On the conclusion that the Respondent was unfairly terminated from his employment, section 49 grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case. This is made clear by section 49 (4) which sets out some 13 considerations which the trial Court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement."

97. Further, in considering an award of damages under this head, the Court should bear in mind the overarching purpose served by the remedies provided under section 49 generally namely *restitutio in integrum*. In *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, Ginthinji JA (as he then was), Karanja and Warsame, JJA took expressed the purpose of remedies under section 49 aforesaid in the following words: "[29] One of the guiding principles for the remedies under section 49 is that they are awarded to compensate the Claimant, not as punishment to the employer... This is based on the principle of "*restitutio in integrum*" which means that the injured party has to be restored as nearly as possible to a position he or she would have been in had the injury not occurred."
98. Although based on discretionary power of the Court, an award of the maximum 12 months' pay must be based on sound judicial principles and not whimsical or capricious. In this connection, the trial Court must justify or explain why a Claimant is entitled to the maximum award or lesser award or any at all. In the Supreme Court of Kenya decision in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR, Mwilu (DCJ&VP), Ibrahim, Wanjala, Njoki, Lenaola, SCJJ stated that "[33] On an award on damages, the Act limits the award a Court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the *Employment Act*..." Also, in the Court of Appeal reasoning in *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, Waki, JA (as he then was), Makhandia and M'Inoti, JJA reasoned that "The compensation awarded to the Respondent under this head was the maximum awardable, that is to say, 12 month's pay. The trial Judge did not at all attempt to justify or explain why the Respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations,



which act then invites our intervention.” Similarly, in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, Ginthinji JA (as he then was), Karanja and Warsame, JJA took the same view and held that “[22] This Court has established the rule that an award of the maximum 12 months’ pay must be based on sound judicial principles... this Court categorically stated that the trial Judge must justify or explain why a Claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.” Further, in *Abraham Nyambane Asiago vs. Barclays Bank of Kenya Limited* [2019] eKLR, Koome JA (as she then was), Okwengu and Kantai, JJA reasoned as follows: “24. We have also considered the established rule of the thumb that an award of maximum compensation must always satisfy stringent conditions that demonstrate gross abuse of procedure or extreme cruelty on the part of the employer...”

99. Finally, in determining a suit on wrongful dismissal or unfair termination of employment, a Court should be guided by the provisions of section 49 of the *Employment Act*, 2007, afore-discussed. Section 50 of the *Employment Act*, 2007 provides that “In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.”
100. First things first. The Claimant asserts that his salary was Kshs. 11,800. This was denied by the Respondent. Although he so claimed, the Claimant exhibited a pay slip (the Claimant’s Exhibit 8) which shows that his salary for May 2018 was Kshs. 10,400. The Claimant did not exhibit the latest pay slip for September 2020. In lieu, the Claimant exhibited a bank statement (the Claimant’s Exhibit 10) which captures an item on 9th October 2020 as “Salary Processed Machakos Golf Club”, translating that he was paid a salary in the sum of Kshs. 11,800 and which the Claimant asserted to be his last salary paid by the Respondent. Considering the obligation of the Respondent to keep records, enjoined by sections 10 and 74 of the Act, this Court finds and so concludes that the Claimant’s evidence in this regard was ineffectually countered by the Respondent. This Court thus concludes that the salary payable to the Claimant as at 23rd October 2020 when he was suspended was Kshs. 11,800.
101. Taking into account first, the circumstances under which the summary dismissal was effected in writing complete with a valid reason for summary dismissal namely stealing by servant, which is heavily countered by the indignity of failing to follow the mandatory procedure laid the said sections 41, 44 and 45 of the *Employment Act*, 2007 including but not limited to interdicting the Claimant verbally; second, that the reason assigned is undoubtedly related to the employer-employee relationship; third, that the Respondent was justified to terminate the employment contract but only failed in procedural fairness; fourth, parity of blameworthiness, since the Claimant also caused or contributed to the termination by his own conduct; fifth, the Claimant’s long stint of continuous service which was approximately 10 years; sixth, the reasonable expectations of the Claimant emanating from the said long stint of service; seventh, the modest wages and the attendant expenses which have been reasonably incurred in filing and prosecuting this claim; and eighth, the precedents on quantum of damages for unfair dismissal upon which reliance was placed by the Claimant, this Court is of the persuasion that it will best serve justice if the Claimant is awarded damages equivalent to ten months worked out as follows: Kshs. 11,800 x 10 months = Kshs. 118,000.
102. Wherefore this Court awards Kshs. 118,000, in damages for unfair termination.

(c) Unpaid salary for the month of October 2020 in the sum of Kshs. 11,800

103. Wrongfully withholding an employee’s salary not only amounts to an offence but also amounts to a civil wrong whose remedy is repayment of the salary. See section 25 of the *Employment Act*, 2007.



104. In circumstances where the interdiction or suspension is lifted either by the employer or the Court, an employee is entitled to withheld salary for the period he was under interdiction or suspension. However, in circumstance where the interdiction or suspension is not lifted, the employee is only entitled to the salary he had worked for.
105. In this case, the dismissal having not been lifted, the Claimant is entitled only to the salary he had worked for.
106. In this regard, as discussed above and emanating from the obligation of the employer to keep records, enjoined by sections 10 and 74 of the Act, whenever an employee asserts that he was not paid, the onus to prove payment shifts to the Respondent. See among others, *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR.
107. In this case, the Claimant asserted that he was not paid his salary for October 2020. The Respondent presented no evidence of payment of the salary for the service the Claimant offered in October 2020, until termination on 23rd October 2023. The Respondent instead faults the Claimant for failing to adduce present evidence in support thereof.
108. This Court thus reaches the conclusion that the Claimant has proved this head, albeit with modification. Since the services of the Claimant were terminated on 23rd October 2020, the award of unpaid salary should be commensurate to the period of service numbering 23 days worked out as follows: $23/30 \times 11,800 = 9,047$.
109. Accordingly awarded a sum of Kshs. 9,047 in unpaid salary for the month of October 2020.

(d) Certificate of Service

110. The Claimant claims that upon termination of the contract of employment, he was not issued with a Certificate of Service.
111. Section 51 of the *Employment Act*, 2007 enjoins an employer to issue an employee who has served for a continuous period of more than four weeks, a certificate of service upon termination of the contract of employment. The said section 51 provides that “(1) An employer shall issue to an employee a certificate of service upon termination of his employment unless the employment has continued for a period of less than four consecutive weeks. (2) A certificate of service issued under subsection (1) shall contain — (a) the name of the employer and his postal address; (b) the name of the employee; (c) the date when employment of the employee commenced; (d) the nature and usual place of employment of the employee; (e) the date when the employment of the employee ceased; and (f) such other particulars as may be prescribed. (3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee. (4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.”
112. As afore-discussed, one of the principal considerations deployable in determining whether a termination was fair or not, enacted in section 45 (5) (c) of the Act is to consider the extent to which the employer has complied with any statutory requirements connected with the termination including but not limited to issuance of a certificate under section 51 thereof.
113. The Claimant’s evidence was uncontroverted and this Court thus reaches a conclusion that the failure to issue a certificate of service was unfair. Accordingly, the prayer for a Certificate of Service is merited.



(iii) Which party will shoulder the costs of this claim?

114. This Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Claimant.

Part vi: Disposition

115. In the upshot, this Court finds the Claim partially successful. Whereas the prayer for pay of one month’s salary in lieu of notice is dismissed for want of merit, Judgement is entered in favour of the Claimant for the balance of the prayers, in the following terms:

- i. A declaration is hereby issued that although the Respondent was armed with a valid reason for summarily dismissing the Claimant, the procedure which was adopted by the Respondent did not conform with the specified mandatory provisions of the *Employment Act*, 2007 and rendering the termination unfair.
- ii. Accordingly, the Respondent shall pay the Claimant damages for unfair termination equivalent to 10 months’ pay, in the sum of Kshs. 118,000, with interest at Court rates from the date of this Judgment until payment in full.
- iii. Further, the Respondent shall pay the Claimant a sum of Kshs. 9,047, in unpaid salary for the 23 days of service in the month of October 2020, with interest at Court rates from 1st November 2020 (when it fell due) until payment in full.
- iv. In accord with section 49(2) of the *Employment Act*, 2007, the damages in (ii) & (iii) supra, are subject to statutory deductions.
- v. The Respondent shall issue the Claimant with a Certificate of Service within a period of 60 days.
- vi. The Respondent shall shoulder the costs of this suit.

116. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 28TH DAY OF MAY, 2024

.....

C.N. Ondieki

Principal Magistrate

Advocate for the Claimant:.....

Advocate for the Respondent:.....

Court Assistant:.....

