Simon v Vanga Shoes Company Limited (Cause E005 of 2022)
[2023] KEMC 108 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEMC 108 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CAUSE E005 OF 2022

CN ONDIEKI, PM

SEPTEMBER 28, 2023

BETWEEN

GAMMA ONWONGA SIMON ..... CLAIMANT

AND

VANGA SHOES COMPANY LIMITED ..... RESPONDENT

JUDGMENT

Part I: Prelude

1. Every employee has the right to fair labour practices.[1] In complimenting the foregoing, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair[2] and in the event 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.[3] A contract of employment is terminable but within the four corners of the law.[4] The law thus prohibits termination of a contract of employment unfairly[5] and permits an employee whose contract of employment has been terminated unlawfully and/or unfairly to question the termination in a Court of law on grounds that the termination was unfair and therefore unlawful.[6] A termination of employment

1 See Article 41(1) of *the Constitution*.

2 See Article 47(1) of *the Constitution*.

3 See Article 47(2) of *the Constitution*.

4 And especially *the Constitution* and the *Employment Act*, 2007.

5 See section 45(1) of the *Employment Act*, 2007.

6 See section 35(4) of the *Employment Act*, 2007.

by an employer is deemed unfair if the employer fails to justify in Court that the reason for the termination is not only valid but also the procedure adopted conforms with the law.[7] The test of fairness is equity and in this construction, that conduct of the employer's which is construed as equitable is deemed fair.[8] The simple reason of matching fairness with equity is based on the understanding that a conduct may be lawful yet unfair. And so, the fairness test is dichotomized into substantive and procedural fairness.[9] While the substantive aspect focuses on whether the reason assigned for termination is valid or not, the procedural aspect looks at the procedure adopted by the employer to effect the termination. 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.[10]

Part II: The Claimant's Case

2. Vide a Memorandum of Claim dated 6th June 2022 and filed on 7th June 2022, the Claimant brought this suit against the Respondent seeking Judgment for the following: (a) The Respondent pays the Claimant dues as tabulated below: (i) Compensation for wrongful, unlawful and/or unfair termination of employment - Kshs. 197,544.00. (ii) One month's salary in lieu of notice - Kshs. 16,462.00. (iii) Interest on (i) and (ii) above from the date the same became due until payment in full and (iv) Costs of the suit. (b) Certificate of Service.

3. The Claimant claims that at all times material to this suit, he was an employee of the Respondent with effect from 10th November 2021. The Claimant avers that he performed his duties as per the contract of service with diligence and dedication. He claims that on 14th April 2022, the Respondent terminated the contract of service unilaterally, without a prior warning or justifiable cause and in complete disregard of the procedure for termination set out in the *Employment Act*, 2007. He claims that at the time of the termination, his gross salary was Kshs. 16,462.

4. At the hearing of the Claimant's case, he adopted his witness statement dated 23rd May 2022 and 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 have thus found no good cause to regurgitate the statement. In support of his claim, the Claimant exhibited the following documents:

   (i) a copy of the Claimant's identity card as the Claimant's Exhibit 1;

   (ii) the Claimant's NSSF Statement as the Claimant's exhibit 2;

   (iii) the Claimant's Bank Statement as the Claimant's exhibit 3;

   (iv) a copy of the letter of termination as the Claimant's exhibit 4; and

   (v) a copy of the demand letter as the Claimant's exhibit 5.

7 See sections 45(2) read with sections 43(2) and 46 of the *Employment Act*, 2007.

8 See Elizabeth Washeke and 62 Others vs. Airtel Networks (K) Ltd & another [2013] eKLR, per M. Mbaru, J.; and Amos Kitavi Kivite vs. Kenya Revenue Authority [2020] eKLR, et alia.

9 Amos Kitavi Kivite vs. Kenya Revenue Authority [2020] eKLR; Walter Ogal Anoro vs. Teachers Service Commission (2013) eKLR; Peter Wangai vs. Egerton University [2019] eKLR; Kenya Plantation & Agricultural Workers Union vs. Sotik Tea Kenya Ltd [2017] eKLR; Justus Mutahi Ihaji vs. Kenya Airways Limited [2018] eKLR; and Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR, et alia.

10 See section 47(5) of the *Employment Act*, 2007.

5. In cross-examination of the Claimant, he stated that four employees were dismissed and they all used to live in Athi River. He admitted that all the four were issued with warning letters. He admitted that upon termination, he was paid his salary and dues. He stated that he was advised the reason for dismissal as abscondment. He admitted that the mistake of failing to attend to duty was his.

6. In his written Submissions dated 19th June 2023 and filed on 20th June 2023, learned Counsel Mr. Maina instructed by the Firm of Messieurs Eboso & Company Advocates representing the Claimant proposes two issues for determination as follows:

   (i) whether the termination wad unlawful and unfair; and

   (ii) the appropriate reliefs.

7. As to whether the termination was unlawful and unfair, Counsel submits that the termination was unlawful since there was no notice issued to the Claimant to show cause why he should not be dismissed and there was no disciplinary hearing, contrary to section 41(1) & (2) of the *Employment Act*, 2007. Reliance is placed on Alphonce Maghanga Mwachanya vs. Operation 680 Limited [2013] eKLR.

8. Relating to reliefs, it is urged by Counsel that the Claimant has made a sufficient case for the reliefs sought, as contemplated under section 35(1)(c) and 49(1)(c) of the *Employment Act*, 2007.

Part III: The Respondent's CasE

9. In its Memorandum of Response dated 24th June 2022 and filed on 5th July 2022, the Respondent denies all material facts except the fact that the Claimant was its employee. The Respondent avers that the Claimant was issued with three prior warnings for absenteeism and that on 7th April 2022 when he failed to assign reasons for absenteeism, he was summarily dismissed.

10. At the hearing of the Respondent's case, Ruth Alice Otieno, the Respondent's Human Resource Manager adopted her witness statement dated 24th June 2022 and filed together with the response as her evidence-in-chief. In her said witness statement, Ms. Otieno has rehashed the substance of the Memorandum of Response. She underlines that the termination was done under section 44 of the *Employment Act* for absenteeism. Ms. Otieno testified that on all the four occasions, the Claimant failed to offer satisfactory reasons for his absenteeism and hence the issuance of warning letters. Finally, Ms. Otieno testified that on 15th April 2022, the Claimant received all his dues being the salary he had earned for the month of April and pay for the leave days unutilized in 2022. Ms. Otieno exhibited the following:

    (i) a letter of termination dated 7th April 2022 as the Respondent's Exhibit 1;

    (ii) two warning letters dated 1st and 18th March 2022 as the Respondent's Exhibits 2 & 3;

    (iii) payment voucher for the terminal dues for days worked; overtime worked; and untaken leave days as the Respondent's Exhibit 4.

11. In cross-examination of Ms. Otieno, she stated that there was no disciplinary hearing and that there was no notice to show cause why he should not be dismissed but the Claimant was paid his terminal dues.

12. In his written Submissions dated 17th July 2023 and filed on 19th July 2023, learned Counsel Mr. Odipo instructed by the Firm of RBZ LLP Advocates representing the Respondent proposes three issues for determination as follows:

    (i) whether termination of employment was unfair, wrong or in violation of the law;

(ii) whether the Claimant is entitled to reliefs sought; and

(iii) whether the claim should be dismissed with costs.

13. On whether the termination was wrong, unfair and in violation of the law, it is submitted that it was since section 44(4) permits summary dismissal for gross misconduct and that absenteeism without permission is one such gross misconduct. It is urged that the termination was not done under section 41 as urged by the Claimant. It is submitted that preceding the termination, three warning letters were issued and they are not disputed by the Claimant. Reliance is placed on Consolata Kemunto Aming'a vs. Milimani High School [2019] eKLR.

14. It is thus urged that the Claimant is not entitled to the reliefs sought and instead, the claim should be dismissed with costs to the Respondent. It is submitted that when an employee is summarily dismissed, there is not notice required and the employee is thus disentitled to salary in lieu of notice, staking this proposition in Kenya Power & Lighitng Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR; and Wilberforce Kimungui vs. United Aryan (EPZ) Limited [2022] eKLR.

Part IV: Points For Determination

15. Commending themselves for determination - gleaning from the Memorandum of Claim; Memorandum of Response and the rival written Submissions - are five questions as follows:

i. First, determination of the Claimant's gross monthly pay and whether this Court has jurisdiction to determine this cause.

ii. Second, whether the Claimant was an employee of the Respondent and the date the Claimant was employed by the Respondent.

iii. Third, whether the employment contract of the Claimant unlawfully, unfairly and wrongfully terminated.

iv. Fourth, appropriate reliefs.

v. Fifth, which party should shoulder the costs of this claim?

Part V: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

16. The principal duty of this Court is to examine facts, evaluate evidence, subject the proven facts to the law and render a decision on a balance of probability.

17. Who shoulders the onus probandi in civil cases generally? In all cases, there is always a legal burden to prove or onus probandi incumbit ei qui dicit, non ei qui negat. This is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In civil cases, the onus probandi is always on the person who brings a claim in a dispute, originally expressed as semper necessitas probandi incumbit ei qui agit (the necessity of proof always lies with the person who will fail if no proof is adduced). The legal burden of proof lies in him who will fail if no evidence is adduced to that end. The obligation first starts with the Plaintiff who must discharge the burden of proof placed on her shoulders to the required standard namely preponderance of probability. See sections 107, 108 and 109 of the *Evidence Act*; Halsbury's Laws of England 4th Edition, at page 662; Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, per Nyamweya, J. (as she then was); Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR; Vincent Okello vs. Attorney General Gulu HCCS No. 4 of 1992 (1995) III KALR 129; Treadsetters Tyres Ltd vs. John Wekesa Wepukhulu (2010) eKLR, per Ibrahim, J., (as he then was); Charlesworth & Percy on

Negligence, 9th Edition at page 387; and Henderson vs. Henry E Jenkins and Sons (1970) AC 232 at 301.

18. In civil cases, the general standard of proof is on preponderance of probabilities. It can vary upwards depending on the gravity of the matter. See Henry Hidaya Ilanga vs. Manyema Manyoka (1961) EA 705; and Miller vs. Minister of Pensions (1947) 2 ALL ER 372, per Denning J.

19. The balance of probabilities standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. See Lord Nicholls of Birkenhead in Re H and Others (Minors) (1996) AC 563, at page 586. Put differently, it means that the case will be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place and in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. See William Kabogo Gitau vs. George Thuo & 2 Others (2010) 1 KLR 526, per Kimaru, J. It can again be said that degree which is not so high as is required in a criminal case so as that a tribunal can say 'we think it more probable than not' and the burden is discharged thereby, but, if the probabilities are equal it is not. See Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court of Appeal adopted the reasoning of Denning, J. in Miller vs. Minister of Pensions (1947) 2 All ER 372.

20. Since evidence is weighed and not numbered, no particular number or volume of evidence is prescribed. See S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) and section 143 of the *Evidence Act*. See also Siraj Din vs. Ali Mohamed Khan (1957) EA 25.

21. 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. took enunciated 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."

22. I now embark on analysis, interrogation, assessment and evaluation of each of the five issues, seriatim.

(i) Determination of the Claimant's gross monthly pay and whether this Court has jurisdiction to determine this cause

23. In Gazette Notice Number 6024 dated 10th June 2018, the Chief Justice Emeritus, His Lordship David Kenani Maraga appointed all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine employment and labour relations cases within their respective areas of jurisdiction as follows:

> "1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
>
> 2. Matters relating to the following specific areas—
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> (i) offences under the *Work Injury Benefits Act*, 2007
>
> (ii) offences under the *Employment Act*, 2007
>
> (iii) offences under the *Labour Institutions Act*, 2007
>
> (iv) offences under *Occupational Safety and Health Act*, 2007; and
>
> (v) offences under the *Labour Relations Act*, 2007."

24. Again, this Court is alive to the fact this designation through the said gazette notice was unsuccessfully challenged in Watson Burugu vs. Attorney General & 2 others [2021] eKLR, per W. Korir.

25. Unlike the Employment and Labour Relations Judge who has general and unlimited jurisdiction in employment and labour relations matters, the jurisdiction of a Magistrate Court in such matters is limited and impacted by three key determinative factors:

(i) appointment by the Chief Justice;

(ii) the pecuniary limit as set by the Chief Justice from time to time, but presently standing at a monthly gross pay not exceeding Kshs. 80,000; and

(iii) the limitation of time to bring the claim under section 90 of the *Employment Act*, 2007.

Determination

26. The Claimant's evidence is that his gross monthly pay as at 7th April 2022 was Kshs. 16,462. This position was not disputed by the Respondent.

27. This Court thus concludes that first, this Court being presided by a Principal Magistrate passes the first hurdle of rank, being within the ranks contemplated in Gazette Number 6024 dated 10th June 2018. Second, the gross monthly pay being Kshs. 16,462 falls within the pecuniary reach of this Court as set in the same Gazette Notice. Third, this claim was not filed outside the three years timeline set by section 90 of the *Employment Act*, 2007.

28. In the upshot, this Court has jurisdiction to hear and determine this cause.

(ii) Whether the Claimant was an employee of the Respondent and the date the Claimant was employed by the Respondent.

29. In this regard, only oral evidence was presented that the Claimant was an employee of the Respondent between 10th November 2020 and 7th April 2022.

30. The Respondent did not controvert this assertion. It was actually admitted in cross-examination. Wherefore this Court concludes that the Claimant was an employee of the Respondent effective 10th November 2020.

(iii) Whether the employment contract of the Claimant unlawfully, unfairly and wrongfully terminated

31. The Claimant contends that the termination of his contract of employment was unlawful, unfair and wrongful on account of failure to issue the Claimant with a notice to show cause why he should not be dismissed and failure to hold a disciplinary hearing.

32. 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."

33. The law takes cognizance 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 prohibits termination of a contract of employment unfairly, within the meaning of unfair termination assigned by section 45(2) of the *Employment Act*, 2007. See section 45(1) of the *Employment Act*, 2007.

34. 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."

35. What is deemed unfair termination? 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 substance and procedure twin test. 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. 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.

36. And what are the reasons which the law deems to constitute unfair termination within section 45(4)(a) of the *Employment Act*, 2007? The unfair reasons include 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. The text of section 46 of the *Employment Act*, 2007 reads: "The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty —

(a) a female employee's pregnancy, or any reason connected with her pregnancy;

(b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;

(c) an employee's membership or proposed membership of a trade union;

(d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;

(e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;

(f) an employee's refusal or proposed refusal to join or withdraw from a trade union;

(g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;

(h) 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

(i) an employee's participation in a lawful strike."

37. 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, 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}

Determination

38. What I glean from the Statement of Claim is that the Claimant was issued with a letter of termination without inviting the Claimant to make representations in a hearing. In response, the Respondent takes a position that it was not obligated to invite the Claimant to make representations as contemplated under section 41 of the *Employment Act*, 2007, since summary dismissal as contemplated under section 44 of the *Employment Act*, 2007, does not require such. The Respondent thus concludes that the steps it took have a basis in section 44 aforesaid and it was not incumbent upon it to follow the procedure under section 41 aforesaid.

39. 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 militate termination of a contract of employment without notice. 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 properly; 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. The text of section 44 aforesaid provides as follows:

> "(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.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if —

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

40. However, in order to ring-fence this draconian step - of summarily dismissing an employee - the employer is obligated to strictly follow the procedure under section 41 of the *Employment Act*, 2007. And so, 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. The text of the said section 41 reads 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."

41. 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.

42. Section 41 aforesaid is couched in obligatory terms and Courts have time and again so held. Differently put, the said section 41 makes a hearing obligatory. See Kenya Revenue Authority vs. Reuwel Waithaka Gitahi & 2 others [2019] eKLR, per Waki JA (as he then was), Warsame and Sichale, JJA. It follows that any termination under section 44 aforesaid which falls short of the said mandatory requirement, both procedurally (process) and substantively (valid reasons), is deemed unfair and thus unlawful. See 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.
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> 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 housed in the said section 41, the termination is deemed unfair.

43. 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*? In Samuel Owiti Obage vs. Kenya Revenue Authority [2020] eKLR, Onesmus Makau, J. had the following to say about fair labour practices in terms of Article 41 of *the Constitution*:

> " 27. The Petitioner submitted that Article 41 of *the Constitution* provides for the right to fair labour practices. He submitted that in Joseph Maina Theuri v Gitonga Kabugi & 3 Others [2017] eKLR and Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR the Court held that Article 41 is in respect of the basic fair treatment of employee s and that what is fair goes beyond what is lawful and legal."

44. It is fair that conduct 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."

45. 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."

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> "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..."

46. 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."

47. 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.

48. 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."

49. 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..."

50. 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*.

51. Having carefully evaluated the Claimant's and the Respondent's evidence, and specifically the Respondent's Exhibits 2 and 3, which were uncontroverted by the Claimant, it goes without saying that the Claimant was issued with two warning letters for absenteeism. Considering the specific reason for termination arising from the said two letters - in the context of section 44 of the *Employment Act*, 2007 - it is irrefutable that the Respondent was armed with a valid reason for termination summarily and on this premise, entitled to invoke the said section 44. It follows that the Respondent has surmounted the substantive fairness test.

52. However, the Respondent's waterloo lies in the path it took regarding procedural fairness test. In this regard, the Respondent took a blatantly erroneous view that actions termination under section 44, is self-governing, exempt from the procedural burden housed in the said section 41. It is not.

53. Having invoked section 44(3)(g) thereof without adhering to the mandatory procedural burden provided in section 41 thereof, and more particularly having failed to accord the Claimant a hearing, the termination is tainted with procedural unfairness and thus unlawful. Any employee who takes the drastic step provided under section 44(3)(g) without affording the Claimant a disciplinary hearing, robs the employee a constitutional right to a hearing, rendering the termination procedurally unfair within the meaning of section 45(2)(c) of the *Employment Act* and further rendering the termination against justice and equity as contemplated under section 45(4) & (5) of the *Employment Act*, 2007.

54. Consequently, having failed to afford the Claimant a hearing; having failed to afford the Claimant an opportunity for appeal against the decision; and having failed to issue a certificate under section 51 of the *Employment Act*, 2007, yields a firm conclusion that the impugned summary dismissal - of the Claimant by the Respondent - was procedurally unfair and thus unlawful.

(iv) Appropriate reliefs

55. The Claimant seeks the following terminal benefits: (a) Compensation for wrongful, unlawful and/or unfair termination of employment in the sum of Kshs. 197,544; (b) One month's salary in lieu of notice in the sum of Kshs. 16,462. (c) Interest; (d) Costs of this claim; and (e) a Certificate of Service.

56. I will dispose each relief sought in turn. But before that, I wish to generally discuss the broad legal principles cutting across all terminal benefits sought (except a Certificate of Service). 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."

57. 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)."

58. 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."

59. 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

60. 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. The Respondent took a position that in summary dismissal, an employee is not entitled to this relief since section 44 does not require notice. The Respondent relied on Wilberforce Kimungui vs. United Aryan (EPZ) Limited [2022] eKLR.

61. 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."

62. 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..."

63. 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..."

64. In the special circumstances of this case, the Claimant was not entitled to notice, the Respondent having been entitled to invoke section 44 of the *Employment Act*, 2007, without notice. Accordingly, this Court finds 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

65. The Claimant claims damages for unfair termination of his contract of employment, equivalent to twelve (12) months' pay, amounting to Kshs. 197,544.

66. 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."

67. 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, Ginthinji 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*."

68. 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."

69. 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."

70. 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 Ol 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..."

71. 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."

72. Taking into account first, the circumstances under which the summary dismissal was effected in writing complete with a valid reason for summary dismissal namely absenteeism carried in three warning letters, which heavily mitigated the indignity of failing to follow the mandatory procedure laid the said section 41; second, that the reason of absenteeism 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 conduct; fifth, the Claimant's short stint of continuous service estimated at one year and six months; sixth, the reasonable expectations of the Claimant emanating from the said short stint of service; and seventh, the modest wages and the attendant expenses which have been reasonably incurred in filing and prosecuting this claim, this Court is of the persuasion that it will best serve justice if the Claimant is awarded damages equivalent to a third of the maximum period permitted by law, which translates to 4 months.

73. Wherefore this Court awards Kshs. 65,848, in damages for unfair termination and wrongful dismissal.

(c) Certificate of Service

74. The Claimant claims that upon termination of the contract of employment, he was not issued with a Certificate of Service.

75. 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."

76. The Claimant's evidence was uncontroverted. Wherefore this Court grants the request for a Certificate of Service.

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

77. This Court is reposed with discretionary power to determine not only whether costs shall be payable in a particular matter but also the person who shall shoulder the costs, the property which may be levied and the extent of the costs. Section 27 of the *Civil Procedure Act* provides that

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.

(2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

78. Whenever a Decree is for payment of money, a Court is reposed with discretionary power to award interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. However, where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum. Section 26 of the *Civil Procedure Act* provides that

"(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any

period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum."

79. The law on costs and interest as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another [2016] eKLR, per C. Kariuki, J.

80. How then is this discretion exercised? Discretion is not the same thing as carte blanche. Beacons demarcating how discretion is exercised are as follows.

81. First, the discretion ought to be exercised with circumspection and judiciously. See Christopher Kiprotich vs. Daniel Gathua & 5 others [1976] eKLR; Mbogo and Another vs. Shah [1968] EA 93 and Mohindra vs. Mohindra (1953) 20 EACA 56. Speaking of discretion, Lord Halsbury L. C., in the case of Sharp vs. Wakefield [1891] 64 L.T Rep. 180 Ap. Ca.173 held that:

> " When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself."

In Rooke's case, 5 Rep. 99b (1598), adverted to in approval by Mativo, J. in Republic vs. Public Procurement Administrative Review Board & 2 others [2018] eKLR, the Court attempted a definition of discretion as follows:

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by *the Constitution* entrusted with."

82. Second, costs follow the event unless the Court finds a good cause to negate this trajectory. See Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another [2016] eKLR). In this context, the meaning ascribed to the words "costs shall follow the event" is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), Judicial Hints on Civil Procedure 2nd edition at page 99; Dipchem East Africa Limited vs. Karutturi Limited (In Receivership) [2015] eKLR, per Gikonyo, J.; Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another (2016) eKLR, per Mativo, J.; and Jasbir Singh Rai & 3 others vs.

Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

83. Third, and closely intertwined with the second, is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR, per Odunga, J.

84. Fourth, and faithfully connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

85. Fifth, but connected to the second, third and fourth beacons, is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others (2014) eKLR; and Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J.

86. Regarding costs, upon considering the Claim and Counter-Claim, 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.

87. Regarding interest, the Respondent having failed to promptly settle the claim at the date of the claim or soon thereafter, it translates that the Claimant would have had a capital sum to invest with gains thereon. On this premise, again, I exercise my discretion in favour of the Claimant.

Part VI: Disposition

88. In the upshot, this Court finds the Claim partially successful. Consequently, Judgement is entered in favour of the Claimant in the following terms:

    i. A declaration is hereby issued that the termination of the contract of employment of the Claimant by the Respondent was procedurally unfair and thus unlawful.

    ii. Accordingly, the Respondent shall pay the Claimant damages for unfair and unlawful dismissal equivalent to 4 months' pay in the sum of Kshs. 65,848, with interest at Court rates from the date of this Judgment until payment in full.

    iii. In accord with section 49(2) of the *Employment Act*, 2007, the damages in (ii) supra, are subject to statutory deductions.

    iv. The Respondent shall issue the Claimant with a Certificate of Service within a period of 60 days.

    v. The Respondent shall shoulder the costs of this suit.

89. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 28TH DAY OF SEPTEMBER 2023

.....

C.N. ONDIEKI

Principal Magistrate

Advocate for the Claimant:.....

Advocate for the Respondent:.....

Court Assistant:.....

Machakos MCELRC Number E005 of 2022 - CNO(J)