REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS HIGH COURT

AT MOMBASA

ELRC CAUSE NO. 104 OF 2021

PETER NDAMABUKI KASIU ..... CLAIMANT

VERSUS

MOMBASA CEMENT LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, he was an employee of the Respondent whose employment they terminated unfairly without conformity to the edicts of procedural and substantive fairness, the Claimant sued the Respondent through a Statement of Claim dated 14th December 2021, seeking the following reliefs;

a) A declaration that the termination of the Claimant's services was unprocedural, unfair, wrongful, unlawful, and/or unjustified.

b) Kshs. 7,447,932/- (sic) being the claimant's terminal dues; gross underpayment and compensation for unlawful termination from employment as tabulated hereinabove.

c) Costs of this suit.

d) Interest on (b) and (c) above at court rates until payment in full.

e) An order compelling the Respondent to issue the Claimant with a Certificate of Service

f) Any other relief that this Honourable court may deem fit to grant.

2. The Respondent opposed the Claimant’s claim through a Statement of Response dated 27th January 2022, contending that the dismissal of the Claimant's employment was justified under the provisions of section 44 of the Employment Act, and procedurally fair. Additionally, the Claimant is not entitled to the reliefs sought.

3. At the hearing, the parties adopted their respective witness statements herein as their evidence in chief, and the documents filed under their respective lists of documents as their documentary evidence.

Claimant's case

4. The Claimant asserts that he was employed by the Respondent, Mombasa Cement Limited, commencing on 15 September 2009, as a Mechanical Technician pursuant to an offer of employment dated 18 August 2009. Over the years, he was promoted, ultimately attaining the position of Senior Section In Charge, with a monthly salary of Kshs. 87,291. He contends that, notwithstanding these promotions and his eleven years of service, the Respondent failed to issue updated contracts reflecting his revised roles, responsibilities, and entitlements.

5. The Claimant asserts that he was unfairly, unlawfully, and wrongfully dismissed from employment, effective 31st

January 2020, pursuant to a letter dated 25th January 2020. He states that the cause of the dismissal was the Respondent's demand, as outlined in the letter dated 7th October 2019, that he relocate to the company's housing site, which he did not comply with for valid and compelling reasons.

6. Upon receiving the latter from Mr Mohammed Bagha, the Administrative Manager, he approached the personnel office and explained his reasons for not being able to relocate. They were convinced and permitted him to remain at Mtwapa.

7. Surprisingly, a month later, he received a show-cause letter from the Administrative Manager dated 7th November 2019, requiring him to explain why disciplinary action could not be taken against him for failing to adhere to the relocation to the Company housing as mandated by management.
8. He responded to the show cause letter on 8th November 2019, stating that he had sought an audience with the

management to air his grievances before accepting the relocation.

9. On 7th January 2020, he was invited to a meeting to discuss the issue of relocation, alongside representatives from management, the Area Secretary of the Union, his personal representative, three Shop Stewards, and the Chief Steward. The purpose of the meeting was to allow him to explain his decision to decline instructions to move to the Company houses.

10. His wife was suffering from serious health complications that were known to the Respondent. She had undergone three surgeries and required his immediate attention and care. His residence in Mtwapa was not far from the company premises. Previously, he had been available as needed and responded promptly whenever called upon.

11. During the meeting, and following an inquiry from the Area Secretary, he responded affirmatively that he would consider relocation if the Respondent provided reasonable

accommodation for his family; additionally, if they were to provide transport for his children who were schooling in Mtwapa. The Administrative Manager could not commit the Respondent to this, stating that he needed to consult Management.

12. The meeting was rescheduled for 10th January 2020, pending a response to the issue. On 10th January 2020, Mohammed Bagha, on behalf of management, regrettably informed him that the family accommodation could not be provided as discussed during the meeting held on 7th January 2020. He stated that the company was ready to accept his relocation to Sheriani instead.

13. The Claimant stated he was willing to relocate to Sheriani if he could provide financial support for the move and cover the school bus expenses for his children, who would continue studying in Mtwapa.

14. When the Claimant requested clarity through a fresh contract before relocating, management refused, and he was

later issued a termination letter without a fair hearing or a Certificate of Service. The Administrative took the position that the idea could only be discussed if the Claimant would agree to relocate and request the necessary assistance after relocation.

15. His plea that at that time he did not have sufficient funds to enable him to relocate without the assistance of the Respondent. He further stated that the Shop Stewards insisted that he relocate first and raise a claim later.
16. He was not clear whether the demands were a result of his new role as Senior Section in Charge or not. As such, he requested that a new contract be issued to him for clarity. The Respondent was unwilling to address the issue of a new contract. He was asked to rethink his position.

17. He was shocked to be summoned on 30th January 2020 and issued with a termination letter, terminating his employment effective 31st January 2020, citing that he had refused to

relocate near the company site as requested by management for the duration of the plant expansion.

18. The Claimant also alleges discrimination and gross underpayment throughout his employment. He states that despite holding supervisory positions, he was paid far below the salary appropriate for Section In Charge and Senior Section In Charge roles between 2012 and January 2020.

19. Cross-examined by Counsel for the Respondent, the Claimant testified that, as reflected in his letter of appointment and confirmation letter, he was employed as a mechanical technician. As at the time of separation, his monthly salary had risen from KShs. 40,000 to 87,291.

20. He further testified that he had not presented to the Court any documents from which his claim of being promoted over time can be discerned.

21. Cross-examined on the discrimination claim, he admitted he had no documentary evidence to prove there were employees of Asian descent working at a similar level to him

but earning a higher salary, and that he was entitled to a salary at any given time of KShs. 180,000 and later KShs. 280,000 per month.

22. He testified that Clause 14 of his employment contract specified that he could be required to serve in any section or location of the group, at management's discretion. Throughout, he was assigned duties consistent with his contract and role.

23. He testified that on 7th October 2019, he received communication from the Respondent instructing him to relocate. Concerning the alleged meeting on 7th October 2019, he admitted that he had no documentary evidence to demonstrate that it was held.

24. He further admitted that he had no documentary evidence to demonstrate that upon receiving the letter, he approached the personnel office and explained to them why he found it challenging to relocate as was directed under the letter.

25. On November 7th, 2019, he was served a Notice to Show Cause. He responded the next day, November 8th, 2019, stating he was not prepared to relocate and requesting a meeting with the Respondent. Later, he received another letter dated November 8th, 2019, detailing the reasons for his required relocation. He attended a disciplinary hearing on 7th January,2020, where he was given audience, and Mr Eric Matano was his witness.

26. The minutes of the hearing do not indicate that he requested confirmation for any role. He signed the minutes.

27. Upon further cross-examination, the Claimant testified that residing in the Company's quarters implied that he would not be able to see his wife, as he would be required to work continuously for 24 hours. His employment letter, specifically clause 7, stipulates that he may be required to undertake overtime and work on public holidays if necessary. However, he didn’t raise this with the Respondent.

28. The union representatives attended the proceedings of 7th January, 2020, as interested parties on the Respondent's invitation.

29. He attended another meeting on 10th January 2020, where Mr. Matano was still his representative. The Respondent offered him the option to relocate to Sheriyani, which was near the site, but he declined because his concerns had not been addressed. Transport was not being provided. The employer's stance was that he should relocate first before any facilitation could be made.

30. He testified that Sheriyani was closer to his place of work, but he failed to relocate because he didn't have the money to. It was January, and he had paid school fees.

31. The proceedings of 10th January,2020, were a continuation of those of 7th January 2020.

32. He received a letter dated 13th January 2020, which stated clearly that he didn't have any claim against the Respondent.

33. He has no documents to prove that he was entitled to gratuity or that his salary was underpaid.

34. In his evidence under cross-examination, the Claimant stated that although he did not possess a document to prove that Asian expatriates were paid more, his colleague would show him his pay slip, thereby making him aware that he was being paid substantially more than he was.

35. He further testified that the minutes tendered in evidence were not a true reflection of what happened during the hearing. He signed the minutes without complaint because he didn't know that he would be dismissed.

36. According to the letter dated 8th November 2019, the people who were to relocate were Section Heads and Heads of Departments. He was hired as a Mechanical Technician.

Respondent's case

37. The Respondent called Mr Patrick Musiko, its Assistant Human Resource Manager, to testify on its behalf. The witness stated that at all material times, the Claimant was in

the employment of the Respondent as A mechanical Technician. He was never promoted to any other role at any time.

38. The Claimant was mandated to move to the Company housing facility to enable prompt response to any emergencies pertaining to plant operations, in accordance with his employment obligations. In blatant disregard of the Respondent's directives, the Claimant failed to undertake the required relocation.

39. Prior to the communication, on 6th October 2019, during the night, there was a major mechanical breakdown at the plant, which resulted in production being halted. The Respondent's management had to arrange for the Claimant to be picked up from his residence in Mtwapa, which was far from the Company's plant. The following day, the Respondent decided that the Claimant's role required him to be on the premises or nearby.

40. Consequently, the Claimant was issued a show cause letter dated 7th November 2019. He was required to explain why disciplinary action could not be taken against him for failure to obey a lawful and proper command within the scope of his duty to obey. He responded to it and admitted that he had declined to relocate as instructed by the Respondent.

41. The Respondent extended an olive branch to the Claimant through a letter dated 8th November 2019, requesting him to relocate to the housing unit effective from 11th November 2019. However, he still did not demonstrate a willingness to relocate.

42. The Claimant underwent disciplinary proceedings, which included a disciplinary hearing. The first session took place on 7th January 2020. According to the minutes from that day, the Claimant was unwilling to relocate. He argued that he had a sick wife and that he had the right to remain wherever he chose, provided he reported to work on time.

43. The Respondent asked the Claimant to move closer to the plant, even if not within the company’s premises, as this would allow him to care for his sick wife and respond to workplace emergencies. This was the most practical option. The Respondent could not accommodate the Claimant and his family on its premises because the plant manufactures cement and poses safety concerns. Only employees were covered by the Respondent’s insurers; their family members were not.

44. As reflected in the minutes, the Respondent was consistently eager to fund the Claimant’s relocation. The sole condition for the funding was the Claimant's agreement to relocate.

45. From the proceedings of the disciplinary meeting, the Claimant was informed at the end of the meeting that he would be issued with another show cause letter to explain why he could not be terminated, to which he responded that he would not respond to any other show cause letter, as he had already responded to a show cause letter.

46. A follow-up meeting was held on 10th January 2020, during which the Claimant was asked to relocate to Sheriani, which was closer to the Company site, but he still refused. As a result, he was summarily dismissed by letter dated 25th January 2020.

47. The Claimant received all owed amounts, including gratuity and Kshs. 87,291 in lieu of notice, and acknowledged receipt of these payments. He signed a final dues letter dated 13th March 2020. He also confirmed that he has no additional claims against the Respondent or its Directors.

48. The witness stated that no Asians were performing the same duties as the Claimant and earning higher wages.

49. Cross-examined by Counsel for the Claimant, the witness testified that indeed the Claimant in his pleadings [paragraph 6] did allege discrimination. However, in response, the Respondent did not specifically deny the allegation. The allegation that he was promoted on numerous occasions was not specifically denied either.

50. The Respondent had several mechanical engineers. The Claimant reported to one of them. Mr Vinod was in charge of line 2 of the new plant. The witness stated that he would not specify Mr Vinod's earnings, as he did not have that information. The Respondent did not present any evidence to counter the Claimant’s assertion that employees of Indian origin were earning more than him, despite performing the same duties.

51. He testified that following the proper establishment of the second line, certain employees, including Mechanical Technicians, were transferred from the previous line to the second line. Some of these employees were accommodated on the second line's premises.

52. Mr. Vinod is still working for the Respondent Company. He is accommodated on the company's premises. He does not have a company car, and his children are not dropped off or picked up from school in a company vehicle.

53. He further testified that the Claimant was issued with a relocation notice. He responded to it with a letter dated 8th November 2019. A meeting was held on 7th January 2020 to discuss the Claimant’s stay on the company's premises. During the meeting, he explained his wife’s health condition.

54. At the meeting on 10th January 2020, the Respondent stated that it was unable to fulfil any of his requests, including housing his family on its premises. The Respondent suggested that he move to Sheriani. The Company was prepared to support him financially and logistically whenever he was ready to relocate. It is therefore not true that the Respondent required him to relocate before he could be paid.

Claimant’s submissions

55. The Claimant’s Counsel submits that the law places a duty on the employer to prove the reasons for the termination of an employee’s employment. To support this point, he places

reliance on the case of **Benedict Abonyo Omollo v Judicial Service Commission & 2 Others (ELRC No. 47 of 2015),** as well as **Keen Kleeners v Kenya Plantation and Agricultural Workers Union (Civil Appeal No. 101 of 2019) KECA 352 (KLR)** 17.

56. He submits further that the termination of the Claimant's employment was without a valid and fair reason. It was predetermined. There was no compliance with the dictates of procedural fairness, as the Claimant was not accorded a fair hearing. The Respondent did not provide any reason for the termination. The charge of insubordination was unfounded, unjustified, and, on the face of it, an afterthought.

57. It is further submitted that during the cross-examination of the Respondent's witness, it emerged that the Claimant was treated unfairly and subjected to unreasonable pressure even when the letter of appointment was silent on housing.

58. Counsel argues that in Kenya, an employer cannot force an employee to live on their premises against their will. While employers may offer housing as a benefit, they cannot compel an employee to accept it or reside there as a condition of employment. The law does not require employers to provide accommodation, and employees are free to choose their own living arrangements. Under section 31 of the Employment Act, the employee has the right to decide whether to be accommodated by the employer or to receive a house allowance.

59. On discrimination, the Claimant's Counsel submits that under Section 5[7] of the Employment Act, where an employee against the employer alleges discrimination, a duty lies upon the employer to prove that discrimination did not take place as alleged, and the discriminatory act or omission is not based on any of the grounds specified in the section. As such, the Respondent bore the burden of proof to demonstrate that there was no discrimination.

60. From the evidence on record by the Respondent's witness, it is clear that the Respondent Company had Asian [Indian] expatriates in their employment; among them was Mr. Vikram who worked as a Senior Section in Charge; the witness didn't present any payroll records to show how much any of the expatriates were paid in comparison to the Kenyan counterparts; and the Respondents in their Statement of Response failed to address the issue of discrimination. In light of this, this Court should find that the Claimant was treated differentially.

61. To support these submissions, Counsel places reliance on the Supreme Court decision in **Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment).**

62. The Claimant was treated unfairly and discriminated on account of his race. He has set out clearly the extent of that discrimination and its resultant effect on his pay over the years.

Respondent's submissions

63. The Respondent states that the Claimant was employed from 15th September 2009 at a consolidated salary of Kshs.40,000 and was earning Kshs.87,291 at the time of separation. It contends that on 7th October 2019 the Claimant was instructed, pursuant to clause 14 of his employment contract, to relocate to the company housing site to ensure availability for plant-related emergencies, particularly given the start-up of a new plant.

64. Despite several opportunities and alternatives offered, the Claimant refused to relocate to the premises or even to an area close to the Respondent operations, thereby committing what the Respondent terms a serious contractual breach that triggered disciplinary proceedings and ultimately termination. The Respondent maintains that the Claimant was paid all terminal dues and is owed nothing further.

65. On the question of fairness of termination, the Respondent relies on **sections 43 and 45 of the Employment Act**,

arguing that it has demonstrated valid and fair reasons for dismissal and that the Claimant failed to discharge his statutory burden under **section 47(5).** It emphasizes that the relocation directive was critical for continuity of plant operations and that the Claimant admitted in cross-examination that he declined to relocate despite acknowledging prior night-time breakdowns at the plant. The Respondent asserts that it acted reasonably within the principles in **British Leyland UK Ltd v Swift (1981) IRLR 91** as adopted in **Lalang v Transnational Bank Ltd [2022] KEELRC 13456 (KLR),** and that the dismissal fell within the permissible “band of reasonableness.”

66. It further submits that full procedural fairness was accorded, citing **Masha v Kazuri London Crocodile Farm Ltd [2022] KEELRC 4871 (KLR**), noting that the Claimant was notified of the charge, heard with representation, and signed the disciplinary minutes confirming their accuracy. The Respondent therefore contends that the termination was both substantively and procedurally fair.

67. With respect to discrimination, the Respondent argues that the Claimant's allegations are unproven, imprecisely pleaded, and unsupported by evidence. It asserts that the Claimant was never promoted as alleged but remained a Mechanical Technician whose salary rose only to account for inflation.

68. The Respondent notes that the Claimant failed to identify any specific Asian comparators or their salaries, contrary to the rule that a party is bound by its pleadings as emphasized in **Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR**). It argues that discrimination must be pleaded with constitutional precision, relying on **Rugendo v Choice Surveillance Limited [2025] KEELRC 1356 (KLR)** and the principles in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**. The Respondent also cites the case of **Omondi & 4 others v Brava Food Industries Ltd [2025] KEELRC 1378 (KLR)** to stress that claims of equal pay require clear comparators.

It therefore submits that the Claimant failed to prove any discriminatory treatment under sections 107–109 of the Evidence Act.

69. On the monetary claims, the Respondent argues that the allegation of gross underpayment lacks evidentiary foundation, asserting that the Claimant was paid strictly in accordance with his contractual terms and later increments. Regarding gratuity, the Respondent relies on **Bamburi Cement Limited v William Kilonzi [2016] KECA 546 (KLR)** and **Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] KECA 759 (KLR)** to submit that gratuity is discretionary and only payable where provided in a contract, CBA, or statute, none of which applies here.

70. The Respondent reiterates that one month’s notice was paid and acknowledged by the Claimant. It also contends that any claim for unfair termination is defeated both by the lawfulness of the dismissal and by the discharge clause signed by the Claimant in the final dues letter of 13th March

2020. For this proposition, the Respondent relies on the case of **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] KECA 793 (KLR)** and **Coastal Bottlers Limited v Kimathi Mithika [2018] KECA 523 (KLR)**, arguing that the discharge constitutes a binding contract absent fraud, coercion, or misrepresentation, none of which the Claimant has pleaded or proven.

Analysis and determination

71. I have carefully considered the pleadings filed herein by the parties, their respective evidence, and submissions by their Counsel, and the following issues emerge for determination, thus;

a) Whether the Claimant's employment was unfairly terminated.

b) Whether the Claimant was discriminated against.

c) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's employment was unfairly terminated.

72. There is no dispute that at all material times, the Claimant was an employee of the Respondent, and that his employment was terminated at the initiative of the Respondent under a letter dated 25th January, 2020.

73. For a termination of an employee's employment to pass the fairness test, two statutory components must be demonstrated to be present in the termination, procedural and substantive fairness. Duty lies on the employer in a dispute like the instant one [concerning termination of an employee's employment] to prove, that the termination was procedurally fair [Section 41 of the Employment Act,2007], the reason[s] for the termination [Section 43 of the Act], that the reason[s] was valid and fair [Section 45 of the Act, and that the termination was justified [Section 47[5] of the Act. Elaborating on this the Court of Appeal in the case of **Naima Khamis v Oxford University Press E.A Limited [2017] eKLR** stated;

"On the first issue, whether the termination was lawful, we wish to take note of the provisions of Section 43[1] of the Employment Act, which provides that in any claim arising out of the termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed unfair. Also, section 45 [2] [c] requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedures as per contract or fails to accord an employee an opportunity to be heard as by law required."

74. Section 41 of the Employment Act provides for a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee from employment must adhere to. The procedure encompasses three key ingredients, the;

I. Notification – the employer must notify the employee of the grounds spurring the contemplation,

II. Hearing- the employer must accord the employee affected adequate opportunity to prepare and make a representation on the grounds. Put in other words, to defend himself against the accusations. Concomitant with this right is the right to accompaniment. The employee has to be allowed to be accompanied by a colleague of choice or a trade union representative [where the employee is a member of a union] during the presentation.

III. Consideration- before reaching a final decision on the matter, the employer shall consider the representation

made by the employee and the person accompanying him [where applicable].

75. Before I delve further into this issue, I am compelled to point out from the onset that Claimant's pleadings are couched, and his evidence in chief presented, in a manner explicitly suggesting that the process leading to the termination of his employment was destitute of all these vital ingredients. However, as emerged from his evidence under cross examination, and that of the Respondent's witness, as shall come out shortly hereinafter, the assertions in the pleadings and evidence in chief, are deliberately misleading.

76. By its letter dated 7th November, 2019, the Respondent wrote to the Claimant thus,

"SHOW ***CAUSE LETTER***

"We refer to our communication to you vide letter issued on 7th October 2019 informing that you shall be required to be accommodated the company housing

unit effective from 14th October 2019, in order to respond to any emergency for plant operation. To date we have noted that you have not complied to stay as required by management.

Kindly show cause why disciplinary action should not be taken against you

Let your response reach the undersigned before 5.00 pm today. ……"

77. The Claimant Responded to this show cause, clearly indicating that he had declined to relocate to and stay in the Company housing and requested for audience with the management to put forward his grievance. After this response, the Respondent wrote him a letter dated 8th November 2019, insisting that it is for cause that he was required to relocate to the Company house and was given up to 11th November 2019, to move into the house.

78. Apparently, the Claimant did not oblige the instruction. Though none of the parties clearly explained how the

meeting held on 7th January 2020 was initiated, it is undisputed that it did take place, the Claimant and union representative on the one part, and the Respondent's representatives on the other, were present. Undeniably, the agenda was relocation of the Claimant to the Company's housing units. However, it is important to point out that the tone of minutes of this meeting clearly signal that the meeting was not a disciplinary meeting. The Respondent's witness's assertion that it was, was wrong. Not every meeting morph into a disciplinary hearing.

79. It is important to point out that in the meeting, the Claimant and the Union representatives fronted condition[s] precedent to the relocation. The meeting was deferred to 10th January 2020, for a response by the Respondent on condition[s]. On 10th January 2020, the Respondent's representative put forward their position. They proposed that the Claimant relocates to Sherian which was near the plant. The minutes are clear, and the Claimant admitted, that he took a firm position that he wouldn't relocate to the

Respondent's housing units or Sheriani. Again, it is important to point out that this was not a disciplinary hearing, in my view.

80. Undoubtedly, at the tail end of the meeting, and to move the matter forward, the Claimant was asked by the Administrative Manager to show cause in writing why disciplinary action could not be taken against but the Claimant defiantly sated that he will not since he previously had written one.

81. In my view, the Manager's instruction was not off mark. In his letter dated 8th November 2019, which read;

> *"In response to the letter issued to me on 7th October 2019 stating that I should stay in the Company housing unit. I declined and requested for audience with the Management. So as I could put forward my grievance before I could input in the ……."*

the Claimant did not show cause why disciplinary action could not be taken against him on the ground that was set out in the Respondent's letter dated 7th October 2019.

82. The Claimant was given an opportunity to participate in the disciplinary proceedings, which the Respondent had initiated by issuance of a notice to show cause, he deliberately refused to participate by refusing to show cause. Having deliberately refused to seize the opportunity, it cannot be open to him to claim that the Respondent did not adhere to the dictates of procedural fairness. At this point, it is imperative to point out that there is a clear distinction between disciplinary proceedings and disciplinary hearing. The latter is a component in the former.

83. By reason of the foregoing premises, I conclude that in the circumstances of the matter, the Respondent reasonably acted in moving to the step of making a decision to terminate, and issuing a termination letter.

84. Under Section 43 of the Employment Act, the Respondent bore the legal burden to prove the reason for the dismissal of the Claimant from his employment. The reason was the

Claimant's defiance to temporarily relocate to the housing units within the Respondent's newly established production line. There was no contestation by the Claimant that this was the genesis of his woes, and a reason that culminated to his dismissal. I am satisfied that the Respondent sufficiently demonstrated the reason for the dismissal.

85. Having found as I have hereinabove, the next question that needs to be answered by this Court is whether the reason was valid and fair. Under section 44[1] of the Employment Act, summary dismissal occurs, when the 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. No doubt, the Claimant's employment without with less notice that the statutory notice contemplated under Section 35 of the Employment Act. As such, he was summarily dismissed.

86. In my view, a valid and fair reason for summary dismissal of an employee is one that falls under the catalogue set out in section 44[4] of the Act, and as the list isn't exhaustive, or

one whose impact on the employment relationship could be like of those listed.

87. Undeniably, there was defiance by the Claimant, to relocate temporarily to the Respondent's housing unit at the plant it had newly established. In its view, in that circumstance, and the incident that occurred on 6th October 2019, it became imperative that Claimant relocates to premises within the plant, or nearby, owing to his role as a Mechanical Technician. His timeous response would be required in the event of an emergence during operation of the plant.

88. The defiance was not denied by the Claimant. In my view, it amounted to a gross misconduct under section 44[4][e]- knowingly failing, or refusing, 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. No doubt, in the circumstances of the matter, the instructions by the Respondent to the Claimant to move to its housing units within the premises of its newly established plant was reasonable, proper and lawful.

89. However, it should be understood that it isn’t every defiance to an instruction to relocate residence that would attract the conclusion that there has been a gross misconduct of failing or refusing to obey lawful command and consequently the sanction of summary dismissal. The Court must apply the contextual test to ascertain whether the instruction is necessary for operational reasons, and that the instructions are lawful and reasonable. The instruction should not be more administrative, convenience -based, or that involves a change that materially alters terms of the contract.

90. I have carefully considered the material placed before this Court, including the fact that the Claimant was being asked to relocated to the Respondent’s premises, temporarily, on account of his role as a Mechanical Technician, and that the plant had just been established and prone to emergencies. In my view, this instruction was based on a genuine operational reason, it was reasonable and proper and contractually anchored [see clause 14 of the contract of employment].

91. I have carefully considered the submissions by Counsel for the Claimant, and I am unpersuaded that the provisions of section 31 of the Employment Act, in any way curtails an employer's right to decide whether or not an employee should be housed within its premises, and the positions/roles of those to be accommodated as such. The test is whether, the housing and the reason for insistence on certain employees being such accommodated, are reasonable.

92. By reason of the foregoing premises, I am persuaded that the summary dismissal against the Claimant was not wrongful, it was lawful and fair.

Was the Claimant Discriminated Against?

93. The Claimant contended that he was discriminated against as throughout his tenure, he was remunerated below what his Asian Counterparts were earning. The deferential treatment was anchored on race, a thing that is prohibited under section 5[3] of the Employment Act. Counsel for the Claimant asserts in his submissions that it was a duty on the

Respondent to prove that discrimination did not occur as alleged by the employee [the Claimant]. That they did not discharge this function.

94. With great respect to Counsel, the argument depicts a total misapprehension of the provisions of the section. It fails to note that under the section a dual burden of proof is set out. The employee bears the initial burden, while the employer does the shifted one. In my view, the employee must first establish a prima facie case that there was discrimination, before the burden shifts to the employer to show a legitimate explanation for termination. Elaborating on this, the Court in GMV **V Bank of Africa Kenya Limited [2013] eKLR,** stated;

> *" … **once the employee has established a prima facie case, the burden shifts to the employer, to show a legitimate explanation for termination. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employer is raised. The***

employer must then articulate clear, specific and non-discriminatory reason for termination. …..' See also the Supreme case of **Gichuru v Package Insurance Brokers Ltd [2021] KESC[KLR].**

95. The employer can only discharge the legal burden under section 5[7] of the Employment Act, 2007, where discrimination has been articulately pleaded, and sufficient evidence led on it. I have carefully considered the Claimant's pleadings, the witness statement [turned evidence in chief], and even his testimony in court, the basis for the claim for discrimination doesn't come out sufficiently, or at all. He did not present a comparator for purposes of demonstrating that his salary was below what his Asian Counterparts were earning, and how much, they were earning. The Claimant failed to demonstrate *prima facie* that he was discriminated against. His case fails at this hurdle. The evidential burden did not shift to the Respondent.

96. I note the Claimant's submissions that the Respondent did not place a payroll before Court to rebut his assertion on discriminatory payments. Production of employment records of employees, particularly payrolls have a special connection to the employees' constitutional right to privacy. The employer cannot blanketly produce the payroll as the Claimant apparently expected. The Claimant ought to have engaged the appropriate procedure mechanisms for production of documents for instance by issuing a notice to produce or a motion for production, to enable the payroll, if at all be produced under necessary safeguards.

97. In conclusion, the Claimant did not prove that he was discriminated against. The answer too this issue is therefore in the negative.

Whether the Claimant is entitled to the reliefs sought

Claim for unfair termination of Kshs. 2,760,000/-

98. The Claimant sought for a compensatory relief under section 49[1][c] of the Employment Act. The relief is typically

tied to the claim for unfair termination or wrongful summary dismissal. Having found as I have hereinabove that the summary dismissal was not wrongful or unfair, it follows that the relief cannot be availed to the Claimant.

Gross and discriminatory underpayment for the period of 1st January 2012-31st March 2017, total Kshs. 8,143,020 and underpayment for the period of 1st April 2017-31st January 2020, total Kshs. 5,048,113

99. Having held as I have hereinabove concerning the Claimant's claim on discrimination, I hesitate not, declining this relief sought.

Gratuity was underpaid, and he claims a sum of Kshs.1,354,090/-

100. This relief was sought on the premise that there were discriminatory payments of salary and underpayments accruing therefrom. Having found as I have hereinabove, this relief is for rejecting.

Pay in lieu of Notice at Kshs. 142,709/-

101. As indicated hereinabove, section 44[1] of the Employment Act allows the employer to terminate an employee's employment summarily, that is, without notice or less notice than the contractual or statutory notice. As such, where a Court finds, as I have hereinabove, that the summary dismissal was both substantively and procedurally fair, the remedy of notice pay cannot be available to the employee. The relief sought under this head is hereby declined.

An order compelling the Respondent to issue the Claimant with a Certificate of Service

102. The claim for a Certificate of Service is provided under section **51 of the Employment Act**. The certificate is a statutory right to an employee who exits their employment. It matters not how they exited. The employer is statutorily obligated to issue the same. They should provide the Certificate if not already issued.

103. In the upshot, I find the Claimant's claim without merit. It is hereby dismissed with costs. Each party to bear its own costs.

Read, Signed and Delivered this 27th Day of November 2025.

OCHARO KEBIRA

JUDGE.