

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT  
NAIROBI**

**ELRC CAUSE NO E242 OF 2022**

**STEPHEN ODHIAMBO.....  
.....CLAIMANT**

**VERSUS**

**WASHINGTON STATE UNIVERSITY GLOBAL HEALTH-  
KENYA.....  
RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant has instituted this suit to challenge the Respondent's decision to terminate the contract of service between the parties. He contends that the Respondent's decision was unjustified and thus unlawful.
2. The Claimant avers that the Respondent hired his services as a Deputy Director-Operations with effect from 16<sup>th</sup> November 2016. He avers that the contract was renewed twice on 2<sup>nd</sup> December 2017 and 5<sup>th</sup> December 2018.
3. The Claimant contends that he executed his duties diligently until 8<sup>th</sup> April 2019 when the Respondent issued him a letter sending him on home duty for an indefinite term. He states that the Respondent asked him to stay away on full pay pending further communication.
4. The Claimant avers that the Respondent asserted that sending him on home duty was necessitated by the need to

conduct a financial audit at the workplace. However, he contends that he had not been notified of any complaints before the decision was made. He further contends that his performance was excellent.

5. The Claimant avers that the Respondent asked him to hand over all documents and correspondence in his custody and threatened adverse action if he did not comply. He contends that he dutifully complied with the requirement.
6. The Claimant avers that the Respondent did not communicate with him for a while after he left the workplace. He contends that the Respondent did not avail him any information even after he made inquiries regarding his employment status.
7. The Claimant contends that the Respondent eventually wrote to him on 14<sup>th</sup> June 2019 informing him that it had terminated his contract of service. He contends that the Respondent alleged that the decision to terminate his services was necessitated by fiscal and organizational challenges. He further contends that the Respondent intimated that it was going to pay him his salary and benefits for the balance of his contractual term.
8. The Claimant avers that on 20<sup>th</sup> June 2019, his lawyers wrote to the Respondent seeking clarification of the decision to terminate his services and the terminal dues that he was to be paid. He contends that the Respondent responded to the letter through its lawyer's letter dated 8<sup>th</sup> July 2019 stating

that the letter which terminated his contract was clear and required no further clarification.

9. The Claimant avers that on 19<sup>th</sup> August 2019, the Respondent deposited Ksh. 1,841,031.40 into his account. However, he contends that there was no explanation for the deposit.
10. The Claimant avers that the decision to terminate his services violated the Respondent's own human resource policies and procedures which forbid it from terminating the services of an employee unfairly. He contends that the Respondent did not have valid reasons to support its decision. He further avers that the Respondent did not follow fair procedure in processing his release from employment.
11. As such, he seeks various reliefs including: a declaration that the termination of his services was unfair and unlawful; payment in lieu of accrued annual leave of 40 days; compensation for wrongful termination of his contract; medical cover; service pay for each year worked; salary for the remainder of the contract; interest; and costs of the suit.
12. The Respondent has opposed the claim. It contends that the Claimant was engaged on a renewable fixed term contract for one year. However, it avers that renewal of the contract was not automatic but subject to various requirements including availability of funding.
13. The Respondent avers that sometime in 2019, it became necessary to conduct an audit of its projects to determine

their viability in relation to the Respondent's funding. It denies that the audit related to its financial statements.

14. The Respondent avers that the aforesaid audit revealed fiscal constraints which informed the decision to terminate the Claimant's contract of service. It contends that termination of the contract was done in accordance with the terms of the contract, the applicable human resource policies and the law. It avers that the Claimant was given the reasons for the decision. As such, it contests the Claimant's assertion that the process was unlawful.
15. The Respondent avers that it paid the Claimant Ksh. 1,841,031.40 to cover all his benefits for the balance of the term of his contract. It contends that the Respondent did not contest the payments after he received them. As such, it contends that the instant claim, which it describes as absurd and untenable, is driven by malice. The Respondent thus prays that the suit be dismissed with costs to it.

### **Issues for Determination**

16. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
  - a) Whether the contract between the parties was unlawfully terminated.
  - b) Whether the Claimant is entitled to the reliefs that he seeks in this action.

### **Analysis**

17. The law which regulates closure of employment relations is encapsulated in *the Employment Act* and complemented by

*the Fair Administrative Action Act*. These pieces of legislation are intended to breathe life into the rights to fair labour practices and fair administrative action under articles 41 and 47 of *the Constitution*.

18. An employee's services can only be terminated for valid reasons and in accordance with fair procedure. This requires that the employer provides substantive justification for the decision to terminate the employee's services and processes his (the employee's) release from service in accordance with fair procedure.
19. With respect to the requirement of substantive justification, the employer is not supposed to merely state to the employee the ground upon which he proposes to terminate his services. He is also required to provide cogent evidence to justify the ground. In line with section 43 (2) of *the Employment Act*, the employer must have credible grounds to entertain a genuine belief that the ground for termination exists.
20. With respect to the requirement of fair procedure, the employer is supposed to inform the employee of the reasons he proposes to terminate his services and allow the employee the opportunity to make his representations on the matter in the presence of a co-employee of his choice. In addition, section 4 of *the Fair Administrative Action Act* requires the employer to provide the employee with all the information that is to be relied on to make the impugned

decision so that the employee has the opportunity to interrogate it.

21. As such, it is no longer open to the employer to terminate a contract of service at will without just cause and without adhering to the tenets of fair procedure. Such decision will be deemed unlawful (see sections 43 and 45 of *the Employment Act*).
22. That the fore stated is the legal position in Kenya has been affirmed in a myriad judicial pronouncements. For instance, in the case of ***Walter Ogal Anuro v Teachers Service Commission [2013] eKLR***, the learned Judge observed that for a decision to terminate an employee's services to be valid, the employer must demonstrate that he not only had valid reasons to anchor the decision but that he also released the employee from service in accordance with fair procedure.
23. The parties to the instant suit are in agreement that the Claimant's contract of service was terminated through the Respondent's letter dated 14<sup>th</sup> June 2019. Whilst the Claimant contends that the termination was unlawful because the Respondent did not justify the grounds for the decision and did not follow fair procedure in closing the contract, the Respondent contends that the decision was lawful.
24. I understand the Respondent's case to be that it relied on clause 8 of the contract between the parties to make the

- impugned decision. The clause allowed it (the Respondent) to terminate the contract on account of fiscal challenges.
25. The Respondent contends that it was sufficient to invoke the aforesaid clause, without more, to close the contract between them. With respect, I do not agree with this proposition.
  26. Although the clause entitled the Respondent to discharge the Claimant on account of fiscal constraints, it (the Respondent) was obligated to justify and or substantiate this ground as required by law. It had to table evidence to speak to the alleged financial constraints and allow the Claimant the opportunity to interrogate the data and offer his response before the decision to close his contract could be made.
  27. The right to close a contract of service by simply invoking the termination clause in the contract no longer obtains in Kenya's legal framework on employment. The employer must proffer and justify the reason for the decision (see ***Kenfreight (E.A.) Limited v Benson K.Nguti [2016] KECA 688 (KLR)***).
  28. The Respondent's contention that it discharged the Claimant's contract on account of fiscal constraints denotes closure of the contract for operational reasons. This essentially implied a redundancy declaration (see sections 40 and 45 (2) (b) (ii) of *the Employment Act*).
  29. Although the Respondent contended that it closed the contract due to fiscal constraints, it did not present to the

Claimant data to back this claim. Further, there is no evidence that it (the Respondent) complied with the requirements of closure of a contract of service on account of redundancy under section 40 of *the Employment Act*.

30. In terms of section 4 of *the Fair Administrative Action Act*, the Respondent essentially failed to furnish the Claimant with information which was critical to the decision that was made to terminate his services when it failed to provide him with data to support the claim that it was facing fiscal constraints. This failure vitiated the decision.
31. Having regard to the totality of the evidence on record, it is without doubt that the Respondent did not justify the claim that it was experiencing fiscal constraints to justify closure of the Claimant's contract of service. Further, there is no doubt that the Claimant was not afforded an opportunity to ventilate on the matter before the decision to close his contract was made. Consequently, it is declared that the decision to terminate his services did not accord with the law and was therefore unlawful.
32. The next question for determination is whether the Claimant is entitled to the reliefs which he seeks in the suit. The reliefs sought will be considered individually in this section.
33. I will begin with the plea for salary for the balance of the contractual term. The evidence on record shows that the employment relationship between the parties was anchored on a one year fixed term contract of service which was to run until December 2019.

34. The parties tendered evidence which shows that the contract was terminated on 14<sup>th</sup> June 2019. In the letter of termination, the Respondent informed the Claimant, in part, as follows:-

*“You will be paid salary and any earned benefits for the remaining period of the contract until its scheduled termination in December.”*

35. The Respondent contends that despite terminating the contract prematurely, it paid the Claimant salary for the entire contractual term. To back this claim, it tendered evidence showing payment of Ksh. 1,841,031.40 to the Claimant’s bank account.

36. The Claimant does not deny that this amount was deposited on his bank account. Nevertheless, during trial, he contended that he was unaware of the source of the funds.

37. Although the Claimant attempted to deny knowledge of the source of the aforesaid funds, the evidence on record demonstrates that he was aware that it is the Respondent who paid the money into his account. This is apparent from paragraph 19 of the Memorandum of Claim and paragraph 8 of his written witness statement where he confirms that the Respondent deposited the money into his account on 19<sup>th</sup> August 2019.

38. As mentioned earlier, the Respondent’s position is that it paid the Claimant’s salary up to December 2019. It relies on the schedule of computation of the Claimant’s final dues it

tendered in evidence to contend that salary for the balance of the contractual term was paid in full.

39. I have looked at the aforesaid schedule containing a computation of the Claimant's final dues. It shows that the salary that was paid to him covered the months of August 2019, September 2019, October 2019, November 2019 and December 2019.
40. The evidence on record shows that the Claimant's services were terminated on 14<sup>th</sup> June 2019. As such, the balance of the contractual term at the time the contract was terminated was to be computed from June 2019 to December 2019. That means that the Respondent was to have paid the Claimant salary for June to December 2019, if it was to honour the pledge it made to him in the letter dated 14<sup>th</sup> June 2019.
41. The Respondent did not tender evidence to demonstrate that it paid the Claimant salary for June 2019 and July 2019 in line with its undertaking to him. The only evidence it presented demonstrates that the salary that was paid was for August to December 2019.
42. Under section 74 of *the Employment Act*, the employer bears the burden of maintaining employment records including those on payment of salary (***Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR***). As such and in terms of section 112 of *the Evidence Act*, he (the employer) is deemed to have special knowledge of

salary remittances and bears the burden of proving that a remittance was made.

43. The Respondent did not discharge this obligation with respect to demonstrating remittance of the Claimant's salary for June and July 2019. That being the case, the court finds that the Claimant is entitled to be paid salary for June and July 2019 in line with the Respondent's pledge to him in the letter dated 14<sup>th</sup> June 2019.
44. From the evidence on record, the Claimant's monthly salary was Ksh. 449,552.00. As such, I enter judgment for him for Ksh. 899,104.00 to cover salary for the months of June and July 2019.
45. The Claimant has also prayed for compensation for the unfair termination of his contract. This is one of the reliefs which is provided under section 49 of *the Employment Act*.
46. Whether to grant the relief is left to the court's discretion. Underscoring this fact, the learned Judge in ***Njuguna v Kiu Construction Company Limited [2025] KEELRC 3008 (KLR)*** stated that an award of compensation for unfair termination under section 49 of *the Employment Act* is not automatic but discretionary.
47. Further, in ***Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2016] KECA 97 (KLR)***, the Court of Appeal expressed itself regarding the remedies under section 49 of *the Employment Act* as follows:-

*"Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory*

*remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning.’’*

48. In exercising the discretion to determine whether to award compensation for breach of a contract, the court is reminded that the purpose of awarding damages is to compensate a party for the loss he has suffered as a result of a wrong. As such, damages are not intended to punish the party who is in breach of the contract but to compensate the aggrieved party for the loss he has suffered. Consequently, before the court can venture to award damages, it must ascertain the loss that has been suffered by the wronged party.
49. Underscoring this fact in the case of ***Cooperative Bank of Kenya Limited v Yator [2021] KECA 95 (KLR)***, the Court of Appeal quoting with approval the decision in the case of ***Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G Dun & Others, Appeal Case No JA 65/205***, stated as follows:-

*“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to*

*ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."*

50. Clause 2 of the contract dated 5<sup>th</sup> December 2018 between parties states that the contract was for a renewable fixed term of one year. Nevertheless, the renewal was not automatic. It was subject to consultations with and advise from the County Director of the Respondent and availability of funds.
51. In effect, the contract did not infuse in the Claimant legitimate expectation for its renewal. That being the case, the Claimant cannot contend that he had legitimate expectation to continue in the Respondent's service beyond 31<sup>st</sup> December 2019. As such, the court is not entitled to speculate on the nature of the relationship which the parties would have had after 31<sup>st</sup> December 2019.
52. It is also apparent from the evidence on record that at the time the Claimant's contract was closed on 14<sup>th</sup> June 2019, the balance of the contractual term under the contract was six months. As such, the loss which he suffered as a result of the premature closure of the contract is confined to the salary he would have earned for this period.
53. A scrutiny of the letter of termination of the Claimant's contract reveals that the Respondent informed him that it was going to pay him salary to cover the balance of his contractual term up to December 2019. The Respondent then proceeded to deposit into his account Ksh.

1,841,031.40. Notwithstanding the Claimant's attempts during the trial to plead ignorance about the source of the payment, it is noteworthy that he had already confirmed receipt of the money from the Respondent at paragraph 19 of the Memorandum of Claim and paragraph 8 of his witness statement.

54. The Respondent contended that the payment covered the Claimant's salary for June 2019 to December 2019 and his accrued leave days. The Respondent tabled a schedule of computation of the Claimant's final dues which shows how the figure of Ksh. 1,841,031.40 was arrived at. According to the computation, the figure included the Claimant's salary for the months of August, September, October, November and December 2019.
55. As such, it is apparent from the evidence on record that the Respondent paid the Claimant salary for August 2019 to December 2019. In this decision, the court has ordered the Respondent to pay him salary for June 2019 and July 2019. This means that notwithstanding that the Claimant's contract was irregularly terminated, he is to receive payment for the entire balance of the term of the contract. As such, having regard to the fact that there was no guarantee that the contract between the parties was going to be renewed after it expired in December 2019, the Claimant cannot contend that he has suffered financial loss as a result of the breach of his contract as he is to be paid for the unexpired term of the contract.

56. Taking this into account and having regard to the guidelines regarding the purpose of awarding damages as set out in the decisions referred to earlier in this decision, I do not think that it will be just to order the Respondent to make further payments to the Claimant as compensation for unfair termination of his contract. As such, I decline to award the request for compensation for unfair termination of the contract.
57. The Claimant has also claimed for pay in lieu of 40 accrued leave days. In response, the Respondent contended that it settled this claim by depositing the leave pay into the Claimant's account.
58. The Respondent tendered in evidence a schedule to explain the sum of Ksh. 1,841,031.41 which it deposited into the Claimant's account. According to the schedule, the amount included payment for 40.5 leave days.
59. Having regard to this evidence, the court finds that the Respondent settled the Claimant's claim for 40 accrued leave days by depositing into his account payments to cover the aforesaid days. As such, the claim for pay in lieu of accrued leave days is declined.
60. The Claimant has prayed for service pay under section 35 (5) of *the Employment Act*. However, the pay slip which he tendered in evidence shows that he was a registered contributor to the National Social Security Fund. As such and in terms of section 35 (6) (d) of *the Employment Act*, he was

excluded from claiming service pay. Consequently, the claim for service pay fails.

61. The Claimant also made a claim for medical cover. However, a scrutiny of the witness statement which he adopted as his evidence in chief and his oral evidence in court shows that he did not speak to this claim. Absent evidence to support the claim, the court cannot grant it. Consequently, it is declined.
62. During trial, the Claimant introduced another claim relating to issuance of a Certificate of Service. Even though it was not pleaded, the Respondent expressed its readiness to issue him with this certificate. As such, the Respondent is asked to issue him with the aforesaid certificate in terms of section 51 of *the Employment Act*.
63. The amount awarded to the Claimant is subject to the statutory deductions that were applicable when the contract between the parties was terminated.
64. The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
65. The Claimant is awarded costs of the suit.

### **Summary of the Findings and Orders**

66. After evaluating the pleadings, evidence, submissions by the parties and the applicable law, the court makes the following findings and attendant orders:-
  - a) The court declares that the Respondent's decision to terminate the Claimant's contract of service did not accord with the law and was therefore unlawful.

- b) The court enters judgment for the Claimant for Ksh. 899,104.00 to cover salary for the months of June and July 2019 being part of the remainder of the term of the Claimant's contract of service.
- c) Having regard to the fact that the Claimant is to be paid for the entire balance of the contractual term, he cannot contend that he has suffered any financial loss on account of breach of the contract under consideration. As such, the court declines to award him the request for compensation for unfair termination of the contract.
- d) The court finds that the Respondent settled the Claimant's claim for 40 accrued leave days by depositing into his account payments to cover the aforesaid days. As such, the claim for pay in lieu of accrued leave days is declined.
- e) The court finds that the Claimant was a registered contributor to the National Social Security Fund. As such and in terms of section 35 (6) (d) of *the Employment Act*, he was excluded from claiming service pay. Consequently, the claim for service pay fails.
- f) The court declines to grant the claim for medical cover because it was not proved.
- g) The Respondent is asked to issue the Claimant with a Certificate of Service in terms of section 51 of *the Employment Act*.
- h) The amount awarded to the Claimant is subject to the statutory deductions that were applicable when the contract between the parties was terminated.

- i) The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
- j) The Claimant is awarded costs of the suit.

**Dated, signed and delivered on the 19<sup>th</sup> day of February, 2026**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**