

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E035 OF 2024

ABRAHAM

OPUKO.....CLAIMANT
NT

VERSUS

NAKURU LUCKY INVESTMENTS
LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit through a Statement of Claim dated 23rd December, 2023, and filed in court on 17th January, 2024, alleging unlawful/unfair termination and non-payment of terminal dues. He seeks the following reliefs as against the Respondent:
 - i. A declaration that the Claimant's termination was unfair, unprocedural, and unlawful.
 - ii. The Claimant be paid his terminal dues, being a total sum of Kshs. 4,887, 692
 - iii. The Respondent to pay the costs of this claim
 - iv. Interest on (ii) and (iii) above at the court rates from the date of filing this claim
 - v. The Respondent to issue a Certificate of service to the claimant

2. The Respondent filed a Memorandum of Reply to the Claim dated 15th February, 2024, denying the Claimant's claim.
3. The Claimant's case was heard on 24th March, 2025, when he testified in support of his case, adopted his witness statement, and produced his list and bundle of documents as exhibits in the matter.
4. The Respondent's case was heard on 13th October, 2025, when the Respondent's witness, Mr. Stephen Mugo, testified in support of the Respondent's case. He too adopted his witness statement and produced the Respondent's list and bundle of documents as exhibits in the matter.
5. Both parties filed submissions, and have been duly considered.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on 13th August 2015 as a Human Resource Manager on a one year contract with a monthly salary of Kshs.50,000. He avers that due to his diligent performance, he received salary increments, with the first one being to Kshs.80,000 under the contract running from 1st August 2017 to 30th July 2019, and later to Kshs.120,000 under the contract from 1st September 2018 to 30th August 2019.

7. It is his case that after the expiry of the last annual contract, he was confirmed as a permanent employee of the Respondent.
8. The Claimant states that in February 2020, the Respondent closed operations due to COVID-19, but required him to continue overseeing the premises monthly and remain in contact with staff until the reopening of the business.
9. He avers that when operations resumed in May 2021, the Respondent unilaterally reduced his salary by Kshs.40,000 effective July 2021 without his consent, and that the reduced salary remained in place until his termination in June 2023, leaving outstanding salary arrears.
10. It is the Claimant's case that following the resumption of operations, his immediate supervisor, Mr. Pan, became hostile. He avers that his annual leave was declined and that he was not compensated, that on 18th June 2023, after inquiring about his leave from the overall boss, Mr. Zhao, he was instructed to leave the office immediately and report the following day, when he was issued with a 60 day suspension letter that did not state the reasons for the suspension.
11. The Claimant states that he served the 60 day unpaid suspension and resumed duty on 18th August 2023, when he was referred by Mr. Pan to Mr. Zhao and then to Mr. Teddy, the local director, who informed him that another Human

Resource Manager had already been hired and that his services were no longer required.

12. The Claimant states that he was not issued with a notice of termination as required by law and his contract. The Claimant further states that he was not granted annual leave for the 2022-2023 leave period, he was not paid a salary from April 2020 to April 2021 despite being on duty during the COVID-19 period, that he was not paid for 19 days worked in June 2023, and the 60 day suspension was also unpaid.
13. The Claimant avers that he seeks payment of terminal dues and compensation comprising notice pay, salary arrears, withheld salary, unpaid leave, unpaid days worked, unpaid suspension period, and 12 months' compensation for unfair and unlawful termination.
14. The Claimant states that his messages and calls to the Respondent's directors on the status of his employment went unanswered. He avers that he was never given a show cause letter nor given a hearing.
15. On cross-examination, the Claimant told this court that he was not working during the COVID period, but that he would be asked to occasionally pass by and check the premises.
16. The Claimant avers that it was not his duty to renew licenses with the Betting Control Board, but admits that he

had a duty to renew County licenses, and that he did renew but did not have them before the court.

17. The Claimant confirmed that he did not write to the Betting Control Board to renew licenses. The Claimant further confirmed that he was earlier issued a warning letter dated 11th April, 2022, for taking alcohol in the casino, which was not accepted, and that he wrote an apology.
18. The Claimant denied that his salary was reduced through mutual consent. It is his evidence that he continued to receive his salary for three months after resuming duty in May 2021 and thereafter began receiving a lower salary.
19. The Claimant prays that the court allow his claim.

The Respondent's Case

20. The Respondent states that it employed the Claimant on 13th August 2015 as a Human Resource Manager on a one year contract at a salary of Ksh.50,000, and that upon expiry of the initial contract, a new contract was executed, increasing his salary to Ksh.80,000.
21. The Respondent further states that after establishing another casino, Jambo Lucky Investments, the Claimant was retained as Human Resource Manager for both casinos. It avers that on 17th October 2018, the Claimant entered into another contract for the two casinos at a salary of Ksh.120,000, but denies that the Claimant became a permanent employee, asserting that all employees were

engaged on fixed term contracts subject to renewal upon expiry.

22.The Respondent also states that both casinos were closed in February 2020 due to the COVID-19 pandemic, in compliance with government directives, and that all employees were sent home as there were no operations or activities during that period.

23.The Respondent states that only Nakuru Lucky Casino reopened in May 2021, while Jambo Casino remained closed, resulting in a reduced workload for the Claimant, and consequently, he was issued with a notice informing him that his salary would be reviewed down to Ksh.80,000 pending the reopening of Jambo Casino.

24.It avers that a fresh contract was issued, and the Claimant, being the Human Resource Manager and custodian of employment contracts, accepted the revised salary and continued to earn it until his employment was terminated in June 2023.

25.The Respondent further states that the Claimant, as a senior manager, was involved in incidents of gross misconduct, and that on 19th June 2023, he was suspended for unprofessional and disrespectful conduct toward management. It is the Respondent's case that he publicly disrespected a director in front of junior staff and clients after being advised to await communication regarding his

leave request, but he instead directly confronted the director, becoming argumentative and causing a scene.

26. The Respondent states that the suspension was necessary to uphold organizational standards. The Respondent further states that the Claimant had previously received warning letters and verbal warnings for misconduct. It avers that on 9th April 2022, the Claimant consumed alcohol in his office with junior staff during working hours, became intoxicated and unruly, and destroyed an internal landline phone.

27. It is the Respondent's further case that a disciplinary meeting was held, after which the Claimant was issued with a warning letter dated 11th April 2022, to which he responded with a written apology.

28. The Respondent states that in 2019, the Claimant committed another act of gross misconduct relating to the renewal of county licenses, where, as Human Resource Manager, he was responsible for ensuring that all licenses and levies were duly paid. It avers that on 27th November 2019, he received Ksh.320,000 for the renewal of Nakuru Lucky Casino's license and Ksh.500,000 for Jambo Lucky Casino, but he failed to renew the licenses, and the omission was only discovered during a routine government inspection.

29. The Respondent states that by the time he was summoned to explain himself, he had only managed to renew Nakuru Lucky's license but not Jambo Lucky's, resulting in fines and

urgent payment to avoid further penalties. The Respondent states that the Claimant has not refunded the funds for Lucky Casino.

30. The Respondent further states that the Claimant repeatedly engaged in misconduct by playing slot machines during working hours without making proper payments and colluding with a slot attendant. It maintains that this conduct led to the termination of another employee, with the Claimant using his senior position to conceal his involvement.

31. The Respondent finally states that prior to the suspension of the Claimant, an internal audit had revealed several issues concerning him, and that being aware of the audit and possible suspension, he became disrespectful, insubordinate, and argumentative toward management, including a director of the Respondent company.

32. The Respondent maintains that the suspension was necessary to protect the organization's integrity and allow investigations without interference.

33. On cross-examination, RW1 told the court that after COVID, all employees were given notice of a reduction in salary, but that the notice was not produced in evidence before the court. He further told the court that the Claimant was the custodian of the Respondent's documents, which he did not surrender when he left, and has never given them back.

34.It is RW1's evidence that the Respondent had no policy on suspension, and that suspension was effected per the employment contract. He further testified that the Claimant accepted the salary cut and that he had the reduced salary until his exit in June 2023.

35.The witness denies that the Claimant was ever terminated and avers instead that he was only suspended though he was never recalled to work. It is his testimony that no notice to show cause was issued to the Claimant.

36.RW1 stated that he could not remember whether the Claimant was paid for the 19 days he worked in June 2023, and is also not aware whether he was paid arrears for the year 2020.

37.RW1 further confirmed that the Claimant sought leave approval from the Respondent, and confirmed further that it is partly the reason he was suspended. It is his case that leave was paid for, but no evidence of such payment was placed before the court.

38.The Respondent prays that the Claimant's claim be dismissed with costs.

Analysis and Determination

39.I have considered the pleadings herein, the witnesses' oral testimonies, the evidence adduced, and the rival submissions. The issues that fall for determination are: -

- i. Whether the Claimant's employment was terminated, and if so, whether the termination was unfair.
- ii. Whether he is deserving of the remedies sought.
- iii. Who bears the costs of the suit?

Whether the Claimant's employment was terminated, and if so, whether the termination was unfair.

40. The Respondent's position is that the Claimant was not terminated, but was only suspended.

41. It is not disputed that the Claimant served a 60 day suspension without pay, and upon reporting back to work, the Respondent informed him that another Human Resource Manager had been hired and that his services were no longer required. It is the Claimant's position, which position remains uncontroverted, that he was never recalled to work after the suspension.

42. Further, both parties are in agreement that no letter of termination was issued. Termination in law is not dependent on the label used by the employer, but on the substance of what actually occurred.

43. In ***Kenfreight (EA) Limited v Benson K. Nguti (2016) KECA 409 (KLR)***, the Court of Appeal emphasized that once an employer ends the employment relationship, the court must interrogate both the reason and the procedure to determine the fairness of the termination. Here, the Respondent's own witness admitted that the

Claimant was never recalled and that no show cause letter was issued.

44. The practical effect of the Respondent's conduct in the circumstances is that the employment relationship between the parties herein came to an end.

45. I, in the premise, find and hold that the Claimant's employment was terminated in June 2023.

Whether the Claimant's termination was unfair.

46. Having found that the Claimant was indeed terminated from the service of the Respondent, the next question is whether the Respondent adhered to both procedural and substantive fairness in terminating the Claimant.

47. The Employment Act, 2007, demands that an employer shall not terminate the services of an employee unfairly. By this provision, the Act obligates an employer to initiate various fair procedure mechanisms of discipline in the workplace to ensure fairness. Failure by an employer to adhere to the stringent requirements of the law in respect of a termination or dismissal constitutes unfair termination/wrongful dismissal.

48. Specifically, Section 41 of the Employment Act provides thus on procedural fairness: -

"41(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.

49. This requirement was underscored in the case of ***Philip Kimosop v Kingdom Bank Limited (2022) eKLR***, where the Court opined that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure. The Court emphasized that all the steps taken by the Respondent prior to terminating the Claimant's employment qualified as following due procedure as contemplated by Section 41 of the Employment Act.

50. The Respondent's witness confirmed that no notice to show cause was issued to the Claimant, that no disciplinary hearing was conducted, and no evidence at all of compliance with Section 41 was presented.

51. Further, the suspension letter did not specify reasons as to why the Claimant was being suspended, and whether or not he needed to respond to any allegations.

52. I therefore have no difficulty finding that the Claimant's termination was procedurally unfair, and so I hold.

53. On the question of substantive justification for the termination, Sections 43 and 45 of the Employment Act place the burden on the employer of proving valid and fair reasons for termination. The standard in these sections of the law was explained in ***British American Tobacco (K) Ltd v Kenyan Union of Commercial Food and Allied Workers (Kuc/aw) [2019] eKLR***, which quoted with approval the decision of ***Anthony Mulaki V Addax Kenya Limited, Cause No. 822 of 2012***, where the Court held as follows:-

"In examining the validity of reasons, the court was correctly directed by the Respondent to the case of BRITISH HOME STORES LTD v BURCHELL (1980) LC.R. 303 E.A.T. where it was held that for the court to uphold the decision by the employer as being fair, it must be shown that:-

(a) The employer must believe at the time of termination that the employee is guilty of the allegations against him/her

(b) The employer had reasonable grounds upon which to sustain that belief; and

(c)The employer carried out as much investigation as reasonable in the circumstances, the employer need only be satisfied on the balance of probability."

54.The Respondent relies on several allegations against the Claimant. Firstly, it contends that the Claimant disrespected and showed insubordination to their director in June 2023, engaged in alcohol consumption, and, lastly, that he destroyed property in April 2022. The Respondent also accused the Claimant of failing to renew various licenses in 2019, playing slot machines, and colluding with staff.

55.The record confirms that the April 2022 alcohol incident resulted in a warning letter, which the Claimant apologized for, and the apology put that matter to rest.

56.An employer cannot, in my view, revive a spent disciplinary sanction to justify a later dismissal unless it forms part of a progressive disciplinary record clearly linked to the eventual termination. In this matter, no such link was demonstrated.

57.Further, the 2019 licensing issue is said to have occurred four years before termination/suspension. No evidence was presented to show that disciplinary action against the Claimant followed immediately after the discovery that the licenses were not renewed. This, in my view, is another stale allegation which the Respondent cannot rely on without proof of a disciplinary outcome.

58. On the issue of insubordination, again, there was no notice to show cause, no minutes of any disciplinary hearing, and no evidence that the Claimant was given an opportunity to defend himself on that specific accusation before the decision to suspend him was arrived at.

59. Further, even assuming the Claimant was argumentative as has been alleged, the Respondent still had an obligation to follow statutory procedure before terminating his employment.

60. On the whole, while there were prior warnings issued, the Respondent has not demonstrated that the June 2023 incident amounted to misconduct validly warranting termination.

61. In the end, I find and hold that the Claimant's termination is both procedurally and substantively unfair.

Whether he is deserving of the remedies sought

62. With the finding that the Claimant's termination was substantively unproven and procedurally unfair, a declaration of unfair termination is merited.

Notice pay

63. There was evidently no notice issued to the Claimant prior to his unfair termination. He is therefore entitled to two months' salary in lieu of notice in accordance with clause 3 of his contract of employment.

64. The court notes that the Claimant at termination was in charge of only one of the Respondent's establishments and was on a salary of Kshs. 80,000, which is what shall be used in computing his entitlement.

Unpaid 19 days in June 2023

65. RW1 could not confirm payment for the days worked in June 2023. In the absence of proof of payment, the claim succeeds.

Suspension without pay

66. The Respondent admitted it had no policy on suspension. Suspension without pay must be contractually or statutorily justified. None was demonstrated; hence, the 60 days' salary claim is justified and is hereby awarded.

Leave for 2022-2023

67. The Respondent did not produce leave records as required under Section 74 of the Employment Act to prove that the Claimant went on leave, and if not, the number of days he had accumulated. The claim for accrued leave succeeds and is awarded as prayed.

Salary arrears 2020-2021

68. Given the closure of the Respondent's operations and the Claimant's own admission that he was not actively working during the period of the claim, this claim is not proved on a balance of probabilities. It is dismissed.

Salary reduction arrears

69. The Claimant confirmed that the Respondent closed one of the establishments, which closure, the Respondent attributes to the reduction of salary. The Claimant continued to receive and accept the reduced salary for nearly two years without formal protest. This conduct is, in my view, construed as acquiescence.

70. I thus decline to award the full claimed arrears for the entire reduction period.

Compensation

71. Under Sections 49 and 50 of the Employment Act, 2007, the court may award up to 12 months' salary as compensation where it finds termination unfair.

72. Considering the Claimant's eight years of service, the prior warnings on record, and the senior position he held at termination, I deem an award of 7 months' salary sufficient compensation for the unfair termination.

73. In whole, the Claimant's claim succeeds and orders granted as follows:-

- a) A declaration that the Claimant's employment was unfairly terminated
- b) Two months' salary in lieu of notice at Kshs.80,000/-
- c) Unpaid salary for the 19 days worked in June 2023 at Kshs.51,000/-
- d) Pay for the period of suspension at KShs.160,000/-
- e) Annual leave not taken at Kshs.80,000/-

- f) Seven (7) months' salary as compensation for the unfair termination at Kshs.560,000/-
- g) The Claimant shall be issued with a certificate of service within 14 days of this judgment.
- h) The Respondent shall bear the costs of the suit.

74. Judgment accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 5TH DAY OF MARCH, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Mokaya present for the Claimant

N/A for the Respondent

Ms. Esther S- C/A