

- i. One month's salary in lieu of notice.....Kshs.
189,425/=
- ii. 15 months unpaid salary from April 2020
to June 2021(15 X 189,425).....Kshs.
2,841,375/=
- iii. 5 months unpaid half salary from July 2021
to November 2021(5 X94,712)..... Kshs.
473,562/=
- iv. Accrued leave day (23 days).....Kshs.
145,225/=
- v. Compensation for unfair termination (12X189,425)
.....Kshs. 2,273,100/=
- f) THAT the Respondent be hereby directed and ordered
to pay costs of this suit.
- g) THAT the Respondent be hereby directed and ordered
to pay the Claimant interest on 4 and 6 above at court
rates from the date of filing this suit until payment in
full.

2. The Respondent filed a Response to the Amended Memorandum of Claim dated 11th March, 2025, in response to the Claimant's claim.

3. The Claimant's case was heard on 18th November, 2025, when the Claimant (CW1) testified in support of her case. She adopted her witness statement dated 30th September, 2024, and produced her list and bundle of documents of even date as exhibits in the matter, which were marked as Claimant's exhibits Nos. 1-18.

4. The Respondent's case was heard on even date when the Respondent's witness (RW1) Ms. Faith Achiro testified in support of the Respondent's case. She adopted her witness statement dated 10th March, 2025, and produced her list and bundle of documents dated 11th March, 2025, as exhibits in the matter and were marked as Respondent's exhibits Nos. 1-5.
5. Submissions were received from both parties.

The Claimant's case

6. The Claimant's case is that she was employed as a Senior Travel consultant on 1st June, 2007, vide an employment contract of 22nd May, 2007, earning a gross salary of Kshs.189,425/=.
7. The Claimant avers that she received a letter dated 25th March, 2020, from the Respondent sending her on unpaid leave from 1st April, 2020, to 31st May, 2020, due to the outbreak of the Covid -19 virus.
8. It is the Claimant's case that the Respondent failed to explain the terms of the unpaid leave in contravention of Section 10(5) of the Employment Act. The Claimant avers that during the period of the unpaid leave, she suffered anxiety, mental, emotional, and financial anguish.

9. It is the Claimant's case that on 28th June, 2021, she received a letter from the Respondent unilaterally varying her terms of employment by reducing her gross salary to Kshs.75,000/= which led her to seek clarification of the same via email on 22nd July, 2021.
10. The Claimant avers that subsequently, the Respondent constituted a meeting with her on 11th August 2021 to clarify the varied terms, and on 13th August 2021, the Respondent shared the minutes of the meeting with her via email.
11. It is her case that in the email, the Respondent's Human Resource Officer affirmed the variation of the contract terms whilst changing the Claimant's employment date from 1st June, 2007 to 1st January, 2007 and affirmed the Respondent's decision to reduce the Claimant's salary by 50%.
12. The Claimant further avers that she continued her employment on the varied terms until 25th November, 2021, when she was served with a termination letter of even date by the Respondent.
13. It is the Claimant's case that she was unlawfully terminated as she was not given reasons for termination, was not accorded an opportunity to defend herself against the allegations in a hearing, and was not allowed to have a colleague of her choice present during the hearing.

14. The Claimant further states that she was not provided a right of appeal on the decision to terminate her services.
15. The Claimant avers that post termination, the Respondent failed to pay her one month's salary in lieu of notice contrary to the provisions of Section 35(2) of the Employment Act. It is the Claimant's case that the termination was tainted with procedural irregularities and that her termination was unlawful and unfair.
16. The Claimant avers that the Respondent unilaterally varied her contract terms, failed to inform her of her rights, failed to inform her of the allegations against her prior to termination, failed to issue her a notice of misconduct, failed to grant her an opportunity to be heard and to attend a hearing in the presence of a colleague of her choice, failed to accord the Claimant a fair hearing and unlawfully terminated her employment in violation of her right to fair administration.
17. During cross-examination, the Claimant stated that she was aware of the impact of COVID-19 on the Respondent's industry. She further stated that she voluntarily signed the unpaid leave letter dated 25th March, 2020, and that the minutes of the meeting attached to the email of 13th August, 2021, were a true reflection of the meeting held between her and the Respondent.

18. The Claimant further told the court that she did not show up at work due to the variation of her contract, and did not raise any objection to the variation.
19. On re-examination, the Claimant clarified that she signed the unpaid leave only for the period between 1st April, 2020, and 31st May, 2020.
20. It is the Claimant's prayer that the Court grant her the relief sought under her claim.

The Respondent's Case

21. The Respondent states that it employed the Claimant in 2007. It avers that COVID-19 severely affected its business, leading to a complete shutdown of its operations due to global travel restrictions.
22. The Respondent states that it subsequently sent the Claimant on an unpaid leave arrangement, which was intended to avoid job loss due to the uncertainties of the pandemic, and this arrangement applied to all of its employees, not just the Claimant.
23. The Respondent avers that it recalled its employees, including the Claimant, who had been placed on unpaid leave and revised their employment terms, with the intention to weigh the emergence from the pandemic, which was also in line with the memorandum of

understanding dated 20th April, 2020, signed by FKE, COTU, and the Ministry of Labour and Social Protection.

24. The Respondent states that the Claimant's date of employment, as indicated as 1st January, 2007, was a typographical error, as was earlier clarified in a meeting held on 11th August, 2021, and in minutes sent to the Claimant on 13th August, 2021.
25. The Respondent further states that its operations improved, and it formally recalled the Claimant back to work vide a letter dated 28th June, 2021, requiring her to resume duties on 15th July, 2021. It avers that the Claimant refused to resume duty as required and, despite many attempts and follow-ups, she failed to report back.
26. The Respondent avers that it ultimately terminated the Claimant's employment on 25th November 2021, due to absenteeism, and was informed of her entitlement to terminal dues upon clearance.
27. On cross-examination, the Respondent stated that no meeting was held with the Claimant prior to sending the letter placing the Claimant on unpaid leave. RW1 told the court that there was a mutual agreement with the Claimant based on a meeting held in respect of the unpaid leave.

28. The Respondent admitted that the letters dated 1st August 2020 and 28th June 2021 extending leave were not signed by the Claimant.
29. The Respondent admitted that no disciplinary proceedings were undertaken, no evidence of absenteeism was presented, and no payments were made to the Claimant post termination.
30. In re- examination, the Respondent indicated that attempts were made through emails enquiring whether the Claimant was interested in resuming duty and that the payments had not been made since the Claimant was yet to clear with the Respondent.
31. The Respondent's prayer that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

32. It is the Claimant's submission that the termination of her employment was unfair and unprocedural as the Respondent failed to comply with the procedure prescribed under Section 41 of the Employment Act, 2007.

33. She submits that the Respondent merely sent emails requesting her to resume work and subsequently issued a termination letter dated 25th November 2021, citing absenteeism, without issuing a Notice to Show Cause, conducting a disciplinary hearing, or affording her an opportunity to respond to the allegations. The Claimant places reliance in ***Lydia Moraa Obara v Tusker Limited, EKLR, 2021***, where the Court emphasized that procedural fairness requires that an employee be given an opportunity to respond to allegations before a decision to terminate employment is made.
34. The Claimant further relied on John ***Jaoko Othino v Intrahealth International [2022]eKLR***, where the Court of Appeal outlined the essential elements of procedural fairness, including explanation of the charges, the right to representation, and consideration of the employee's response.
35. The Claimant further submitted that the Respondent did not produce evidence to substantiate the allegation of absenteeism, which formed the basis of the termination. She argued that under the Employment Act, the employer bears the burden of proving the reasons for termination and demonstrating that those reasons are valid and fair. In support of this position, she cited ***Charity Wambui Nyambura v Mayfair Holdings Limited [2022] eKLR***.
36. The Claimant submitted that the Respondent unlawfully and unilaterally varied her employment terms, particularly her

remuneration. She stated that although she agreed to proceed on unpaid leave for a period of two months from 1st April to 31st May 2020, the Respondent subsequently issued a letter dated 28th June 2021 purporting to resume her employment under altered terms, including a reduced salary of Kshs. 75,000. The Claimant argued that she neither signed nor consented to the said variation and that the Respondent did not engage her in consultation prior to implementing the changes.

37. The Claimant relied on Section 10(5) of the Employment Act, which requires employers to consult employees and revise the employment contract where material changes occur in the terms of employment. She submitted that the Respondent failed to comply with these statutory requirements as the variation was implemented without prior notice, consultation, or her consent.

38. The Claimant sought to rely on the case of ***Gatuma v Kenya Breweries Ltd & 3 Others(Pet E023 OF 2023) [2024] KESC 52(KLR)***, where the Court affirmed that changing an employee's terms of employment without consultation violates the principles of fair labour practice. She also relied on ***Wanjai v Media Max Network Limited E607 of 2022***, in which the Court held that a salary reduction beyond an agreed period without consultation contravenes the law.

39. Additionally, the Claimant cited ***Kamau v Copycat Limited (Cause E759 of 2021) [2025] KEELRC 2330***, where the Court held that deductions or interference with an employee's wages without the employee's request or consent are unlawful.
40. In conclusion, the Claimant submitted that the Respondent both unfairly terminated her employment and unlawfully varied her employment contract without consultation or consent.
41. The Claimant therefore urges the Court to find in her favour and grant the reliefs sought in the claim.

The Respondent's submissions

42. It is the Respondent's submission that an employment relationship is governed by a written contract as required under Section 10(2) of the Employment Act, 2007, which specifies essential contract elements, and Section 10(5) mandates that any variation must involve consultation and written notification, but not necessarily agreement.
43. The Respondent relied on ***Nakuru ELRC Petition No. 29/2016, Maxwell Miyawa & 7 others v JSC [2017] eKLR***, where the Court held that unilateral variations without consultation are unlawful, but consultation suffices even without agreement. Similarly, in ***Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy [2020]***

KEELRC 574 (KLR), the Court clarified that agreement is not required, only consultation and notification.

44. The Respondent submitted that consultation occurred, as evidenced by a written notice dated 25th March 2020, voluntarily signed by the Claimant, and subsequent extensions communicated via email due to COVID-19 impacts. Reliance was placed on **Muga v G. North & Son Limited (Cause E716 of 2023) [2025] KEELRC 753 (KLR)**, where salary reductions and unpaid leave during the pandemic, after consultation, were deemed lawful.

45. The Respondent submits that their approach preserved employment and statutory benefits, acting reasonably under pandemic circumstances, consistent with the principles in **Emmanuel Wambua Muthusi & 6 others [supra]**, and insists that the variation of the Claimant's contract was lawful, fair, reasonable, and justified.

46. The Respondent further submitted that following lawful unpaid leave, the Claimant was recalled via a letter dated 28th June 2021 to resume work on 15th July 2021, including revised arrangements and a temporary salary reduction communicated in follow up correspondence, which the Claimant failed to honour, neglected engagement, and did not report to duty.

47. The Respondent sought reliance on Section 44(4) of the Employment Act, 2007, establishing that prolonged

unexplained absence amounts to valid grounds for termination.

48. The Respondent submitted that the termination was substantively justified, procedurally fair, and fully compliant with the Employment Act. The Respondent confirmed willingness to settle terminal dues, including one month's salary in lieu of notice and accrued leave as at 31st March 2020.

49. In conclusion, the Respondent submitted that the variation of the Claimant's contract through unpaid leave and recall was lawful, fair, and justified, the termination resulted solely from the Claimant's failure to resume duty and constituted lawful termination on grounds of absenteeism, and that the Claimant has failed to discharge her burden under Section 47(5) of the Employment Act.

50. The Respondent prays that the Claimant's Claim be dismissed with costs.

Analysis and Determination

51. I have considered the pleadings, the witnesses' testimonies, and the rival submissions. The following issues crystallize for my determination: -

- i. Whether the Respondent unlawfully and unilaterally varied the Claimant's employment contract.
- ii. Whether the unpaid leave arrangement and subsequent salary reduction were lawful.

- iii. Whether the termination of the Claimant's employment was substantively and procedurally fair.
- iv. Whether the Claimant is entitled to the reliefs sought.

Whether the Respondent unlawfully varied the Claimant's employment contract

52. Section 10(5) of the Employment Act, 2007, provides that where any matter stipulated in the contract changes, the employer must consult the employee and revise the contract to reflect the change. Courts have consistently held that material changes to employment terms, particularly salary, require consultation with the employee.

53. In ***Maxwell Miyawa & 7 others v Judicial Service Commission [2017] eKLR***, the Court held that unilateral alteration of employment terms without consultation violates Section 10(5) of the Employment Act. Further, in ***Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy [2020] eKLR***, the Court clarified that while consultation does not necessarily require agreement, the employer must demonstrate that meaningful consultation occurred prior to implementing the change.

54. The Claimant admitted to voluntarily signing the unpaid leave letter dated 25th March 2020 covering the period 1st April 2020 to 31st May 2020. It is, however, evident from the evidence adduced that the Respondent proceeded to extend the unpaid leave period and subsequently reduced the Claimant's salary through letters dated 1st August 2020

and 28th June 2021, which letters were not signed by the Claimant.

55. The Respondent, through their witness, also confirmed during cross-examination that no meeting was held prior to placing the Claimant on unpaid leave.

56. While the initial unpaid leave was consensual, the subsequent extensions and salary reduction lacked clear evidence of consultation or consent by the Claimant. The Court in ***Gatuma v Kenya Breweries Ltd & 3 Others [2024] KESC 52 (KLR)*** affirmed that altering employment terms without meaningful consultation violates the constitutional right to fair labour practices under Article 41 of the Constitution.

57. Further in ***Wanjai v Media Max Network Limited [2022] eKLR***, the Court held that continuation of salary reductions beyond an agreed period without consultation constitutes unlawful variation of contract.

58. Accordingly, this Court finds and holds that the Respondent unlawfully varied the Claimant's employment terms beyond the initial agreed unpaid leave period.

Whether the unpaid leave arrangement and salary reduction were lawful

59. On the justifiability of the unpaid leave and the salary reduction, this Court acknowledges the extraordinary circumstances brought about by the COVID-19 pandemic,

which severely affected industries such as the one the Respondent is in.

60. The tripartite Memorandum of Understanding dated 20th April 2020 between the Government, COTU, and FKE referred to by the Respondent, recognized that employers could implement temporary measures to preserve employment during the pandemic. This position was affirmed in the case of ***Muga v G. North & Son Limited [2025] KEELRC 753 (KLR)***, where the Court held that temporary salary reductions or unpaid leave during the pandemic could be lawful where there was consultation and employee participation.

61. This court is, however, alive to the requirement for parties to consult and enter into a mutual agreement where possible.

62. It is not disputed that the Claimant consented to two months' of unpaid leave. It is, however, obvious that the Respondent proceeded to unilaterally extend the arrangement and alter salary terms without a documented agreement or, at the very least, consultation with the Claimant on the new arrangement.

63. While there is no doubt that the Respondent needed to retain the Claimant in the terms she now disputes, it was under an obligation to consult the Claimant before unilaterally effecting the changes to her contract.

64. In the circumstances, I find that the Respondent acted unlawfully in extending the unpaid leave and implementing the salary reduction without consulting the Claimant.

Whether the termination was substantively and procedurally fair

65. Termination of employment is governed by Sections 41, 43, and 45 of the Employment Act, which require that an employer must establish a valid reason for termination and adhere to the tenets of fair procedure before terminating an employee's contract.

66. The Respondent's position is that the Claimant was terminated on account of absenteeism after failing to report to work upon recall. On her part, the Claimant contends that the Respondent has not tendered evidence of the alleged absenteeism, which was the sole reason for the termination of her employment.

67. Absenteeism no doubt constitutes a valid ground for summary dismissal under Section 44(4)(a) of the Employment Act. The law, however, demands that the employer prove the reason (s) for the termination, and further prove that the reasons are fair. In ***Charity Wambui Nyambura v Mayfair Holdings Limited [2022] eKLR***, the Court held that an employer must provide evidence substantiating allegations relied upon in terminating employment.

68. The Claimant, on cross-examination, told the court that she did not show up at work upon recall, on the basis that the terms of her contract had been varied. There is therefore no doubt that the Claimant was recalled, but she did not heed the recall by her employer.

69. In my considered view, much as the Respondent did not produce attendance records or other evidence showing the Claimant absented herself from duty, she personally admitted disobeying the employer's lawful orders to report back to work.

70. The Court therefore finds that the Respondent, by the Claimant's own admission, had a valid and fair reason to terminate the Claimant's employment, which substantively justifies the termination of her employment, and so I hold.

71. The second limb in determining the fairness of a termination/dismissal is the question of procedural fairness. Section 41 of the Employment Act requires an employer to explain the reason for termination to the employee and allow the employee an opportunity to respond to the charges in the presence of a fellow employee or union representative.

72. In ***Lydia Moraa Obara v Tusker Mattresses Limited [2021] eKLR***, the Court held that failure to accord an employee a disciplinary hearing renders termination procedurally unfair.

73. Similarly, the Court of Appeal in ***John Jaoko Othino v IntraHealth International [2022] eKLR*** affirmed that procedural fairness includes explanation of charges, hearing the employee's response, and consideration of the employee's representation.

74. The Respondent, through its witness, confirmed that no disciplinary hearing was conducted, no notice to show cause was issued, and neither was the Claimant given an opportunity to defend herself.

75. The termination was thus without doubt procedurally unfair and unlawful, and so I hold.

Whether the Claimant is entitled to the reliefs sought

76. Having found that the termination of the Claimant's employment was unfair, the Court must now consider the appropriate remedies under Section 49 of the Employment Act.

Salary in lieu of notice

77. Section 35 of the Employment Act entitles the Claimant to one month's salary in lieu of notice in view of her unfair termination. The court also notes that the Respondent acknowledged owing the Claimant on account of notice and further indicated readiness to remit the amount.

78. The Claim is therefore merited and is allowed as prayed.

Unpaid Salary (April 2020 - June 2021)

79. The Claimant admitted having consented to unpaid leave for the first two months only. However, evidence before court shows that she did not report to work after recall and admitted she stopped reporting because of the variation of her contract.

80. Given these circumstances, the Court cannot award salary for the entire of this period as the Claimant did not render any services to the Respondent.

81. This claim, therefore, fails.

Half salary claim (July - November 2021)

82. The Claimant did not lead any evidence to show that she worked during this period or that half salary was agreed upon. This claim, therefore, similarly fails.

Accrued leave

83. The Respondent admitted that the Claimant had accrued leave days prior to proceeding for the unpaid leave. The claim is therefore merited and is allowed as prayed.

Compensation for unfair termination

84. The finding that the Claimant's termination is unfair on account of procedure, entitles her to compensation in accordance with Section 49 of the Employment Act, 2007.

85. Taking into account the Claimant's long service, the extraordinary circumstances caused by the COVID-19

pandemic and her failure to report to work upon recall, I deem an award of four (4) months' salary sufficient compensation for the unfair termination of her services.

86. In the final analysis, the Claimant's claim is allowed and the following reliefs granted: -

- a) A declaration that the Respondent unlawfully varied the Claimant's employment terms without proper consultation.
- b) A declaration that the Claimant's contract was unfairly terminated on account of procedure.
- c) An order that the Respondent pays the Claimant: -
 - i. One month's salary in lieu of notice at Kshs. 189,425
 - ii. Pay for 23 days accrued leave at Kshs. 145,225
 - iii. Four (4) months' salary as compensation for the unfair termination at Kshs.757,700/-
 - iv. Costs of the suit shall also be borne by the Respondent.

87. It is so ordered.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 12TH DAY OF MARCH, 2026.**

**C. N. BAARI
JUDGE**

Appearance:

Ms. Okumu present for the Claimant

Mr. Otiende present for the Respondent

Ms. Esther S- C/A