



Muga v Ojienda Sc, t/a Prof Tom Ojienda and Associates (Cause E047 of 2023) [2026] KEELRC 1252 (KLR) (8 May 2026) (Judgment)

Neutral citation: [2026] KEELRC 1252 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E047 OF 2023**

**AK NZEI, J
MAY 8, 2026**

BETWEEN

ALLAN MUGA CLAIMANT

AND

PROFESSOR TOM OJIENDA SC, T/A PROF TOM OJIENDA AND ASSOCIATES RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Statement of Claim dated 24th January, 2023 and sought the following reliefs:-
 - a. A declaration that termination of the Claimant's employment contract was substantively unjustified and procedurally unfair.
 - b. A declaration that the Respondent's action of terminating the Claimant's employment contract violated the Claimant's constitutionally protected right to fair labour practice and right to fair hearing.
 - c. An order of 12 months' salary to be paid to the Claimant for wrongful and unfair termination of employment at Kshs.2,236,080/= in line with Section 49 of the Employment Act.
 - d. Kshs.186,340/= being one month pay in lieu of notice as per Section 36 of the Employment Act.
 - e. Kshs.372,680/= as service pay at the rate of 15 days for the years worked in line with Section 35(5) of the Employment Act.
 - f. Kshs.391,313.79 being unutilized and unpaid leave days for 3 years of employment.



- g. Kshs.1,468,949.23 being gross underpayment of salary for 3 years of employment.
- h. Unpaid commission due at Kshs.9,750,000/=.
- i. An order for compensation for violation of the Claimant's constitutional right to fair labour practice and fair hearing as per Article 23(3) of the Constitution.
- j. A certificate of service as required under Section 51 of the Employment Act.
- k. Interest on (c), (d), (e), (f), (g) and (h) above from the date of filing to payment in full at Court rates.
- l. Costs of the suit and interest thereon from the date of Judgment until payment in full.

2. The Claimant pleaded:-

- a. that the Respondent employed him as an Associate Advocate in July 2018, as Staff No. 12, with a contractual monthly salary of Kshs.192,138/=.
- b. that it was a term of the contract that the Claimant would be entitled to annual salary increment of 20% on the base agreed salary (net salary).
- c. that it was a further term of the employment relationship that the Claimant would be entitled to a 15% commission from the total fees raised from all the legal briefs conducted by the Claimant.
- d. that the Claimant's performance was so satisfactory and exemplary that on 22nd December, 2022, the Respondent awarded him a Certificate of Appreciation for being the Firm's Commercial Law Practitioner of the year.
- e. that the Claimant was severally discriminated against by the Respondent during the period of his employment in that he was not paid bonuses when other employees were paid, and was at times subjected to staying out of the office without any proper cause.
- f. that in 2020, the Respondent arbitrarily reduced the Claimant's salary without any cause or notice while other employees retained their monthly earnings.
- g. that on 29th September, 2021 and out of the blues, the Claimant received a letter from the Respondent terminating his employment, on allegation that the Claimant had admitted ordering books without the authority of the office, which exposed the office to embarrassment.
- h. that the termination was not founded on any valid grounds, but on personal reasons unrelated to his professional competence. That even if, arguendo, the reason cited for termination were to be an act of gross misconduct, the law requires that the Claimant ought to have been given an opportunity to be heard. That the Claimant was not issued with a show cause letter, and was not invited to any disciplinary hearing.
- i. that the termination had no lawful basis, and violated the Claimant's right to due process, fair labour practice and to a fair hearing.



- j. that although both in the termination letter and in subsequent communication, the Respondent assured the Claimant that he would received all payments due to him, payment is yet to be made.
 - k. that the Claimant suffered, and continues to suffer financial distress as a direct consequence of the gross violations and repudiatory breaches by the Respondent.
 - l. that the decision to terminate the Claimant's employment was both procedurally unfair and substantively unjustified in that:-
 - i. whereas gross misconduct was alleged, the Respondent never complied with the provisions of Section 41 of the Employment Act.
 - ii. there was no valid reason for the termination, contrary to Sections 43 and 45 of the Employment Act.
3. Documents filed alongside the Statement of Claim included written witness statements of the Claimant (dated 24th January, 2023), Samson Omamo and Jeremiah Wanga. Also filed alongside the Claimant's statement of claim was the Claimant's list of documents dated 24th January, 2023, listing 6 documents. The listed documents were the Claimant's staff identity card, certificate of exemplary services awarded to the Claimant on 22nd December, 2020, a termination letter dated 29th September, 2021, transcripts of messages between the Claimant and the Respondent, demand letter dated 1st November, 2021, and salary and commission underpayment workings Report.
4. The Respondent defended the suit vide a Memorandum of Response dated 6th March, 2023. The Respondent admitted having employed the Claimant but denied his claim, and pleaded:-
- a. that the Respondent discovered too late that the Claimant was a fraud from the word go as the Respondent discovered that the Claimant was admitted to the Bar in 2018 but not 2017 as misrepresented by the Claimant through his application letter.
 - b. that although the Claimant had misrepresented his qualifications as including a Masters Degree from the University of Nairobi, the Respondent found out that the Claimant did not have a Masters Degree.
 - c. that the misrepresentations were meant to arm-twist the Respondent into giving the Claimant a salary far beyond his pay grade, as he neither had the alleged practice experience nor did he have a Masters Degree.
 - d. that the Respondent called the Claimant for a disciplinary meeting as he had gotten employment through material misrepresentation of facts as to his qualifications and years of experience; and that the Claimant pleaded for forgiveness as he was the sole provider for his family.
 - e. that the Respondent exercised restraint and allowed the Claimant to continue working with him as an Associate.
 - f. that the Claimant was being paid an all-inclusive salary of Kshs.120,000/=; but not Kshs.192,138/=. That the Claimant was not entitled to either 20% annual



salary increment nor 15% commission on total fees raised from all legal briefs conducted by him.

- g. that immediately after COVID, the Claimant took a rather lacklustre attitude towards work and:-
- i. reported to work late almost on daily basis and left as early as 2.00 pm without any basis.
 - ii. reported to work drunk on several occasions and ended up locking himself in his office to avoid being interrogated.
 - iii. failed and/or refused to comply with Court directions in several matters at the expense of clients' cases.
 - iv. that the Claimant was not discriminated against, and was not subjected to staying out of the office.
 - v. that on 10th February, 2021, the Claimant under the guise of being registered for Huduma Number brought an unidentified female to the office and engaged in sexual activities and drinking alcohol with her in the office, and left a used condom in the office waiting lounge as an outright disrespect to the office and his colleagues.
 - vi. that on 10th February, 2021, the Claimant was instructed by the Law Firm to take up instructions from one of its clients, Lavington Security Limited, to commence legal proceedings with respect to the recovery of Kshs.5,160,376.20; but refused to act upon the file seven months down the line, and was issued with a warning letter as a consequence.
- h. that the Claimant had no respect for authority, and insubordinated the Respondent and occasioned untold embarrassment to the Law Firm by ordering books worthy Kshs.157,000/= using the Law Firm's name and failing to pay for them. That the Claimant failed to respond to a show cause letter issued to him on 20th September, 2021 and engaged in mere denials at the hearing conducted on 28th September, 2021, leading to his summary dismissal on 29th September, 2021.
- i. that the Respondent came to learn that the Claimant, in the course of his employment, had engaged in acts of misconduct and had:-
- i. on 14th September, 2021 defrauded a client of the Law Firm, Lavington Security Limited, a total of Kshs.1,000,000/= under the pretext that he was responsible for receiving legal fees.
 - ii. on 20th April, 2021 defrauded the same client, Lavington Security Limited, a total of Kshs.1,000,000/= under the pretext he was responsible for receiving legal fees.
 - iii. on 10th September, 2021 defrauded Lavington Security Limited of a total of Kshs.50,000/= under the pretext that he was responsible for receiving legal fees.



- iv. on 30th September, 2021, one day after his summary dismissal, the Claimant defrauded a client of the Law Firm, Lavington Security Limited, a total of Kshs.300,000/= under the pretext that he was responsible for receiving legal fees.
 - v. that sometimes in the year 2021, the Claimant defrauded one of the Law Firm's client, Kezia Njambi Maingi, a total of Kshs.100,000/= under the pretext that he was responsible for receiving legal fees.
 - vi. that none of these monies were ever remitted to the Law Firm.
 - m. that the Claimant is a pathological liar who deserves no equity from the Court.
 - n. that the Claimant was paid an ex-gratia payment of Kshs.820,000/= despite his unfathomable conduct; and it is despicable to aver that he was not paid.
 - o. that the Claimant went as far as threatening to interfere with the Respondent's political ambitions in a bid to blackmail him to give him money.
 - p. that the Claimant's termination was not unfair, unjust or in violation of rights, and that the Claimant was not entitled to any damages.
5. Documents filed alongside the Respondent's statement of response included the Claimant's witness statement dated 6th March, 2023 and a list of documents dated 9th March, 2023, listing 7 documents. The listed documents included the Respondent's letter dated 13th August, 2021, notice to show cause dated 20th September, 2021, the summary dismissal letter dated 29th September, 2021, minutes of a disciplinary hearing held on 28th September, 2021, a letter from Lavington Security Limited dated 8th December, 2021, an email from the Claimant dated 9th December, 2021, and a letter to the Claimant dated 22nd December, 2022.
 6. The Respondent also filed witness statements of Meso Oganda, Monica Waweru, Lenson Murungi, Jackson Omwansa Nyamweya and Serah Njoki Esther, all dated 9th March, 2023.
 7. The Claimant filed a Reply to the Respondent's Response dated 10th July, 2023, and joined issues with the Respondent.
 8. The Claimant filed a further list of documents dated 4th December, 2024, listing 1 document, being the Claimant's bank account statements for the period 7th October, 2021 to 26th November, 2021.
 9. Trial commenced before Dr. Jacob Gakeri, J on 21st May, 2024. The Claimant adopted his filed witness statement, which to a great extent restates the averments made in the statement of claim, and produced in evidence his filed documents referred to at paragraph 3 of this Judgment.
 10. Cross-examined, the Claimant testified that he was employed in July 2018. That his contract was oral and that the agreed salary was Kshs.140,000/= with 20% increment per year. That he worked for 3 years and did not apply for leave, that his salary was being deposited in the bank, and that he was underpaid.
 11. The Claimant further testified (under cross-examination):-
 - a. that the Respondent told him that he would earn commission, that this was part of the offer and was never paid.



- b. that the Claimant was never given the notice to show cause, and that there were no proceedings on 28th September, 2021.
 - c. that the Claimant received Lavington Security Limited's letter dated 8th December, 2021 on refund of money (Kshs.1,000,000/=; Kshs.1,000,000/= and Kshs.300,000/=) after termination. That although he responded to the letter vide an email dated 9th December, 2021, he did not refute the demands of the letter.
 - d. that the Claimant was paid Kshs.820,000/=.
12. Re-examined, the Claimant testified that the employer deposited cash in the bank, and that there were no payslips given; and that the Claimant did not sign the (disciplinary) minutes.
13. The Claimant's second witness, Samson Omamo (CW-II), adopted his filed witness statement as his testimony. On being cross-examined, the CW-II testified that he was not privy to the terms of the Claimant's terms and conditions of employment; and that he was not aware of any hearing before termination.
14. The Claimant's third witness, Jeremiah Wanga (CW-III) adopted his filed witness statement as his testimony. Cross-examined, CW-III testified that he had requested the Claimant to market his books through the Respondent's firm and marketed, but was not able to sell. That he gave the Claimant about 7 samples, whose titles he could not recall. That the Claimant ordered books from him and paid in cash. That he (the witness) had never been to the Respondent's office; and had never sold books to the Respondent. That he could not remember having tweeted about the Respondent (Prof. Tom Ojienda).
15. The Claimant's fourth witness, Walter Moenga (CW-IV) adopted his filed witness statement as his testimony. Cross-examined, CW-IV testified that he was a Certified Public Accountant, certified in 2007. That his report was dated 8th April, 2022. That the terms of the basis of his analysis were figures given by the client by word of mouth. That the methodology used was based on the information availed by the Claimant/Client; and variables were given by word of mouth. That the witness saw some WhatsApp messages between the Claimant and the employer; and that there was no reference of the Claimant in the report, though it had been prepared on his behalf.
16. I became seized of the matter herein on 24th October, 2024 on being transferred to ELRC Nairobi Court Station that month, and I ordered that the Court's proceedings taken before the previous trial Judge be typed and certified, which was subsequently done.
17. The Respondent's case opened before me on 27th February, 2025. The Claimant's first witness, Oganda Meso (DW-1) adopted his filed witness statement as his testimony, and further testified that it was a misconduct for one to order books for personal use through the firm.
18. Cross-examined, DW-I testified:-
 - a. that Mr. Wanga shamed the firm through twitter posts, and that the minutes (on disciplinary hearing) were only signed by the managing partner. That the Claimant refused to sign. That there was nothing in the minutes to show that the Claimant refused to sign.



- b. that Wanga attended the disciplinary hearing and testified that he had pulled down the offensive clips/posts. That there was no entry in the minutes to show that he (Wanga) had attended the meeting.
 - c. that he could not testify on whether or not the show cause letter was received.
19. Jackson Omwanza Nyamweya (RW-2) adopted his filed witness statement as his testimony, and so did Monica Waweru (RW-3). Cross-examined, RW-3 testified:-
- a. that she was not the one who dispatched the show cause letter to the Claimant, and could not tell whether there was any document showing that it was sent.
 - b. that the disciplinary minutes do not mention the show cause letter, and whether or not the Claimant responded to it. That the witness (RW-3) did not sign the minutes of the disciplinary hearing, though she attended.
20. The Respondent (RW-4) testified and adopted his filed witness statement, which substantially restates the averments made in Response to claim, as his testimony.
21. The Respondent further testified:-
- a. that the Claimant had worked for him, and that the Claimant had indicated that he had been admitted in 2017 as opposed to 2018.
 - b. that he issued a show cause letter because Jeremiah Wanga had severally gone to his office demanding Kshs.157,000/= for books that he had allegedly ordered. That he had not ordered for any books.
 - c. that the Claimant had ordered the books for his personal use.
 - d. that Jeremiah Wanga (the Publisher) went on twitter and published that the Respondent had ordered for the books, which greatly embarrassed the Respondent.
 - e. that the Respondent asked the Claimant to attend a disciplinary hearing on 28th September, 2021. That the Claimant attended the hearing and asked to be pardoned; but the disciplinary committee recommended termination for gross misconduct.
 - f. that even after summarily dismissing the Claimant, the Respondent paid him a total of Kshs.820,000/= as follows:-
 - i. Kshs.120,000/= on 7th October, 2021 (by transfer); and
 - ii. Kshs.550,000/= on 21st November, 2021
 - iii. Kshs.150,000/=.
 - g. that times were hard then, and that the Respondent had forgiven the Claimant, whom he had mentored.
22. Cross-examined, the Respondent testified:-
- a. that the Claimant had not been issued with a letter of appointment setting out his terms of employment;



- b. that the Claimant was terminated in September 2021.
 - c. that the Claimant was being paid by transfer of money into his account.
 - d. that whenever the Claimant travelled and was entitled to a refund, the refund was paid at the end of the month together with his pay.
 - e. that this was why there were payments of Kshs.140,000/= on 29th October, 2018 and 29th March, 2019 respectively.
 - f. that the Claimant's salary was Kshs.120,000/=; and that for Court attendance, it depended on how many times one had travelled. That the Respondent paid Kshs.2,000/= per Court attendance.
 - g. that there were no payslips, and that the Claimant had none. That the Claimant had requested to be paid an all-inclusive sum.
 - h. that the substance of the reason for termination was that the Claimant had bought books for personal use in the Firm's name.
 - i. that the Respondent did not have the tweet in issue, as it had been deleted together with the reactions thereto.
 - j. that the show cause letter issued was dated 20th September, 2021; and that the same did not have the Claimant's signature on its face. That the letter was served on the Claimant by the office.
 - k. that the Respondent never underpaid the Claimant, and even paid him after termination.
23. Re-examined, the Respondent testified that he chaired the disciplinary meeting and signed the minutes.
24. Having considered the pleadings filed herein and the evidence presented thereon, issues that fall for determination, in my view, are as follows:-
- a. Whether termination of the Claimant's employment by the Respondent amounted to a violation of the Claimant's right to fair labour practices and fair hearing as protected by Articles 41 and 50 of *the Constitution* of Kenya; and whether the Claimant is entitled to reliefs for such violation.
 - b. Whether termination of the Claimant's employment by the Respondent was unfair.
 - c. Whether the reliefs sought are merited.
25. On the first issue, the suit herein is a simple claim for compensation arising from an alleged unfair termination of employment. The suit does not raise any constitutional moment, as it does not demonstrate any question of interpretation or application of *the Constitution*. The issues raised by the Claimant fall within the purview of the *Employment Act* 2007.



26. The Court of Appeal stated as follows in the case of Summaya Athman Hassan – Vs – Paul Masinde Simidi & Another [2019] eKLR:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the *Employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of a certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.

The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of *the constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*. We adopt and uphold the general principle in the persuasive authority in BARBARA DE KLERK (Supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the Communication's Commission Case (supra).”

27. Further, on the same issue, it was stated as follows in Francis Atonya Ayeka – Vs Kenya Police Service & Another [2017] eKLR:-

“... The cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. . . . A litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of *the Constitution* on the right to fair labour practices. The purpose of *the Constitution* is that the right to fair labour practices is given effect in various statutes, of which the *Employment Act* and the *Labour Relations Act* are primary. The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to *the Constitution*.”

28. The Claimant’s claim for a declaratory order and for damages based on an alleged violation of Constitutional rights and/or rights as sought herein cannot be entertained and/or allowed in a suit based on alleged breach of an employment contract or unfair/wrongful termination of employment. The Claimant cannot purport to go around the *Employment Act* and purport to found a claim for damages directly on *the Constitution*. Prayers (b) and (i) as set out in paragraph 1 of this Judgment are rejected.
29. On the 2nd issue, for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. (Walter Ogal Anuro – vs – Teachers Service Commission [2013] KEELRC 386 (KLR)).



30. In the present case, it was a common ground that the Claimant's employment with the Respondent was terminated vide a summary dismissal letter dated 29th September, 2021. The Claimant denied having been served with a show cause letter or to have attended a disciplinary hearing before termination. The Respondent, on the other hand, maintained that the Claimant was issued with a show cause letter dated 20th September, 2021 and that he attended a disciplinary hearing on 28th September, 2021, before being issued with a summary dismissal letter on 29th September, 2021.
31. The Respondent produced in evidence a show cause letter dated 20th September, 2021. The said show cause letter was not shown to have been served on the Claimant or to have been received by him. No evidence was adduced on how the letter was given to the Claimant, and when.
32. In matters employment, a show cause letter serves the purpose of a charge sheet, as it sets out the accusation and/or a catalogue of accusations levelled against an employee, and gives him an opportunity to respond to those accusations in writing within a reasonable time frame that must be set out in the show cause letter. Such reasonable time, in my view, should never be less than seven working days.
33. A show cause letter must always be served on the accused employee, who must acknowledge receipt thereon, and indicate the date and time received. If the employee refuses to either acknowledge receipt or to indicate time, the person serving the show cause letter must make a record of the employee's decline, and the date and time of the same; and must keep the record for purposes of future disciplinary proceedings and/or litigation.
34. The foregoing required acts of due diligence on the part of the employer, in my view, fall within the parameters of Section 45(4)(b) of the *Employment Act* 2007 which provides that a termination of employment shall be unfair for the purposes of Part VI of the Act (Termination and Dismissal) where –
- “(b) it is found out that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”
35. Neither the Respondent nor his witnesses testified to having served and/or dispatched the alleged show cause letter on/to the Claimant. Indeed, the Respondent's Office Administrator (Monica Waweru) testified that she did not know who had dispatched it. As already stated, the Claimant denied having received the said letter.
36. The show cause letter states in part:-
- “Let us have your written response to this notice to show cause within seven (7) days and thereafter we shall hold a disciplinary hearing on 28th September, 2021 at 9.00 a.m in the Office's Boardroom. You are free to bring along a fellow employee/advocate of your choice in the hearing.”
37. It was testified by the Respondent that the Claimant did not respond to the show cause letter, but attended the disciplinary hearing on 28th September, 2021. The Respondent's witnesses, save for Jeremiah Wanga, testified that the Claimant attended the disciplinary hearing.
38. The Respondent produced in evidence minutes of the disciplinary hearing said to have been conducted on 28th September, 2021. The said minutes are not shown to have been signed by those in attendance; and particularly members of the disciplinary panel. The Claimant is not listed as having been part of



those in attendance, though his name is mentioned in what appears to be a written report on what happened at the venue.

39. I have stated before, and again do state here, that disciplinary proceedings are legal proceedings as Section 41(2) of the [Employment Act](#) provides as follows:-

“(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

40. The words “hear and consider” in the foregoing mandatory provision of the statute and the words “entitled to have another employee . . .” as used in Section 41(1) of the Act contemplate a formal physical hearing, at which oral presentations are made by an accused employee and a fellow employee or a Trade Union Official of his choice. In my view, the representations made must be recorded as made and when made, but not as a reported speech or a report written by a person who may decide what to write and how to write it. Those in attendance at the hearing, including the accused employee, ought to confirm such attendance and ownership/correctness of the proceedings by appending their signatures thereon.

41. In the present case, the minutes exhibited by the Respondent are shown to have been signed by the Respondent only, and do not, in my view, contain any representations made by the Claimant at the disciplinary hearing.

42. In view of all the foregoing, the Respondent is not shown to have adhered to the mandatory procedure set out in Section 41 of the [Employment Act](#) regarding employees accused of misconduct and poor performance. I make a finding that termination of the Claimant’s employment was procedurally unfair.

43. On substantive justification, and according to the pleadings and evidence on record, the Claimant was summarily dismissed from employment for using the Respondent’s Law Firm’s name to order for books from Jeremiah Wanga of Fame Book Stores worthy Kshs.157,000/= for his personal use. Nothing, however, was presented in evidence to show that the Claimant, indeed, ordered for the books in issue in the Respondent’s Law Firm’s name. The bookseller, Jeremiah Wanga (CW-III) testified that the Claimant had ordered for the books and had paid for them in cash. The alleged offensive tweets by him (CW-III) were never presented in evidence. It was testified for the defence that the tweets had been deleted. The Court was not shown any admission by the Claimant to having ordered for the books in the Law Firm’s name. The books issue is shown to have been the sole reason for termination of the Claimant’s employment; and I am unable to find any evidence on record pointing to the validity of this reason.

44. Section 43(1) of the [Employment Act](#) provides as follows:-

“(1) In any claim arising out of a termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”



45. Section 45(2)(a) of the *Employment Act* provides as follows:-
- “(2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. that the reason for the termination is valid”.
46. Termination of the Claimant’s employment was, therefore, procedurally and substantively unfair. I so find and declare.
47. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of six months’ salary in compensation for unfair termination of employment.
48. The Claimant’s monthly salary at the time of termination was disputed. The Claimant pleaded that he was earning Kshs.192,138/= per month, but testified (under cross-examination) that he was earning Kshs.140,000/= per month. There were no payslips exhibited, and the Court was told by both parties that they did not have a written contract.
49. The Respondent testified that the Claimant’s monthly salary was an all-inclusive sum of Kshs.120,000/= . In view of the foregoing material contradiction on the part of the Claimant regarding his monthly salary, I accept the Respondent’s evidence that the Claimant’s salary was Kshs.120,000/= per month. The equivalent of six (6) months’ salary is Kshs.120,000 x 6 = Kshs.720,000/= which I award the Claimant for unfair termination of employment.
50. The claim for one month salary in lieu of notice is allowed at Kshs.120,000/= pursuant to Section 35(1)(c) of the *Employment Act*.
51. The claim for Kshs.372,680/= being service pay at the rate of 15 days for the years worked is declined as the same is not shown to have been fixed pursuant to Section 35(5) of the *Employment Act*. The Claimant did not demonstrate that he was entitled to service pay, by virtue of either his employment contract or a Collective Bargaining Agreement (CBA) covering him.
52. The Claimant claimed Kshs.391,313.79 being payment for unutilized and unpaid leave days for 3 years of employment. It was a common ground that the Claimant was employed by the Respondent in July 2018, that he was terminated on 29th September, 2021, and that he did not take leave during the period of employment. The Claimant worked for 3 years and was earning Kshs.120,000/= per month. Pursuant to Section 28(1)(a) of the *Employment Act* –
- “(1) An employee shall be entitled to –
- (b) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay.”
53. Giving the Claimant 21 working days’ leave for every twelve consecutive months of service, I award the Claimant Kshs.252,000/= being payment for unutilized and unpaid leave days.
54. The claim for Kshs.1,468,949.23 being salary underpayment was not proved, either on a balance of probabilities or at all, and is declined.
55. The claim for Kshs.9,750,000/= being unpaid commissions due was not proved, and is declined. There was no written contract exhibited providing for payment of such commissions, and no valid evidence



on accrual of such commissions was produced in Court. Indeed, Walter Moenga (CW-IV), a Certified Public Accountant, testified that the report that he presented in Court had been prepared by him based on figures given to him by the Claimant by word of mouth. Such report was of no evidential value, and I refuse to find any such value in it. I reject it.

56. The claim for issuance of a certificate of service is allowed pursuant to Section 51(1) of the *Employment Act*.
57. I cannot conclude this Judgment without taking note of the Respondent's pleading and evidence in Court that he made an ex-gratia payment of Kshs.820,000/= to the Claimant after dismissing him; and that he made the said payment due to the fact that times were hard then, and that the Claimant was someone that he (the Respondent) had mentored.
58. Although this was a noble gesture by an employer making the kind of allegations against a former employee as are set out in paragraph 4 of this Judgment, the Court will not take into account the said sum of Kshs.820,000/= in computing the final award payable to the Claimant, as the payment was made ex-gratia.
59. The Concise Oxford English Dictionary (Twelfth Edition) defines the word ex-gratia as –

“(with reference to payment) payment done from a sense of moral obligation rather than because of any legal requirement.”
60. In sum, and having considered written submissions filed herein on behalf of the parties herein, Judgment is hereby entered for the Claimant against the Respondent in the following terms:-
 - a. Compensation for unfair termination of employment Kshs.720,000/=.
 - b. Payment in lieu of notice Kshs.120,000/=.
 - c. Unutilized and unpaid leave days Kshs.252,000/=.Total = Kshs.1,092,000/=.
61. The awarded sum shall be subject to Pay As You Earn (PAYE) pursuant to Section 49(2) of the *Employment Act*.
62. The Claimant is awarded interest on the awarded sum, at Court rates. Interest shall be calculated from the date of this Judgment until payment in full.
63. The Respondent shall issue the Claimant with a Certificate of Service within thirty days of this Judgment.
64. The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2026

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI



JUDGE

Appearance:

Mr. Amimo for the Claimant

Mr. Ashioya for the Respondent

