



Andera v Aimsoft Limited (Employment and Labour Relations Cause 1791 of 2017) [2025] KEELRC 60 (KLR) (16 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 60 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1791 OF 2017
K OCHARO, J
JANUARY 16, 2025**

BETWEEN

ANGELA AUMA ANDERA CLAIMANT

AND

AIMSOFT LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 19th March 2018, the Claimant sued the Respondent seeking against it the following reliefs: -
 - a. Loss of Employment [20 years x 207, 848] KShs. 4,159,960
 - b. Service Pay [4.5 x207,848] KShs. 935, 316
 - c. Pay in lieu of Notice KShs. 207. 848
 - d. NSSF for June 2014, May & June 2017 KShs. 1,200.
 - e. CIC Pension Plan April, May, June, Sept, Oct KShs. 93, 625.
 - f. Interest on [a], [b] and [c] at court rates from the day each payment fell due and payable until payment in full.
 - g. Costs of this suit.
2. In response to the Memorandum of Claim, the Respondent filed a Response to the Statement of Claim dated 27th September 2018, denying the Claimant's assertions that it maliciously and unlawfully terminated her employment contract and that she is entitled to the reliefs sought.



Claimant's case

3. At the hearing, the Claimant adopted her witness statement dated 24th August 2017 as her evidence in chief. She stated that she first came into the employment of the Respondent, on 14th January 2013 as a Business Development Manager, at an agreed starting salary of KShs. 175,000 per month. According to the appointment letter, the salary was reviewable upwards annually depending on her performance, and the discretion of the Respondent.
4. It was a further term of her employment contract that she was to earn commissions and bonuses depending on business profitability flowing from her direct sales, as per the Respondent's incentive policy.
5. She further stated that she successfully completed her six months' probationally period and on 5th August 2013, she was confirmed into employment a permanent employee. In the confirmation letter, targets were set for her. For the period August 2013 to July 2014, she was required to secure three clients whose cumulative value would be USD 150,000. Her commission was to be 5% of the gross profit of the new business brought in. Thereafter, this target wasn't reviewed.
6. She Contended that she brought in business from various clients in the years 2014, 2015, 2016, and 2017, under the "Main mother product AIMS Enterprises" as follows:
 - a. 2014-APA Insurance Uganda USD 220,000
 - b. 2015-Special Guarantee Fund Rwanda USD 347, 000
 - c. 2016- Reunion Insurance Malawi USD 265,844
 - d. 2017- MO Assurance Tanzania USD 220, 080
7. Further, under the new product that she personally suggested, and was subsequently developed by internal engineers – AIMS -VAMS [Visitors Access Management System], she secured the following clients and business for the Respondent:
 - a. 2014- Geminia Insurance -Kenya KShs. 130,000
 - b. 2015- I & M Building KShs. 150,000
 - c. 2016-Westwood Building -Westlands Kenya KShs. 150,000
 - d. 2016- Cardinal Otunga Plaza-CBD Nairobi KShs. 140, 000
8. The foregoing notwithstanding, the Respondent never paid her any commissions, bonus, award, or even formally appreciated her effort.
9. With the sole aim of depriving her commission earnings, the Respondent's General Manager at all material times manipulated her performance by including other Managers from the Finance, Projects, Technical and Development teams, to act on some aspects of her sales cycle, hence claiming that she never merited the commissions individually.
10. On 27th June 2017, via email, she briefed the General Manager on some business deals which had stalled. In response, the General Manager asked for an emergency meeting that afternoon whose objective was to deliberate on measures that needed to be implemented for the successful closure of the business deals. Surprisingly, in the meeting, the General Manager lectured her on how her performance was unsatisfactory, she was the wrong person for the job and not the type of person who could lead the



- Respondent company to rise financially. She then handed her an envelop and pronounced that she had been dismissed from employment.
11. There hadn't been any warning or notification that her performance was not satisfactory. No performance appraisal was conducted by any panel. She asserted further that she was dismissed without notice, contrary to the stipulations of her employment contract.
 12. The Respondent did set out her terminal dues in the letter thus, basic salary for June 2017 [KShs. 207,840], One month's salary in lieu of notice [KShs. 207,840], and outstanding leave days, 21.5 days [KShs. 204,305.14]. This notwithstanding, the Respondent didn't pay her the June salary until August 2017, and the notice pay and compensation for the unutilized leave days, at all.
 13. The Respondent refused to pay the Commissions for the businesses she secured for it. Prior to her dismissal from employment, the Respondent hadn't for the months of April, May, June, September and October 2016, remitted her contributions to her pension scheme, KShs. 93,625. Similarly, it didn't remit NSSF contributions for June 2014, and May and June 2017, totaling to KShs. 1200.
 14. Cross-examined by Counsel for the Respondent, the Claimant testified that currently she is working in Canada, having gone there in 2017. She started working in 2019, after completing her studies.
 15. She reiterated that under her contract of employment, her entitlement to commissions and bonuses was dependent on the profitability of the sales attributed to her sales.
 16. At her appointment, the Respondent didn't set forth for her any performance targets. The targets were brought in at confirmation into employment, through the confirmation letter. Per the schedule thereon, the targets were supposed to be achieved within the first one year.
 17. The document that she executed on 6th August 2013, did set business targets for her. It did stipulate the business value as at least USD 150,000[or its equivalent] per new site.
 18. She refuted the contention that the business was generated by another employee other than her.
 19. In 2014, she generated KShs. 125,000 from I&M Bank.
 20. The Claimant didn't agree with the suggestion that in 2014, she didn't meet her targets. She had three businesses signed. Two out of the three were repeat clients.
 21. She testified that Counsel's suggestion that the expected target for the financial year 2015, was USD, 410,000 wasn't correct. Further, it flowed from Counsel's failure to differentiate between the budget that she had prepared for the figure and a business target. She denied that during the period, the only business brought in was for USD. 159,153.
 22. She further testified that contrary to the Respondent's assertion, in 2016, it didn't bring in an Independent Consultant to generate business for it. Kevin Ombunge was not an Independent Consultant.
 23. She admitted that in 2017 she didn't meet the target of USD. 450,000. Only USD 220,080 was achieved from a Tanzanian firm, which was introduced to the Respondent by another customer.
 24. The letter dated 15th March 2016, spoke to her poor performance.
 25. While in the employment of the Respondent, she was looking forward to relocating to Canada. As such, it wasn't her intention to continue working for 20 years.
 26. The clearance form which she executed expressly placed forth the number of leave days that she hadn't utilized.



27. In her evidence under re-examination, she stated that she left for her studies in Canada in August 2017 after the termination of her employment.
28. She confirmed that in her Statement of Claim, she did not ask for unpaid commissions and bonuses.
29. Targets were only set for the Financial year 2013-2014. She further stated that contrary to the Respondent's assertion, the business value achieved during the period, was more than 140,080. The Respondent didn't capture all her sales.
30. In practice, as a Business manager, one can get business referrals. The business earned out of the referrals is considered to be earned as such through the Business manager. However, she was surprised to learn in the course of the proceedings herein, that the Respondent wasn't at all material times treating the business as such.
31. She asserted that she was never placed on a performance improvement plan.

Respondent's case

32. The Respondent presented one witness, GEORGE K MWANGI, its General Manager to testify of its behalf. At the hearing, the witness adopted his witness statement dated 15th May 2019, as his evidence in chief, and tendered the documents filed herein by the Respondent as its documentary evidence.
33. The witness stated that he was appointed as the Respondent's acting General Manager after the previous General Manager Ms. Leah Karobi left the Respondent's employment. He previously worked as the Respondent's Finance Manager and knew the Claimant personally. His evidence on the instant matter is solely based on the Claimant's employment records in the custody of the Respondent.
34. He stated that the Claimant was employed by the Respondent on 14th January 2013 as a Business Development Manager through a letter of appointment dated 23rd January 2013. She was on probation for a period of six months and was subsequently confirmed into employment vide a letter dated 5th August 2013.
35. Upon confirmation into employment, the Claimant became entitled, inter alia, to a Contributory Group Pension scheme, where she and the Respondent were each required to contribute 5% towards the scheme with CIC Life Insurance Company and a 5% sales commission based on the profitability of the business and her direct sales.
36. The Respondent didn't set any business targets for the Claimant at her appointment. However, upon confirmation of her appointment as the Business Development Manager, the Claimant was provided with her Business Targets for 2013/2014, which were annexed to the letter.
37. For the year 2013/2014, the Claimant was expected to bring in, a minimum of three [3] new clients and a business value of at least 150,000 USD [or its equivalent] per new site. She was then entitled to a commission of 5% of the gross profit, which was payable according to the project phases as payment was received from the Respondent's Client. Failure to meet her targets would be regarded as an under-performance of her duties and the Respondent would be entitled to take any action as it deemed necessary against her.
38. In the 2013 financial year, the Claimant generated VAMS sales worth KShs. 130,000 from Geminia Insurance Company. This was below the expected business target for the Claimant for that year.
39. He further stated that in the 2014 financial year, the Claimant's expected business target for the AIMS product was 530,000 USD. However, the actual value of business brought in, that year amounted to



USD 140, 008, from APA Insurance Company Limited Uganda. This was below the expected target. Moreover, this business wasn't acquired through the Claimant's direct sales activities but through the witness's direct contact with the Respondent's Project Manager Mr. Vincent Bitok during his tenure as the Finance Manager.

40. The witness stated further that during the 2014 financial year, the Claimant was also expected to reach a business target for VAMS product worth KShs. 6,000,000. However, the Claimant generated new business from I &M Bank in Kenya worth KShs. 125,000.
41. In the financial year 2015, the Claimant's expected business target for AIMS product was USD. 450,000. The actual value of business that was brought in, that year, amounted to USD 159,000 from the Special Guarantee Fund, Rwanda. This business wasn't acquired by the Claimant's direct sales activities but through one of the Respondent's former employees Mr Innocent Mugabo who directly contacted the Respondent's Projects Manager and the witness.
42. The witness asserted further that during the 2015 financial year, the Claimant's expected business target for VAMS product was KShs. 3,600,000. However, the Claimant failed to meet the target and brought no business at all in relation to the product.
43. In the 2016 financial year, the Claimant was expected to achieve a business target for AIMS product worth USD. 450,000. However, the actual business brought in during the period amounted to USD. 255,844 from Reunion Insurance, Malawi. This was below the Claimant's expected business target. Further, the business wasn't acquired through her direct sales activities as the client was referred to the witness and the Respondent's Project Manager by one of the Respondent's Clients. She wasn't therefore responsible for bringing in that new business.
44. In the financial year, the Respondent didn't set any business target for her with respect to the VAMS product due to her dismal performance over the previous years. Instead, it contracted an independent commission agent, Kevin Ombunge to handle sales with respect to the product for that year. The agent brought in business worth KShs. 150,000 from Cardinal Odunga Plaza, and KShs.130,000 from Westwood plaza both based in Nairobi. The Claimant didn't bring in any business in respect of the product.
45. In the financial year 2017, the Claimant was expected to bring in business with a value of USD. 450,000 for the AIMS product, but the actual value of the business that was brought in was USD. 220,080 from MO Assurance, Tanzania. The Respondent's existing client referred the client to the witness.
46. In the 2017 financial year, the Respondent didn't set any business targets for the Claimant for the VAMS product. Instead, the Respondent again contracted the Independent Commission agent, Kevin Ombunge to handle sales for the product.
47. The witness asserted that the Claimant's performance over the years demonstrated that she lacked the ability to assess and determine the viability of a sales prospect accurately, as she would present several seemingly strong prospects that would drop off two weeks later.
48. She was aware she was not eligible to claim sales commissions as she did not meet the minimum business targets for each financial year.
49. The Claimant was informed of her termination from employment on 27th June 2017 during a meeting convened by the previous General Manager. During the meeting, she was informed of why the Respondent was considering terminating her employment. The Claimant was informed that the lack of improvement in her performance despite several warnings on the same, as well as the absence of



credible sales prospects, had led the Respondent to conclude that she was no longer a suitable person for the position she held.

50. The witness stated that after the Claimant's employment was terminated, she was given two days to enable her to complete the clearance process. She completed the process on 28th June 2018 and returned the company laptop on that date. Thereafter, she was paid her salary for June.
51. He further stated that at the time of termination, he still had 10 leave days outstanding. The Respondent paid her for the same as part of her final dues. There are no outstanding National Social Security Fund or National Health Insurance Fund contributions that remain unremitted. The Respondent duly remitted all the statutory contributions.
52. He asserted that the Claimant was entitled to one month's notice or one month's salary in lieu of notice. The Respondent duly paid the Claimant all salary owed up to and including salary for July 2017.
53. Cross-examined by Counsel for the Claimant, the witness stated that at the time the Claimant was being employed, the Respondent was selling a Product called AIMS. The targets set out on the Business Targets document tendered by the Respondent as evidence were not for this specific product only. He couldn't speak with certainty as to when the VAMS product was brought on board.
54. The witness disputed the assertion by the Claimant that the VAMS product was her brainchild. The product was developed by the Respondent's internal Engineers, in the Development Department. However, he admitted that in the year 2014, there were sales in relation to the product.
55. The witness stated that one of the duties of the Claimant as per her job description was to assist the Respondent realize its vision by developing new products.
56. The business targets set out in the Business Target document mentioned above related to the financial year, 2013/2014. These targets were to be reviewed yearly. For the subsequent financial years up to the time her employment was terminated, the reviews were done. However, the Respondent did not present any document[s] before the Court to support the alleged reviews and the fact that there were targets that the Claimant committed herself to, for the years.
57. He stated that though in her witness statement he contends that in the year 2014, the Claimant was to meet a target of business sales worth KShs. 6,000,000, the Respondent didn't have any document to support this assertion.
58. The Respondent didn't lodge any document in court to show that indeed there was a principal-Agent relationship between the Respondent and Kevin Ombunge. The Respondent didn't write to her, instructing her to stop marketing the VAMS product.
59. The Respondent's Human Resource Policy provided for performance improvement plan. There is nothing to demonstrate that the Claimant was ever placed on any such plan.
60. He admitted that though in her witness statement he did state that the Claimant didn't make any sales, the termination letter indicated the contrary, she had closed three.
61. As per the Respondent's Human Resource Policy, the Claimant was supposed to be issued with a show cause letter, but the Claimant wasn't served with any. Further, there are no disciplinary hearing minutes to demonstrate that there was a disciplinary hearing against her.

Analysis and Determination

62. I have carefully considered the pleadings by the parties herein, their evidence, and submissions by their respective Counsel, and distil the following issues for determination, thus: -



- i. Whether the termination of the Claimant’s employment was fair.
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the termination was fair.

63. In determining the appropriateness of termination of an employee’s employment or summary dismissal of an employee from employment, this Court is enjoined to take into account the totality of the circumstances of the matter and the fact that the burden to prove the fairness of the termination or dismissal rests with the employer. In the persuasive decision in *Theewatersskloof Municipality V- Salga* [2010] 10 BLLR 1216[LC], 1223, the South Africa Labour Court aptly summed it thus;

“The core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer’s decision was fair.”

64. Section 35[1][c] of the *Employment Act*, 2007 provides;

A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made be performed in Kenya, be deemed to be: -

- a.
- b.
- c. Where the contract is to pay wages or salary periodically at intervals of exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing;

and Section 35[4] provides:

“Nothing in this section affects the right-

- a. Of an employee whose services have been terminated to dispute lawfulness or fairness of the termination in accordance with provisions of section or,
- b. of an employer or an employee to terminate contract employment without notice for any cause recognized by law”

65. Section 36 of the Act provides for payment in lieu of notice thus: -

“.....either of the parties to a contract of service of which section 35[5] applies may terminate the contract without notice upon payment to the other party of the remuneration which would have been issued by the other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section”

66. Interpreting these provisions, the Respondent’s Counsel argued that they went hand in hand with the Respondent’s Human Resource Manual which stipulates that either party may terminate the contract by giving the other party one month’s salary in lieu of notice. The Claimant was paid one month’s salary in lieu of notice upon termination of her employment on account of poor performance.



67. The submissions express Counsel's thinking that having paid salary in lieu of notice, the Respondent was entitled to terminate her employment it did. This line of thinking is unpersuasive. Certainly, the same appears to be a product of reading certain provisions of the Act in isolation from others, consequently blurring the Respondent from seeing the whole picture on the matter. The position is not aligned with the structure of the post-2007 employment and labour relations regime and the import thereof.
68. The provisions of the *Employment Act*, of 2007 on unfair dismissal dislodged the ability of employers at common law to dismiss employees without cause. At common law, an employee could be dismissed without reason[s] for as long as he was given reasonable notice or pay in lieu.
69. Section 45 of the *Employment Act*, dictates that no employer shall terminate the employment of an employee unfairly. According to the provision, termination of an employee's employment can only be considered to have been fair if there was procedural fairness in the process leading to the decision to terminate, and the reason[s] for the termination were valid and fair.
70. Section 41 of the Act provides for a mandatory procedure that any employer contemplating terminating an employee's employment has to adhere to. The procedure requires that the employer notifies the employee of its intention and the grounds fueling the intention. Upon notification, the employer must then allow the employee adequate time to prepare, and make representations on the ground[s]. The employer must consider the representation made before making a final decision on the matter.
71. In the case of *National Bank of Kenya v Samuel Nguru Mutonyi* [2019] eKLR, the Court of Appeal stated;
- “We fully adopt the above position in law that the Bank ought to have invoked the process when contemplating termination of the Claimant's employment. None of the above procedures were outlined by DW1 as having been undertaken by the Bank before terminating the Claimant's employment. We therefore find no basis for interfering with the Judge's finding that the procedure employed by the Bank to terminate the Claimant's employment was unprocedural.”
72. The notification contemplated under the provision must expressly and clearly show the employer's contemplation to terminate the employee's employment and the grounds spurring the same. In my view, any letter, or communication in any form that doesn't speak to these two aspects cannot qualify to be a proper notification under the section.
73. The Respondent's Counsel submitted that the letters dated 7th November 2014, 15th March 2016 and 7th June 2017 amounted to a fair hearing. I find considerable difficulty in understanding how they could. In my view, the letters didn't even qualify as a notification of the Respondent's intention to take disciplinary action against the Claimant in the form of a termination of her employment and the reasons thereof.
74. Ordinarily, the employer's contemplation and the grounds thereof are communicated through a show cause letter and or an invitation letter to a disciplinary hearing. The Respondent's witness admitted that the Claimant was never issued with any show cause letter, and the Respondent didn't tender any material before this Court to demonstrate that there was and disciplinary hearing where the Claimant was heard.



75. The Respondent's Counsel cited the decision in *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* [2019], to support his submissions. To say the least, Counsel misunderstands the context of, and true holding, in the case. The Court, in my view, was referring to those rare occasion[s] when the employer sets forth an accusation[s] against the employee, and requires and allows him or her to answer to the accusation[s] by other ways other than orally, for example through an explanatory letter or statement.
76. By reason of the premises, I conclude that the Respondent failed to prove adhered to the canons of fair procedure embodied in Section 41 of the *Employment Act*, and resultantly find that the termination of the Claimant's employment was procedurally unfair.
77. I now turn to consider whether the termination was substantively fair. The Respondent advanced the reason for terminating the Claimant's employment as poor performance. In a claim for unfair termination of employment where an employer asserts that the termination was on account of poor performance, the assertion can only be successful if he or she demonstrates the existence of the factors that were aptly put forth in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Cause Number 823 of 2010; [2010] LLR 255[ICK]*, thus
- a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show that measures were in place to enable them to assess the performance of each employee and further, what measures they have taken to address poor performance as the effort leading to this decision must be established.
 - c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."
78. I have carefully considered the evidence presented by the Respondent before this Court, and I am convinced that the same wasn't directed to establish the matters forestated.
79. The foregoing notwithstanding, I note that the Respondent's Human Resource Policy Manual does not substantively provide for Performance appraisal, however, it in a sketchy manner provides at Clause 9.2, thus;

"Whenever an employee has been involved in a disciplinary situation that has not been readily resolved or when he/she has demonstrated an ability to perform assigned work responsibilities effectively, the employee may be placed on a performance improvement plan [PIP]. PIP for status will last for a predetermined amount of time not to exceed 90 days. Within this time period, the employee must demonstrate a willingness and ability to meet and maintain the conduct and or work requirements as specified by the supervisor and the organization. At the end of the performance improvement period, the



performance improvement plan may be closed or, if established goals aren't met, dismissal may occur.....”

80. Without an elaborate provision in the Human Resource Manual, the Respondent needed to lead evidence to demonstrate; how at its workplace, performance targets could be set; the role of the employee and or their supervisor in setting the performance targets; the process of weighting the employee's performance; and how the employee would bind themselves to the targets set and the outcome of the performance assessment. It didn't do it. The conditions set out in the Jane Samba case [supra] were not made.
81. In my view, a budget estimate cannot be held to be a document binding an employee to the contents therein as performance targets, not unless there is concurrence between the employee and the employer that the contents will morph into performance targets. The budget estimates that were prepared by the Claimant could not, therefore, be validly held by the Respondent as performance targets.
82. If at all the Claimant's performance was unsatisfactory, the Respondent was bound by its own policy to place her under a performance improvement plan in the manner stipulated in the policy. Undoubtedly, the Claimant was not put under a performance improvement plan at any time.
83. In the upshot, I come to the inevitable conclusion that the termination of the Claimant's employment wasn't substantively fair.

Whether the Claimant is entitled to the reliefs sought.

84. The Claimant sought inter alia compensation for loss of employment computed at her gross salary for 20years. I agree with the Respondent's Counsel that there cannot be, and the Claimant didn't demonstrate, any legal or contractual justification for compensation to the extent sought.
85. However, this Court hasn't lost sight of the fact that Section 49[1][c] of the *Employment Act* provides for compensation for loss of employment through unfair termination and places a ceiling of such compensation at twelve [12] months' gross salary. It is pertinent to point out that an award of this compensatory relief is discretionary, and awardable depending on the circumstances of each case. I have carefully considered the length of service of the Claimant to the Respondent, the Respondent's total disregard of the requirements of the law and more specifically those relating to matters, fairness in the termination of an employee's employment, and the Claimant's expectation as regards the period that she was to serve under her permanent and pensionable contract, and come to the conclusion that she is entitled to the compensatory relief to an extent of her five [5] months gross salary.
86. The Respondent's Counsel submitted that the Claimant didn't prove her claim for unremitted NSSF contributions. In her pleadings, the Claimant was very specific as regards the months when the remittances weren't made, by the Respondent. The Respondent on the other hand contended that it dutifully did remit. Under section 74 of the *Employment Act*, the employer is the custodian of employee records. As such a custodian nothing would have been easier for it than producing a record to discount the Claimant's claim. It did not. In my view, therefore, the Claimant must succeed in her claim under this head.
87. I note, the persuasive decisions cited by the Respondent's Counsel inter alia Lunga'tso v Hilwig [2022] KEELRC 1375 [KLR], suggesting that the relief isn't awardable under a claim like the instant. I state that the employer's duty under Section 74 of the Act was not brought to the attention of the Court. Further, the fact that Section 12 of the *Employment and Labour Relations Court Act*, liberally construed could reveal that the relief is awardable by the Court under a claim such as the instant.



88. By parity of reasoning, I award the Claimant the relief sought under the head, unremitted CIC Pension contributions.
89. There was no dispute that the Claimant was not issued with a termination notice contemplated under her contract. The Respondent contended that she was paid one month's salary in lieu. The Claimant asserted she wasn't. The Respondent didn't place forth any material to show that the payment was made, when and how. For this reason, I am persuaded that the Claimant was not paid a salary in lieu of notice.
90. The Claimant sought severance pay. Severance pay is provided under Section 40 of the Employment Act. It is awardable in redundancy claims. The same must never be confused with service pay under Section 35 of the Act payable under unfair termination claims. Resultantly, relief [severance pay] sought by the Claimant cannot be availed to her in the circumstances of this case.
91. Additionally, Section 35[6] of the Act excludes certain categories of employees from the benefit of service pay, among them, those who are members of the National Social Security Fund. There is no dispute that the Claimant was a member. She is, therefore, not entitled to claim service pay.
92. By reason of these premises, the Claimant's claim for KShs. 935,316 is declined. Maybe the Claimant's Counsel needs to take note that under Section 35 of the Act, service pay is computed using 15 days' salary for each year worked, not a month's salary. So, assuming the Claimant were to qualify for service pay, for the four and half years, he could only get KShs. 467, 658.
93. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- a. A declaration that the termination of her employment was unfair.
 - b. Compensation under section 49[1][c] of the Employment Act for unfair termination of employment, KShs. 1,038,240.
 - c. Severance pay, KShs. 467,658.
 - d. Notice pay, Kshs. 207, 848.
 - e. Unremitted Contributions for Claimant's NSSF Account.
 - f. Unremitted Contributions for the Claimant's CIC Pension Scheme account, KShs. 93,625.
 - g. Interest on [b] above at court rates from the date of this judgment till full payment.
 - h. Interest on the sums awarded in [c] [d] and [e] above at court rates from the date of filing this suit till full payment.
 - i. Costs this suit.

READ, DELIVERED AND SIGNED THIS 16th Day of January 2025

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Khadoli for the Claimant

Mr Oloo for the Respondent

