



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzioka v Lemoc Limited (Cause 495 of 2016)  
[2025] KEELRC 501 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 495 OF 2016  
K OCHARO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JOHN MUNUVE NZIOKA ..... CLAIMANT**

**AND**

**LEMOC LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By Statement of Claim dated 18<sup>th</sup> March 2016, the Claimant sued the Respondent seeking the following reliefs;
  - i. A declaration that the termination of the Claimants' employment and/or dismissal was unfair.
  - ii. A declaration that the Respondents fundamentally breached its statutory obligations under *the Constitution* of Kenya and the *Employment Act*, 2007.
  - iii. An order directing and/or compelling the Respondents to pay the Claimant the calculated sum being Kshs. 14,673,587.00 as particularized in paragraph 17 of the statement of claim with interest at court rates from the date of filing of this suit.
  - iv. An order directing and/or compelling the Respondent to issue a Certificate of Service to the Claimant in accordance with Section 51 of the *Employment Act*, 2007.
  - v. An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.
  - vi. Any other relief as the Court would deem just and expedient to grant.
2. The sum mention in 1(iii) above broken down as;



- i. One month's pay in lieu of notice =Kshs.42,866.00
  - ii. Days worked in November 2015 =Kshs.33,200.00
  - iii. Service pay  $42,861/30 \times 15 \times 69\text{months}/12$  =Kshs.123,225.00
  - iv. NSSF deducted and not remitted  
(12months 400) =Kshs.6,000.00
  - v. NHIF deducted and not remitted  
(67 months x 1000) =Kshs.67,000.00
  - vi. Compensation for wrongful termination  
(60yrs-33yrs) x12 months x 42861 =Kshs.13,886,964.00
  - vii. Compensation for unfair dismissal  
(42,861 x 12 months) =Kshs.514,332.00
- TOTAL =Kshs.14,673,587.00

3. The Respondent resisted the Claimant's Claim through a Memorandum of Response dated 18<sup>th</sup> April 2017. The Respondent contended that, it dismissed the Claimant for a justifiable reason[s], his case is founded on quicksand, and he is undeserving of the reliefs he has sought.
4. At the close of pleadings, there was a joinder of issues and the matter got ripe for hearing inter partes on merit. At the hearing, the Claimant and the Respondent's witness adopted their witness statements filed herein as their respective evidence in chief.

#### **Claimant's case**

5. It was the Claimant's case that he first came into the employment of the Respondent, when the latter verbally employed him as a meat attendant /salesman on or about 18th March 2010. On 29th August 2012, he was confirmed into employment on permanent employment terms. This followed a successful completion of his probation period. His monthly basic salary was agreed at Kshs. 42,861.
6. On 1st August 2014, he was promoted to the position of supervisor. The promotion came with a salary increase.
7. He worked dedicatedly and diligently in his new position. As a result, the monthly sales at his station impressively rose. In appreciation of this, the Respondent decided to transfer him from his station, the South C shop to the Thika Road Mall shop to improve the sales and turn around the outlet to profitability.
8. On 19th November 2015, the Claimant was called on the phone by the Respondent's Secretary, Jennifer, who informed him not to report to work the following day before reporting to the main office. He visited the office on 20th November 2015, where Jennifer informed him that his services had been terminated.
9. This turn of events prompted him to visit the Respondent's Director's office on 23rd November 2015, to inquire why his employment was being terminated. The Director shouted at him and informed him that he was no longer needed at the Respondent's. She instructed him to pick up his termination letter and leave.



10. Upon reading the letter, he was shocked to learn that he was being dismissed on account of alleged complaints of cheating from the Respondent's customers. The allegations were completely untrue and strange to him.
11. He asserted that he was not involved in the pricing of products as alleged in the termination letter. His role was limited to weighing the meat. The weighing machine could automatically dispense the price tags upon weighing a product.
12. The Respondent did not at any time warn him against any infraction of cheating or at all, or issue him with a show cause letter. Further, notify him of any complaint[s], by customers against him.
13. The termination of his employment was unwarranted. It was not preceded by an opportunity being accorded to him to defend himself against any accusations that the Respondent had against him.
14. Additionally, the Respondent made statutory deductions for the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) but did not remit some of the amounts to the relevant Authorities.
15. Cross examined by Counsel for the Respondent, the Claimant testified that he never received the warning letters that the Respondent has filed in this matter. They aren't even signed by him in acknowledgment of receipt.
16. The warning letter was on an alleged overstocking of meat. The meat in issue was the 14 Kgs which he refused to sell as it had overstayed in the fridge. It was part of the stock that he inherited when he reported to the new station. He sought permission from the Senior Supervisor to have it discarded, and he permitted it to happen.
17. Contrary to the Respondent's allegations, he didn't overstock any product on 11<sup>th</sup> September 2015. He didn't receive the alleged warning letter dated 18<sup>th</sup> September 2015, in regard thereto.
18. Further, contrary to the Respondent's allegation, he didn't have any meeting with Mr. Kilonzo and Michael.
19. The termination letter didn't set out his terminal dues. Jennifer told him that he was to be paid 127,000. He never picked the amount as the Respondent didn't demonstrate how the figure was arrived at, and give him the reason for the termination of his employment.

### **Respondent's case**

20. The Respondent presented two witnesses, Stephen Kilonzo [RW1] and Monia Posti [RW2]. It was the Respondent's case as can be discerned from the witnesses' evidence that the Claimant was first employed by the Respondent on a permanent basis on the 29th of August, 2012, at a gross salary of Kshs.42,861.
21. Remittances into the Claimant's NHIF and NSSF accounts were dutifully made to the relevant Authorities. This is demonstrated by the National Social Security Fund statement, of account it has presented they have presented before this Court, and NHIF, a clearance certificate for the period ending 30th June 2016.
22. Before being promoted, the Claimant didn't have any disciplinary issue[s]. However, after the promotion, he got into a habit of defrauding the Respondent's customers and failing to adhere to lawful directions, given to him.



23. On some occasions, the Claimant carelessly overstocked the counter he was supervising with meat. This made them incur losses. He was warned on two separate occasions via the warning letters issued on the 11th and 19th of September, 2015, against the practice. The overstocking of the counter was done in blatant disregard for internal memos shared with all the Respondent's employees on 10th September 2014.
24. The Claimant's time as a supervisor at their Thika Road Mall branch was plagued with numerous complaints from both customers and fellow employees working under him. The persistent complaints of overstocking and cheating customers prompted the Respondent to undertake a disciplinary hearing which they conducted on the 12<sup>th</sup> November 2015. The hearing was attended by members of management as well as by a branch staff member who worked with the Respondent.
25. At the hearing, the Claimant did not deny that he was overstocking meat at the counters despite being aware of the Respondent's policy against overstocking meat.
26. Flowing from the findings of the disciplinary hearing, and given the numerous warning letters issued to the Claimant, their management decided to terminate the Claimant's employment. The decision was duly communicated to the Claimant vide the termination letter dated 19th November, 2015.
27. The Claimant was informed that the termination of his employment was a result of his conduct. Additionally, he was informed that his terminal dues were to be processed and paid by the accountant.
28. Cross-examined by Counsel for the Claimant, RW1 testified that he had only one meeting with the Claimant and that was on 12<sup>th</sup> November 2015. In the meeting, the Claimant was asked to cease overstocking the counters. In the meeting, the dismissal of the Claimant from employment was not discussed. As Managers, they didn't have the power to. In the meeting, it was not recommended that he be dismissed. The Managers only escalated the matter to the Higher management.
29. The termination letter dated 19<sup>th</sup> November 2015, does not bear the reasons for the termination of the Claimant's employment.
30. In the meeting, the Claimant was accorded an opportunity to defend himself against the accusations that had been levelled against him.
31. The Claimant could use codes meant for other products on sale of cheaper products with the sole aim of hiking sales.
32. To demonstrate that there were complaints from customers against the activities of the Claimant, the Respondent presented to the court an email dated 12<sup>th</sup> May 2016, yet the Claimant's case herein was filed in 2015.
33. The Respondent had control systems to monitor stock. Supplies were being done daily. Orders could be placed people at the counter. Despite the memo on overstocking, the Respondent continued to supply him with meat.
34. In his evidence in re-examination, the witness stated that the employee who was present in the meeting confirmed that the Claimant was engaged in the infractions he was being accused of. As the Supervisor, he was responsible for the counters he was supervising and therefore it was for him to make the right orders that couldn't lead to overstocking.
35. Cross-examined RW2 stated that the Claimant's employment was terminated on 23<sup>rd</sup> November 2015. For the days worked in November, he was paid his dues. However, she couldn't tell when exactly the payment was made.



36. Though she didn't have a statement of account from NSSF, she verily knows that remittances for the Claimant's account were duly made.
37. His employment was terminated on two accounts. First, his failure to adhere to the Respondent's rules. Secondly, cheating on the actual prices of products.
38. The Claimant was invited to a disciplinary hearing through the Managers. The meeting was held on 12<sup>th</sup> November 2015. The agenda of the meeting was overstocking of products and cheating on prices. The Claimant admitted the accusations against him.
39. The termination of the Claimant's employment wasn't only on account of overstocking, there were other factors.
40. The date of the email by the Customer, 12<sup>th</sup> May 2016, was way after the Claimant's employment had been terminated. She admitted that the Respondent didn't have any email of complaint by any customer of a date earlier than the termination date.

### **Claimant's submissions**

41. The Claimant identified the following issues for determination, thus; whether the Claimant was unfairly terminated; whether the Claimant should be reinstated back to his employment; whether the Claimant is entitled to the orders sought; and costs.
42. The Respondent did not issue the Claimant with a notice to show cause before effecting the termination. Further, any document from which it can be discerned that indeed the alleged meeting of 12<sup>th</sup> November 2015 was a disciplinary hearing meeting. As such, it cannot be argued that the Claimant was taken through the due process contemplated under Section 41 of the *Employment Act* 2007.
43. Further, the purported termination dated 19<sup>th</sup> November fails to meet the substantive threshold provided for by section 45(1) and (2) of the *Employment Act*, 2007.
44. In the letter of termination dated 19<sup>th</sup> November 2015 the Claimant was accused of doing "fishy things". This is very ambiguous a reason to the Claimant.
45. RW2 confirmed during cross-examination that there was no personal invitation to the Claimant for a disciplinary process leading to his termination. She also confirmed that the meeting held on 12<sup>th</sup> November 2015 was not for termination reasons and there was no recommendation from the meeting to terminate the claimant's employment.
46. To support the submission that it was a duty on the Respondent to show that there was present, procedural and substantive justification, reliance was placed on the Court of Appeal case of Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR the Court of Appeal stated as follows;

"There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (Section 43); and prove reasons are valid and fair (Section 45) ...among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination."



47. Further, in the case of *Walter Ogal Anuro-v-Teachers Service Commission* [2013] eKLR where the Court held that:
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
48. The Claimant worked for the 23 days in July 2018. He was not paid his salary for these days worked, the same should be availed to him.
49. Having established that the termination of his employment was unfair, the Claimant is entitled to the remedies prayed for and as provided for under Section 49 (1) of the *Employment Act* being salary in lieu of notice, service pay, compensation for wrongful termination, and compensation for unfair termination.
50. Further, the Respondent used to deduct the statutory deductions including NHIF and NSSF as evidenced in his payslip but did not remit the same to the relevant institution. During cross-examination, RW2 confirmed that there were no NHIF remittances despite the same being deducted from the Claimant's salary for the year 2010 and some months in 2011,2012,2013,2014 and 2015 and could not produce evidence showing the same was paid in court.
51. It is very clear that the Claimant diligently worked for the Respondent. He should be awarded a gratuity.

### **Respondent's Submissions**

52. The Claimant identified the following issues for determination, thus; whether the Claimant's termination of Employment was fair; and whether the Claimant is entitled to the reliefs sought.
53. In September 2014, the Respondent issued a Memo to all its staff members, warning against the overstocking of meat at the meat counters as such overstocking would lead to damage to the perishable meats sold by the Respondent.
54. In the year 2015, the Claimant as a supervisor of the Respondent at the Respondent's shop at Thika Road Mall, was warned on two occasions not to overstock meat at the meat counters. Despite the foregoing warnings issued to the Claimant in writing, he persisted in his conduct of overstocking the counters which then prompted the Respondent to take disciplinary action against the Claimant.
55. The Claimant alleged that he did not receive the said warning letters. He went on to point to the fact that he had not signed the said warning letters as evidence that he had not received them.
56. Stephen Kilonzo, the Respondent's first witness, testified that warning letters were typically dispatched to the branches and handed over to the affected employee, and as such did not have provision for the employee to sign anywhere. Further, the promotion letter, transfer letter, and termination letter produced by the Claimant as part of his bundle of documents were also not signed by the Claimant.
57. The Claimant was duly informed by the Respondent's first witness, Stephen Kilonzo, that a disciplinary hearing would be held on the 12th of November 2015 to discuss the issues of overstocking in the meat in defiance of an express internal memo and the issue of cheating customers on prices. It was attended by all the employees of the Respondent who worked at the TRM branch.



58. Following the disciplinary hearing, on the first issue, of overstocking meat, the Claimant admitted to overstocking the meat counters and further admitted to being aware of the risks associated with the meat going bad as a result of overstocking the meat counters.
59. On the issue of irregularly/fraudulently hiking prices, the Claimant indicated that he was allegedly promised a promotion to manager if he improved his revenue collection and that this was his way of ensuring that he achieved improved revenue collection at his station.
60. The disciplinary panel also questioned two other employees of the Respondent, Cyrilla Otota and Stella Ogendi, who confirmed that the Claimant indeed engaged in the manipulation of the computer system by logging various products as a different product whose price per kilo is higher than the product actually bought and further that he threatened anyone who questioned the practice.
61. Following this, the Disciplinary Panel management decided to terminate the Claimant's employment.
62. As the Claimant's termination was by way of summary dismissal, the Claimant was not entitled to payment of one month's salary in lieu of notice as claimed.

### **Analysis and determination**

#### Issues

- i. Whether the Claimant was unfairly terminated.
- ii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was unfairly terminated**

63. It is not in dispute that the Claimant was the Respondent's employee, hired on a permanent basis from 29<sup>th</sup> August 2012 and that his said employment was terminated at the initiation of the Respondent. However, there is a huge controversy regarding whether the termination was fair. Whilst the Claimant asserted that the termination was destitute of procedural fairness and substantive justification, the Respondent contended otherwise.
64. Section 45 of the *Employment Act* prohibits unfair termination of an employee's employment. A reading of the provision reveals that termination of an employee's employment is unfair if it is not on account of a valid and fair reason[s] related to an employee's conduct, capacity or compatibility, or the employer's operational requirements. Further, if not in adherence to the dictates of procedural fairness.
65. Therefore, whenever a Court is tasked to interrogate whether or not the termination of an employee's employment was fair, it must consider the above-stated statutory aspects, procedural and substantive fairness.
66. Elaborating on this, the Court in the case of *Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR* aptly stated that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
67. The Court in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* held that,

“ 13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section



43); prove the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules.”

68. Section 41 of the Act provides a mandatory procedure that any employer contemplating terminating an employee’s employment must follow, otherwise, the termination shall be deemed unfair within the meaning of section 45 of the Act. The ingredients of the procedure contemplated under the provision are, that the employer must notify the employee of their intention and the grounds spurring the same, the employee must then be given an adequate opportunity to prepare and make a representation on the grounds. Conjoined with this is the right to be accompanied by a colleague of his choice, or a Trade union representative, during the hearing, and consideration of the representations made by the employee and or the person accompanying him, before the employer takes a final decision on the matter.
69. I have carefully considered the material placed before this Court by the Respondent, and it is clear, that the Claimant was not issued with any show cause letter or invitation to a disciplinary hearing. Ordinarily, the accusations against an employee facing a disciplinary process would be contained in one or both of these documents. It is important to point out that there isn’t any document placed before this Court to show that before the termination of his employment, or the alleged disciplinary hearing, which I will shortly hereafter I will demonstrate was never, the Claimant was notified of the Respondent’s intention to take adverse action against him and the basis for the same.
70. The Respondent alleged that a disciplinary hearing was conducted on 12<sup>th</sup> November 2015. In a bid to convince the Court that indeed there was, they tendered a document before this Court captioned “Minutes of the Meeting held at Thika Road Mall Meatery Counter.” One of the people indicated to have attended the meeting was RW1. However, contrary to the position posited by the Respondent, in his evidence under cross-examination, this witness stated that during the meeting they never discussed the dismissal of the Claimant and or made a decision for his dismissal.
71. I have carefully, considered the document. Sure, it doesn’t speak to a disciplinary hearing. I take the view, that, on this, the Respondent misguidedly attempted to mislead the court.
72. By reason of the foregoing, I am persuaded by the Claimant’s version, that he was not notified that the Respondent intended to take adverse action against him and the reasons the basis therefore, and accorded an opportunity to defend himself and conclude that the termination was, procedurally unfair.
73. Section 43 of the Employment Act, places a legal obligation on the employer in a dispute regarding the termination of employment of an employee to prove the reason[s] for the termination. Section 45 of the Act, a further obligation to prove that the reason[s] was valid and fair. The reason must be a reason that existed at the time when the employer was deciding to terminate.
74. On 18<sup>th</sup> November 2015, the Respondent wrote to the Claimant: -

“Termination letter

We have received many complaints from our customers, regarding cheating about actual prices of the products also swapping of the same.



Nzioka you have been warned several times for doing fishy things but it seems you are not able to change and the management can not tolerate your misconduct behaviour.

Kindly see the attached email from one of our branch managers.”

75. Considering this letter, I find no difficulty in concluding that the reason put forth thereon was too ambiguous and not easy to understand. Therefore, reason cannot be held to be valid and fair.

76. The Respondent produced in evidence an alleged email correspondence from one of its customers purportedly complaining about the Claimant’s infractions. It turns out that the email was written on 12<sup>th</sup> May 2016, long after the termination of the Claimant’s employment, and institution of the suit herein. This only helped the Respondent to come out as an uncandid party, whose evidence is untrustworthy. Further, a close interrogation of the email, reveals that it is full of hearsay.

77. This Court comes to the inevitable conclusion, that the Respondent failed to discharge its legal burden under sections 43 and 45 of the Employment Act. The termination was substantively unfair.

Whether the Claimant is entitled to the reliefs sought

An order directing and/or compelling the Respondent to issue a Certificate of Service to the Claimant in accordance with Section 51 of the Employment Act, 2007.

78. Under the above-stated section of the law, a certificate of service is a right of any employee separating from his or her employer. In the instant matter, the same was not issued with. The Respondent is hereby directed to issue the same within 30 days of the date of this Judgment.

**One month’s pay in lieu of notice =Kshs.42,866.00**

79. The Claimant’s employment was in nature terminable by a twenty eight days’ notice under section 35 of the Act. Undeniably, the Respondent terminated his employment without one. Having found that the termination was unfair, I find the relief under this head entitled to by the Claimant.

**Days worked in November 2015 =Kshs.33,200.00**

80. There was no dispute that the Claimant’s case was terminated on 23<sup>rd</sup> November 2015, and that he rendered services up to the termination. The Respondent didn’t contend, and prove that he was paid for these days worked. As such, I am convinced that the Claimant wasn’t paid his salary for the days. It is hereby awarded.

**Service pay  $42,861/30 \times 15 \times 69 \text{ months}/12 =\text{Kshs.123,225.00}$**

81. The Claimant sought service pay contending that though he was a member of NSSF, and therefore, excluded from pursuing the benefit of service pay, by operation of the provisions of section 35[5] of the Employment Act, he is entitled to the same as the Respondent wasn’t faithfully remitting what they were under duty to, to the Fund, for his account.

82. On the innovative thinking as is the Claimant’s here, and that this Court cannot have the powers to approach the matter as urged by the Claimant, this Court held in Wafula v Fidelity Security Limited [Cause 24 of 2017] KEELRC 3418[KLR] [20 December 2023] [Judgment];

“The Claimant’s case was that though he was a member of NSSF, the Respondent at all material times remitted funds to his account that were far much less than what was statutorily expected. He innovatively argued that since the Respondent breached its



statutory obligation, this Court should compel it to avail him of service pay. As shall come out shortly hereafter, this court is not persuaded by this innovative line of thinking.

Section 35(5) of the Employment Act provides for service pay. However, section 35(6) of the Act, exempts particular classes of employees from the benefit of service pay. Therefore, even agitating for the benefit. The subsection states:-

“this section shall not apply where an employee is a member of:-

- a. A registered pension or provident fund scheme under the Retirement Benefits Act.
- b. A gratuity or service pay scheme established under a collective agreement.
- c. Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- d. The National Social Security Fund.”

The claimant falls under the categories of those employees contemplated under subsection (6) (d). in my view, where it is alleged that an employer didn't fully or at all make due contributions as contemplated under the NSSF Act, the remedy for an offended employee lies under Section 14 of the same Act, which provides:-

“14. If any contribution for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution to which it relates falls, a sum equal to five per cent of the amount of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which is added.”

Where a statute has expressly provided for a remedy for a particular situation as the Act mentioned hereinabove has done, it will be inappropriate for the litigants or the Court to version another remedy for the same situation. The provision mentioned above does not contemplate an order of payment of service pay as a sanction for the employer's default in making remittances duly. There would not be any justification for this Court to make the order.

Assuming that the Respondent didn't make full contributions as alleged by the claimant, the latter would only find a cause of action under section 14 above, and pursue the remedy thereunder. This the claimant didn't do. His claim is for rejection. It is hereby rejected.”

### **NSSF deducted and not remitted (12 months 400) =Kshs.6,000.00**

83. In the case of *Simiyu v Nzoia Sugar Company Limited* (Employment and Labour Relations Claim E005 of 2021) [2022] KEELRC 1758 (KLR) (12 May 2022) (Judgment), the Court held that:-

“The court finds that NSSF is a statutory body with powers to recover unremitted monies from the employer. The claimant ought to have lodged a claim with the statutory body with the mandate and powers to even levy a penalty under section 14 of the NSSF Act (cap 258) as cited by the claimant. The court has no basis for interfering with the work of the statutory body on its mandate. Only the NSSF can impose the said penalty for non-remittance.



40. Consequently, the claim for NSSF contribution and the said penalty should be pursued with the said statutory body. The entire claim for unremitted NSSF dues and penalties are declined on that ground.”

84. Based on the reasoning in the above-stated legal precedents, and in the circumstances of this matter, I decline to award the relief sought under this head, and NHIF deducted and not remitted.

**Compensation for unfair dismissal (42,861 x 12months) =Kshs.514,332.00**

85. Section 49[1][c] of the *Employment Act*, bestows this Court with the authority to grant a compensatory relief for unfair termination of an employee’s employment. However, it is important to point out that the authority is exercised discretionarily depending on the circumstances of each case. I have carefully considered how the employment was terminated, without care to the requirements of procedural and substantive fairness, the fact that the Claimant was employed on permanent terms, the length of his service, and the Respondent’s attempt to mislead the Court as came out hereinabove, exposing them as an uncandid employer, and conclude that he is entitled to the compensatory relief, seven [7] months gross salary.

**Gratuity**

86. The Claimant urged this Court to find that the Respondent is obligated to pay him gratuity. I have found considerable difficulty in understanding the basis for this call. Gratuity, is a contractual benefit, only grantable where the contract between the parties permits it. The Claimant didn’t argue and show that the contract did provide for gratuity payment. It cannot be availed to him, therefore.

87. In *Bamburi Cement Ltd v William Kilonzi* [2016] eKLR, the Court of Appeal stated;

“Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer..... Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct.”

88. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

- I. A declaration that the termination of his employment was unfair.
- II. Compensation pursuant to the provisions of section 59[1][c] of the *Employment Act*, seven [7] months’ gross salary, KShs. 300,027.
- III. One month’s salary in lieu of notice, KShs. 42,861.
- IV. Salary for the days worked in November 2015, KShs. 33, 200.00.
- V. The Respondent is to issue the Claimant with a certificate of service within 30 days of the date of this Judgment.
- VI. Interest on the awarded sums at court rates from the date of this Judgment till full payment.
- VII. Costs of the suit

**READ SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**



**OCHARO KEBIRA**

**JUDGE**

In the presence of:-

Mr. Okato for the Claimant.

Ms. Omino for the Respondent.

