



REPUBLIC OF KENYA



Rono v Sai Pharmaceuticals Kenya Limited (Employment and Labour Relations Cause E8067 of 2021) [2025] KEELRC 2151 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E8067 OF 2021**

**JW KELI, J
JULY 18, 2025**

BETWEEN

JOSEPH KIPTANUI RONO CLAIMANT

AND

SAI PHARMACEUTICALS KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim dated 23rd September 2021 against the respondent seeking for the following reliefs:-
 - i) A declaration that the termination of the Claimant was illegal and unlawful.
 - ii) The Respondents to pay to the Claimant amount of Kshs 3,445,500.00 as stated in paragraph 24 above.
 - iii) The Respondents do pay the Claimant compensation of Kshs 900,000.00
 - iv) Costs of the suit and interest.
2. The claimant in addition filed his witness statement dated 23rd September 2021 and list of documents of even date and the bundle.
3. The claim was opposed. The respondent entered appearance and filed statement of response dated 18th October 2021, list of documents dated 10th November 2020 and the bundle of documents, its witness statement of Grace Kinyua dated 7th November 2021. The respondent filed supplementary list of documents dated 15th may 2024 and the bundle.



Hearing and evidence

4. The claimant's case was heard on the 30th January 2025 when the claimant testified on oath and adopted his witness statement dated 23rd September 2021, adopted the respondent's documents under list of even date. He was cross-examined by counsel for the respondent, Ondego.
5. The respondent's case was heard on the 26th March 2025 with Grace Kinyua as RW1. She testified on oath and adopted her witness statement dated 7th November 2021 and produced the documents under list of even date and the documents under the list of documents dated 15th May 2024. She was cross-examined by counsel for the claimant. Khalwale.

Claimant's case

6. The claimant stated that on or about 11.6.2018, the Respondent engaged the services of the Claimant as an Area Sales Manager Eastern & North Eastern Regions at a monthly salary of Kshs 75,000.00 which was computed and made payable through the Claimant's Bank Account. The Claimant's duties as an Area Sales Manager included:
 - i. Supervision of Route Salesmen
 - ii. Supervision of all Distributors and all major customers
 - iii. Ensure sufficient Distributor stock levels
 - iv. Follow up on payments.
7. The claimant contended that to enable the Claimant perform and discharge his mandate effectively it was agreed between the parties that the Respondent would pay to the Claimant money for facilitation. The Claimant was entitled to commission for sales done over and above the targets including Kshs 50.00 for each and every diaper carton sold. The Claimant's hard work and commitment to his work saw the continuous steady and sharp rise of sales in the region though the onset of the Covid 19 leading to curfews and lock downs curtailed the increase in sales.
8. The Claimant stated that he used to work every day of the week from 8:00am to 6:00pm or as may be directed by the Respondent.
9. The Claimant was also not housed nor paid house allowance as provided "under the Labour Laws. The Claimant exerted his efforts and skills to the best of his abilities whole heartedly throughout his period in employment.
10. The Claimant did his work honestly and diligently throughout his work schedule as had been agreed that lasted 37 months without proceeding on leave.
11. In or about May 2020 the Respondents reduced Claimant's salary from Kshs 75,000.00 to Kshs 60,000.00 without consultation and for no justifiable reason.
12. In or about May 2021 the Respondents suspended payment of salary to the Claimant for no justifiable reason which made the Claimant's life unbearable.
13. On or about 18.5.2021 while the Claimant was travelling in the cause of his duties along Mwingi - Garissa road near Ukasi trading centre and in company of the Head of sales the Claimant was involved in a road traffic accident which occasioned the Claimant serious bodily injuries.



14. On 1.7. 2021 the Respondents in total breach of the terms of employment introduced a new term contract during the subsistence of a binding contract between the parties. The introduction of a new term contract was malicious and meant to terminate the Claimant.
15. As at the time of termination the Claimant was owed Ksh 966,750.00 in commissions made up as hereunder;-
- a) June 2018- May 2019 (7,692ctns x 50) Kshs 384,600,00
 - b) June 2019- May 2020 (6,523ctns x 50) Kshs 326,150.00
 - c) June 2020- May 2021 (5,120ctns x 50) Kshs 256,000.00
- Totals Kshs 966,750.00.
16. The Respondents were malicious in their actions of withholding the Claimant's salary and introduction of a new term contract.
- Particulars Of Malice
- i. Unilaterally varying the terms of employment.
 - ii. Frustrating the Claimant in the performance of his duties.
 - iii. Paying to the Claimant less salary than had been agreed.
 - iv. Discriminating the Claimant in the payment of salary.
 - v. Withholding and refusal to pay the Claimant's salary.
 - vi. Refusal to facilitate the Claimant to recover the outstanding money.
 - vii. Refusal to pay the Claimant monthly salary.
 - viii. Introduction of a new and fresh contract during the subsistence of another contract.
 - ix. Seeking to terminate the Claimant unprocedurally.
 - x. Lodging a criminal complaint when there is no criminal offence.
17. On 22.7. 2021 the Respondents wrote to the Claimant a show cause letter falsely accusing the Claimant of failing to perform his duties including. collection of monies owed to various customers for products supplied.
18. On the same day of 22.7. 2021 the Claimant replied to the said Show cause letter in which he denied the allegations and stated that his salaries had since been suspended and facilitation withdrawn thus making his working environment un-conducive and totally impossible to work.
19. On or about 5.8.2021, the Claimant through his Advocates wrote to the Respondent demanding salaries and other payments being unlawfully and unfairly held by the Respondent. The Claimants abrupt and immediate termination of employment was therefore illegal, unfair, callous and inhuman and had the effect of traumatizing him through abrupt and unplanned loss of employment which led to his loss of self-esteem and financial embarrassment due to his inability to meet his financial obligations to himself and his immediate family members.
20. The Respondent did not pay for the Claimant the necessary statutory contributions to NSSF and NHIF.



21. The Claimant wherefore makes a claim against the Respondents for payment of terminal benefits and other monies due as set out hereunder;
- i) Salary for May September 2021 (75,000 x 4) Kshs 300,000.00
 - ii) Unpaid salary reductions (15,000 x 15months) Kshs 225,000.00
 - iii) One month notice Kshs 75,000.00
 - iv) Commissions earned for 37months Kshs 966,750.00
 - v) House allowance for 37months(11,250 x 37) Kshs 416,250.00
 - vi) Leave Pay for 3 years (75,000 x 3) Kshs 225,000.00
 - vii) Service for 3years (75,000 x 3 x 1.5) Kshs 337,500.00
 - viii) 12 months' salary compensation (75000 x 12) Kshs 900,000.00
- TOTALS..... Kshs 3,445,500.00

The respondent's case

22. The Respondent had offered the Claimant employment as Area Sales Manager on a fixed term basis via a Fixed Term Employment Contract dated 1st July 2019, particulars of which are as reproduced hereunder: (Refer to claimant's fixed term employment contract marked as SP-2 in the respondent's List of Documents)
23. Particulars Of Claimant's Fixed Term Contract
- a. Claimant's employment to commence from 1st July 2019 to automatically expire on 31st December 2019;
 - b. Claimant appointed as Area Sales Manager and will be reporting to the Chief Executive Officer of the Company;
 - c. Your monthly consolidated gross salary including house allowance will be Kshs. 75,000/-;
 - d. You will be entitled to 1.75 working days annual leave per month;
 - e. You will be expected to clear customer debts generated by you in the course of business, and provide a detailed report for those that are pending;
 - f. The company will have full authority to recover the amount from your sales commission and/ or your salary for undisclosed debts.
24. The Claimant, having read and understood the contents of his Fixed Term Contract, and by appending his signature to said Letter on the 1st July 2019, voluntarily agreed to be bound by the terms and conditions therein.
25. The Claimant's fixed term employment was renewed on a number of occasions as evidenced in his Fixed Term Renewal Letters, the latest one being dated 1st January 2021 details of which re as hereunder: (Refer to claimant's contract renewals marked as SP-3 in the respondent's List of Documents)
26. Particulars Of Claimant's Fixed Term Contract Renewal
- a. We refer to your fixed term employment contract dated 1st July, 2020, and which was to expire on 31st December, 2020;



- b. The management is pleased to inform you that your contract has been renewed for a further six months. Subsequently your employment contract will run from 1st January, 2021 to automatically expire on 30th June, 2021 at midnight;
 - c. All other terms and conditions of your employment remain unaltered as per the initial contract letter.
27. The claimant's employment was based only on terms in his employment contract, and he cannot purport to bring in new terms that do not form part of the agreement. The issue of facilitation money and/or commission fees as described in the memorandum of claim are alien and strange to the respondent. The claimant has not adduced any evidence to prove his far-fetched claim that he led to a steady and sharp rise of sales in the region through the onset of Covid 19 as falsely alleged in the Memorandum of Claim. The claimant's work hours were as per captured in his employment contract. At no point in time did the Claimant work overtime, and is thus not entitled to such a claim.
28. The claimant was paid a gross salary which was inclusive of house allowance as clearly captured in his pay slips adduced as evidence before this honourable court. (Refer to claimant's pay slips marked as SP-4 in the respondent's List of Documents)
29. The claimant did not perform his duties honestly and diligently as erroneously claimed in the claimant's pleadings.
30. The respondent did issue the claimant with a notice of change of terms of employment contract dated 1st May 2020 and 1st September 2020, details of which are as hereunder: (Refer to claimant's notice of change of terms of employment marked as SP-5 in the respondent's List of Documents)

Particulars Of Notice Of Change Of Terms Of Employment Contract Dated 1.9.2020

- i. Reference is made to the employment contract signed between premium hygiene products limited and yourself dated 1st July 2020. Please note below changes;
 - ii. Clause 5(c) is amended to read: "You shall be entitled to sick leave after two consecutive months of service of not less than 30 days with full pay and thereafter to sick leave of 15 days with half pay in each period of twelve consecutive months of service, subject to production of a certificate of incapacity to work signed by a duly qualified medical practitioner."
31. Clause 7 is amended to read: "Either party may terminate this contract by giving one month's notice in writing or one month's salary in lieu of notice."

Particulars Of Notice Of Change Of Terms Of Employment Contract Dated 1.5.2020

- i. As we are all aware, the Covid 19 pandemic is posing challenges for everyone. In an effort to remain operational during this economically challenging time, the management has come to a difficult but necessary decision.
 - ii. Effective 1st May 2020, all employees will receive a 20 percent cut in their monthly salary.
32. The salary cut will continue until the Covid 19 pandemic is over and the financial situation of the company normalizes. This was an extremely tough decision, and we understand the impact this will have. However, please know that we considered several other alternatives, and this was the best option and will have the least impact on our employees overall. The claimant did not object to, and agreed to be bound by the new terms. aforementioned by appending his signature to both notices and did not display any hesitance, and was not coerced to sign and agree to be bound by the same. On signing, the aforementioned terms formed part and parcel of his contract agreement with the respondent.



The claimant cannot now renege and claim that the terms were altered without his knowledge. The claimant was made well aware of the impending changes to be effected to his employment and that he agreed to be bound by them by appending his signature to the notices issued thereunder, and effectively by continuing to work for the respondent under the new terms voluntarily.

33. The respondent did issue the claimant with a show cause letter, particulars of which are as hereunder: (Refer to claimant's show cause marked as SP-6 in the respondent's List of Documents)

Particulars Of Claimant's show Cause Letter Dated 21.7.2021

- a. This show cause letter is issued to you on grounds of violation of company rules and procedures as follows;
 - b. Van sales account on 18th May 2021 you reconciled and were left with a balance of Kshs. 99,356.10 which remains unsettled up to date;
 - c. Guled East Africa Store Limited - gave you Kshs. 62,200 but you never remitted to the company;
 - d. Ezekiel Mwangi Macharia - claims that he never ordered any goods as per invoice no. LC15005463 and never deposited the alleged Kshs. 25000 to SPKL Equity Bank Account;
 - e. Jihan Distributors Limited gave you Kshs. 90,000 worth of goods and Kshs. 35000 in cash against invoice no. LC100952 which you have not remitted/accounted for;
 - f. Since 18th May you have not reported to work and no communication has been received from you.
 - g. You are therefore required to within 48 hours of the date of service hereof by email to show cause in writing as to why disciplinary action should not be taken against you.
34. The claimant did acknowledge the show cause and issued his response on the 22nd July 2021, where he did not clearly respond to the allegations raised in his show cause letter. (Refer to claimant's response to show cause marked as SP-7 in the respondent's List of Documents). The respondent proceeded to invite the claimant for a disciplinary hearing via an invitation notice dated 22nd July 2021, and wherein it clearly indicated that the disciplinary hearing would be held on the 26th July 2021. (Refer to invitation to hearing marked as SP-8 in the respondent's List of Documents)
35. The claimant wrote indicating that he was not able to attend said disciplinary hearing due to lack of any facilitation from the respondent, thus forcing the respondent to postpone the disciplinary hearing to a later date. (Refer to claimant's notice indicating his inability to attend the disciplinary hearing marked as SP-9 in the respondent's List of Documents) The respondent did offer its car to go and pick and drop off the claimant, and further requested that the hearing can be conducted via zoom, however, the claimant has wantonly refused and/or neglected to avail himself for his disciplinary hearing. (Refer to correspondence between claimant and respondent marked as SP-10 in the respondent's List of Documents) The respondent proceeded to conduct the disciplinary hearing on the 11th August 2021 despite the claimant's absence and issued him with a report emanating from said hearing listing its various demands as against the claimant. (Refer to disciplinary hearing report marked as SP-11 in the respondent's List of Documents)
36. The claimant, through its Advocates on record proceeded to issue the respondent with a demand letter dated 5th August 2021, forcing the respondent company to issue its response thereto on the 9th August 2021 particulars of which are as hereunder: (Refer to response to demand letter marked as SP-12 in the respondent's List of Documents)



Particulars Of Respondents Response To Demand Letter

37. We are in receipt of your letter dated 5th August 2021 and wish to respond that:
- a. No commission is pending to Joseph as per our records;
 - b. Housing allowance is inclusive in the gross salary as indicated in the employment contract;
 - c. As per the salary cut letter issued in May 2020, Joseph consented to this via the letter signed on 2nd May 2020;
 - d. Night out allowance and airtime is preapproved depending on the approved route plan assigned to the sales person. Furnish us with proof to support this claim;
 - e. Salary for April and May 2021 - As per Joseph's letter to credit control he requested that the amount due for his van sales account be adjusted against his salary;
 - f. June and July 2021 Joseph has not presented himself to work;
 - g. The accident occurred on 19th May 2021 and as per the doctor's report sent to us by Joseph, he was to proceed on sick leave from 19th to 29th May 2021. No other information has been received regarding his injury despite the numerous requests we have made to him asking for the requisite documents for WIBA claim processing and subsequent payment to him;
 - h. Internally, his disciplinary process is still pending.
38. The Respondent is yet to take any disciplinary action against the claimant, and thus this suit is premature, and should be struck out for being frivolous. The respondent is yet to terminate the claimant. It is actually the claimant who has wantonly refused to report to work, and attend to his disciplinary hearing despite constant reminders to do so by the respondent. The claim by the respondent is premature as it contravenes the employer's statutory right to discipline its employees as per provisions of the law. The respondent has not terminated the claimant's services. The respondent further does not owe the claimant any dues as falsely alleged in the memorandum of claim. It is actually the claimant who owes the respondent company sales money he got after selling their merchandise. The Claim is frivolous, vexatious and an abuse of the Court's process. The Claimant is not entitled to the prayers sought under paragraphs (i), to (viii), as the same are malicious and based on false and sham allegations.
39. The parties filed written submissions.

Determination

Issues for determination

40. The claimant addressed the following issues in written submissions –
- i. Whether the claimant was terminated or he absconded duties.
 - ii. Whether the Fixed term contracts are legal and valid.
 - iii. Whether the Claimant is entitled to the prayers sought.
 - iv. Who should be condemned to pay costs.
41. The respondent addressed the following issues-



- a. Was the Claimant constructively dismissed.
 - b. Was the Claimant unlawfully terminated.
 - c. Is the Claimant entitled to compensation as prayed in his claim.
 - d. Who is entitled to costs of the Suit.
42. The court finds that the issues for determination ought to relate to the prayers sought and are framed as follows:-
- a. Whether there was termination and if so, whether it was lawful and fair.
 - b. Whether there was unfair variation of contracts of employment
 - c. Whether the claimant was entitled to reliefs sought

Whether the was termination and if it was lawful and fair.

Claimant's submission's

43. The claimant submitted on whether his services were terminated or he absconded duty as follows:-
44. The Claimant stated that in may 2021, while travelling to Garissa with his Boss they were involved in a road traffic accident. The Boss was rescued and treated but the claimant was not attended to leave alone being paid salary. Out of the accident the claimant was seriously injured and admitted at Avenue Healthcare from 19.5.2021 to 29.5.2021. The Claimant has pleaded that from may 2021 to september2021 he never received his monthly salaries. Was not assigned any duties and was given facilitation allowance or transport. The Respondents have at pages 13,14,15 and 16 of their list of documents dated 10 November 2020 attached copies of payslips for march, April, May and June 2021. The Claimant vehemently denied knowledge of the payslips or payments for the said period of time.
45. At page 10 of the Respondents list of documents is a Fixed term Employment contract Renewal dated 1 January 2021 to automatically expire on 30th June 2021 which contract was not renewed. On 21 July 2021 the Respondent issued to the Claimant a show cause letter and on 22 July 2021 the Respondents issued an invitation to a disciplinary hearing to be held on the 26 July 2021. This disciplinary hearing is a testimony to the fact that in July 2021, the Claimant was an employee of the Respondents. The Respondent then proceeded to constructively terminate the services of the Claimant after 26th July 2021 in that:
- (a) The Respondent did not pay the Claimant his monthly salaries for several months.
 - (b) The last fixed term contract issued to the claimant expired on 31 of june 2021 and was not renewed.
 - (c) The claimant was not given money for facilitation of his work.
46. It is therefore misleading for the Respondent to allege that the claimant is still in employment when they had stopped his monthly salary. Section 43 (1) *Employment Act* 2007 provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 *Employment Act* 2007. In the instant case, the claimant was not told or given reasons for his dismissal and therefore the reason for termination was not fair and just. Section 45(1) *Employment Act* 2007 provides that NO employer shall terminate the employment of an employee unfairly. Section 45 (2) *Employment Act* 2007, a termination of employment by an



employer is unfair if the employer fails to prove that the employee was terminated in accordance with fair procedure. Still on the law, section 35 *Employment Act* 2007 provides for a termination notice. The claimant in the instance case was not issued with a termination notice. It is therefore crystal clear that the termination of the claimant was unfair both in substance and procedure.

Respondent's submissions.

47. Section 41 of the *Employment Act*, 2007 provides that: "(1) An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) 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." As per provisions of the law aforementioned, the Respondent was clearly informed of the reasons as to why the Respondent was considering dismissing his services and that the Claimant was given an opportunity to respond to said reasons. As was clearly captured in our pleadings and evidence produced before the trial court, and as it clearly came out during examination of witnesses, the claimant was issued with a show cause letter dated 21st July 2021 which clearly laid out the reasons why the Respondent Company was considering dismissing him from employment. (page 18 of Respondent's bundle of documents dated 10th November).
48. The Respondent did issue his response to the show cause letter and which response(page 19 of Respondent's bundle dated 10th November). The Respondent did further invite the Claimant to a disciplinary hearing via the invitation dated 22nd July 2021(page 20 of Respondent's bundle of documents dated 10th November). From the invitation, it is evident that the Claimant was informed that his disciplinary hearing will be held on the 26th July 2021 at 11:00 am. The Claimant did not attend said disciplinary hearing forcing the Respondent to postpone the same on more than one occasion in a bid to ensure that the Claimant is able to attend the disciplinary hearing. The Respondent even offered to send a car to pick the Claimant and bring him to the disciplinary hearing or in the alternative conduct the hearing virtually, options of which the Claimant totally ignored thus leaving the Respondent with no other choice than to conduct the hearing in his absence, and which they conducted on the 11th August 2021.
49. From the hearing, the Respondent came to the decision to issue the Claimant with a letter asking him to clear the debt he owed the company from his individual sales of the company's products and whose payments were outstanding. The Respondent did not at any point terminate or dismiss the Claimant's employment and of which was also communicated to the Claimant's Advocates when the Respondent issued a response clearly stating that they had not terminated the Claimant's employment, but that it is he who had failed to report back to work. The Claimant failed to act on this communication clearly stating that he was not terminated, and continued to fail to report back to work, actions which can only be blamed on him.
50. The Court of Appeal in the case of Kenya Ports Authority vs Mary Saru Mwandawiro (2017) eKLR at paragraphs 26 and 27 while holding that the appellant had failed to prove that it accorded the respondent an opportunity to be heard, held that: "It is mandatory that even when an employer feels that the termination is justified, an opportunity must be given for the concerned worker to be heard"(see Kenfreight (EA) Ltd vs Benson Nguti (2016) eKLR), where in resolving the aspect of unfair



termination, the Court stated as follows: 'Under section 41 of the Employment Act, the employer is required in mandatory terms to give a personal hearing to his employee in the presence of another employee of his choice before dismissing him for misconduct under section 44 of the Act.' The Respondent did adhere to the provisions of section 41 of the Employment Act by giving the Claimant an opportunity to respond to the allegations leveled against him and further affording him a hearing which he failed to attend despite the Respondent making various concessions to accommodate him and ensure he attended the same. The Claimant was not terminated by the Respondent and therefore his claim for unlawful, unfair and wrongful termination should be dismissed.

Decision

51. The burden of proof of termination of employment lies with the employee as per section 47(5) of the Employment Act to wit:- '(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'
52. The claimant told that court that after his injury he never resumed work for lack of facilitation and specifically stated he was not paid salary. The claimant admitted he was on sick leave from 19th May 2021 and was expected to resume duty on 29th May 2021. He stated that he did not do so for lack of salary. The claimant admitted he authorised the employer vide his letter dated the April 2021 to deduct outstanding dues of 99,356.10 from his April salary. (see the letter at page of the respondent's supplementary list of documents dated 15th May 2024). There was evidence of subsequent communication with the employer inviting the employee to show cause why he had not resumed duty among others and he kept on stating the lack of salary. The respondent's evidence at cross-examination on payment of salary of May was not shaken at cross-examination. The court found the claimant had agreed under clause 9 of his contract to recovery of bad debts from his salary. The Respondent in letter of response dated 9th August 2021 to the demand letter by Khalwale & Company Advocates for the claimant it was stated that the claimant's disciplinary was still pending and he ought to present himself to answer on monies he owed the company.
53. The court in the circumstances finds that the claimant's employment was never terminated. Taking into account he had refused to go back to work deliberately as the excuse of non-payment of salary is not valid the claimant having committed his April salary to settle outstanding debt and further the money not being enough the May salary also recovered (as per cross-examination of RW1) and the employee not being entitled to salary having not worked, I find and hold that the claimant having been invited to disciplinary proceedings on the absconding, the employer complied with obligations under section 41 of the Employment Act. The employee constructively terminated their employment in the circumstances. I am persuaded that the employer complied with the law. See Simon Mbithi Mbane Vs Inter Security Services Limited (2018) e KLR where the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. In the instant case the employer even offered to pick up the claimant in the alternative Zoom call and the claimant refused to cooperate (page 24 of the respondent's bundle dated 10th November 2020). The court finds that it is unfair to impose unreasonable burden beyond efforts made by the respondent to bring the claimant back to employment. An employee who is not willing to attend place of work cannot expect to be paid salary. Salary is the price in exchange for labour. In the circumstances I hold that there was no prove of termination hence the issue of its fairness of the termination cannot arise.



Whether there was unfair variation of contracts of employment

Claimant's submissions

54. The Claimant was employed on permanent and pensionable basis vide the letter of employment dated 11th June 2018. There is nowhere this letter of employment was terminated by the parties. The fixed term contracts did not make mention of the letter of employment. The claimant submitted that the fixed term contracts purportedly entered into without proper termination of the main contract of employment are illegal and invalid.

Respondent's submissions

55. The Respondent submits that the Claimant was on fixed term employment as captured in his fixed term contracts at pages 4 – 9 of respondent's bundle of documents dated 10th November 2020. That the contract on which the Claimant is relying on, and being the contract at page 11 – 15 of the Claimant's bundle dated 23rd September 2021, was never confirmed, and this was clearly brought out by the Respondent's witness during her examination both in chief and cross-examination. The Respondent avers that the Claimant was issued with his first fixed term contract of employment in July 2019, and the same was renewed on a number of occasions as clearly captured in the various contract renewals at pages 4 – 12 of Respondent's bundle of documents dated 10th November.
56. That the Claimant continued working without raising any complaints when he was issued with the fixed term contracts and the various contract renewal notices, showing that he had agreed to being employed on fixed term basis. The Claimant further did not resign from his employment when issued with the fixed term contract and the various renewals, showing that he had fully accepted to be bound and work under the terms of said fixed term contracts. It is worthy for the court to note that the Claimant during his cross examination by Respondent's Counsel confirmed to having not raised any issue when he was issued with the fixed term contracts and further that he continued working for the Respondent for a number of years under said fixed term contracts. The Claimant himself has even adduced one of his contract renewal notices which is at page 17 of the claimant's bundle dated 23rd September 2021. At no point in time did the Claimant claim breach of his employment by being employed under fixed term contracts, and cannot now claim the same when he had agreed to be employed under the terms of the fixed term contracts. As captured under the court decisions mentioned under paragraphs 3 and 4 of our submissions hereinbefore, the Claimant's actions amount to him waiving any claim of constructive dismissal that may have arisen given the fact that he accepted to be employed under fixed term basis and worked for several years under said terms without raising any issues. Further that, the issue of fixed term employment is legally recognized under the [Employment Act 2007](#) which at paragraph 2 defines "contract of service" as:

"an agreement whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service..." It is evident that the Respondent acted legally in issuing the Claimant with various fixed term contracts and renewing the same on various occasions, and the same does not amount to breach of the Claimant's employment. There being no breach, the Claimant cannot now claim constructive dismissal.



Decision

57. The court found it was an issue in dispute as to when the claimant was employed and under what terms. The claimant stated he was employed in 2018 vide a contract dated 11th June 2018 (C-exh 1). Conversely, the respondent stated that the claimant was employed on 1st July 2019 with contract automatically expiring on 31st December 2019 and was subsequently renewed every 6 months. The claimant produced a fixed term contract of 6 months dated 1st July 2021 expiring on 31st December 2021.
58. The respondent stated that the contract of 2018 was never confirmed. The court on perusal of the contract found that it was only signed by the claimant on 14th June 2018 and not the employer. A contract must be signed by all parties and in this case must be signed by the employer to be legally binding, indeed all fixed contracts produced subsequently are signed by 2 directors of the Respondent's company. The court in the circumstances finds that the contract produced by the claimant of 2018 having not been signed by the employer was not a valid document and cannot be relied on as evidence to prove variation of terms of service or even of employment.
59. The court found variation of the salary payable following letter dated 1st May 2020 to the claimant on salary cut by 20% due to the COVID 19 pandemic. The claimant said he was coerced to accept the cuts. The court noted that the communication was unilaterally from employer. The court noted the acceptance clause was to the effect that the claimant had read and understood the content of the letter on salary reduction by 20% and accepted that. The claimant signed on 2nd May 2020 witnessed by HR executive. The court found the claimant was a well-educated employee and had no challenge in understanding the consequence of accepting the contract variation. This court has taken the position that COVID 19 impacted businesses globally adversely and supported efforts by employers to keep employees rather than offloading them taking into account the market dynamics. The court did not find evidence of the alleged coercion as on expiry of the contract at the material time the claimant accepted renewal of the contract on 27th July 2020 and did not object to the terms. During his employment he did not raise any issues with the salary.
60. The court for the foregoing reason finds that the salary cuts were necessitated by COVID 19 pandemic which was beyond control of employer and was justified to keep the business afloat and retain employees at work. The court found no evidence of coercion by the respondent to the claimant in accepting the salary cuts.

Whether the claimant is entitled reliefs sought.

61. Unpaid salary- the same is rejected as the salary for May covered outstanding debts and the claimant was entitled to salary from 29th May 2021 when he refused to resume work.
62. Salary deductions – not payable the court having held they were lawful and justified.
63. Claim for 1 month notice- the court held there was no proof of termination of employment.
64. Claim for Commissions earned- the claimant did not prove on a balance of probability any commissions owed. He was paid some commissions under produced payslips. In response to demand letter he was invited to substantiate the claim for due commissions. He did not do so. The mere statement of commission for 37 months cannot hold as commission is based on actual sales which ought to be specified.



65. Claim for House allowance -The first fixed term contract dated 1st July 2019 and accepted by the claimant on even date stated that salary was Kshs. 75000 including house allowance. The claim had no basis.
66. Claim for untaken Leave pay in lieu -The claimant sought untaken leave for 3 years. Section 28(4) of the *Employment Act* only allows 18 months can be carried over. It states –‘(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.’ “The respondent produced evidence to effect that in 2020 the claimant took 7 days leave remaining 14 days. In 2021 he took 4 days remaining 17 days. The court allows leave claim of the balance days total 31 days leave. The court finding that the employment relationship is over awards leave in lieu at the contract salary of Ksh. 75000. 31 days is equal to most months days and leave is awarded at Kshs. 75000.
67. Claim for Service pay- the claimant was on NSSF. Section 35(6) of the *employment act* applies. The court finds that the allegations of non-remittance was not proved. The court further holds the NSSF board has capacity under the law to recover such monies if deducted and not remitted with penalties.
68. No compensation is due as there was no prove of termination.

Conclusion

69. In the upshot the claim is allowed for payment of 31 days of leave (1 month salary under contract). Judgment is entered for the claimant against the respondent as follows-
- a. Untaken 31 days leave Kshs. 75000.
 - b. Interest at court rate from date of filing suit.
 - c. Costs of the suit
70. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant – Ochieng h/b Khalwale

Respondent: Odengo

