



REPUBLIC OF KENYA



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**Guerra v Urysia Limited (Cause 649 of 2017)
[2024] KEELRC 488 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 488 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 649 OF 2017
K OCHARO, J
FEBRUARY 23, 2024**

BETWEEN
LUIS MANUEL FONSECA PASSOS GUERRA CLAIMANT
AND
URYSLIA LIMITED RESPONDENT

JUDGMENT

Introduction

1. Luis Manuel Fonseca Passos Guerra [the Claimant], a Higher National Diploma holder in automobile engineering, trained in the United Kingdom and with over twenty [20] years in various jurisdictions, in a range of companies as a workshop and technical team's coordinator, national learning and development manager, human resources manager, operations manager, technical trainer, training manager, technical manager, workshop manager and mechanic, was on or about the 1st October 2017, employed by the Respondent under a two years fixed term contract. In an abrupt and unexpected twist of things, the Respondent terminated his employment only six months into the contract period.
2. Contending the termination was unfair and counter to fair labour practices, the Claimant instituted this claim against the Respondent seeking several remedies; injunctive; declaratory; and compensatory, in nature.
3. The Respondent resisted the Claimant's claim through a Statement of Defence dated 10th July 2017. The Claimant's claim that the termination of his employment was unfair and contrary to the canons of fair labour practices, and entitlement to the reliefs sought was vehemently denied. The Respondent contended that the termination was on account of a valid reason, unsatisfactory performance, during a probationary period.



4. After hearing the parties' respective cases, this Court directed to the parties to file their written submissions. They obliged the directions. This judgment is with the benefit of their respective submissions, therefore.

Claimant's case

5. At the hearing, the Claimant adopted the contents of his witness statement as his evidence in chief. Further, he tendered in evidence the documents that he filed herein under a list of documents dated 5th April 2017 as his documentary evidence.
6. The Claimant stated that during his working life and before he joined the employment of the Respondent he had worked inter alia as a development manager and trainer of technical and sales teams for globally renowned companies and brands including Precision Tune Auto-care in Portugal and Spain, Opel [Vauxhall], Nissan Renault, Mahindra, JMC, Isuzu, Nissan Diesel, Honda Motorbikes, Gilera and Piaggio.
7. It was the Claimant's case that he was first introduced to the Respondent by Mr Paulo Jorge Goncalves, at the request of the Respondent. The Respondent was then headhunting for a professional with qualifications like his. In its email dated 28th June 2016, the Respondent intimated to him that it was impressed by his Curriculum Vitae, and initiated a negotiation process. It set out their preferred terms, including that "The duration of the contract could be between 2-5 years renewable."
8. The Claimant stated further that after lengthy negotiations and planning, on or about the 27th of June 2016, the Respondent agreed to employ him on a three year contract from 1st October 2016 to 30th September 2019. Following this, he resigned from a well paying job in Angola and joined the Respondent on the 4th of October 2016. He joined the Respondent's workforce on the understanding that the contract period was three years and without any probationary period. He was joined by his wife [who also resigned from her employment] and a child.
9. At the time of arrival in Kenya, no contract of employment had been presented to him for consideration even though at all times, the Respondent's Managing Director kept on promising that the contract could be prepared and availed the Claimant.
10. The Claimant asserted that out of the negotiations and verbal agreement, the terms that were to be embodied in the written agreement were;
 - a. A net salary of 80,000 Euros- per year;
 - b. Contract term would be two (2) years from 1st October 2017 to 30th September 2019, with the option of renewal;
 - c. The Respondent will pay accommodation costs, Medical Cover equivalent to BUPA, return tickets, club membership and other benefits afforded to senior management.
11. It was further stated that, upon arrival in Kenya, the Respondent changed its position and, amongst other things, insisted on unilaterally:
 - a. Setting his gross salary at Kshs. 735,037.60 per month, an amount which was below the agreed sum;
 - b. Introduced a clause on probation which was not agreed on;
 - c. Introduced a clause on restraint of future employment without provision for compensation during the period of restraint, which was not agreed;



- d. Altered or excluded the clause on benefits particularly housing, insurance, car, air return tickets, club membership, necessary entertainment expenses and other benefits enjoyed by senior management, and insisted the Claimant was to settle from his own pocket, which was not agreed.
12. For the reason that the terms of the contract had been unilaterally altered, the Claimant did not approve or execute the first draft contract sent to him in January or February 2017, save that he agreed to a reduced term of 2 years after significant harassment by the Respondent. He expressed his dissatisfaction on the terms in the draft by his email dated 28th March 2017.
13. It didn't matter to the Respondent that he had not executed the agreement for the reasons stated. The Respondent commenced paying him the altered sum of Kshs. 735,037.60, and did so for 5 months.
14. Besides distorting the agreement, the Respondent embarked on harassing and intimidating the Claimant to constrain him to resign or execute the skewed contract. The actions didn't yield any fruit.
15. It is averred that on 29th March 2017, the Respondent unduly influenced the Claimant to execute the lopsided agreement by placing the Claimant under immense duress. The Respondent's Senior Management and auditors represented to him that the execution was only required to enable the Respondent to update its records. Further, as the probation period was ending on the 31st of March 2017, the Parties were to execute a contract that could factor in all the terms that were agreed during the negotiations. He signed a backdated agreement on the 29th of March 2017.
16. The Claimant was instructed to backdate the contract to 1st October 2016, a date when he had not even arrived in Kenya. He only arrived in Kenya on 3rd October 2016, and began his employment on 4th October 2016.
17. The Claimant stated that after executing the backdated agreement, the Respondent immediately initiated a process of terminating his employment on the account that he had been on probation, and couldn't be confirmed into employment as Head of Aftersales as his performance was unsatisfactory. By a letter dated 30th March 2017 delivered to him on 31st March 2017, the Respondent terminated his contract of service.
18. That on 31st March 2017, the Claimant was ordered to surrender his alien card, house keys, car, medical cover, computer and all other benefits. His inquiry as to the reasons for the termination didn't attract any response. Further, his plea that he be given time to organize himself and his family didn't elicit any favourable reaction, instead, the Respondent ordered security guards and the compound manager to confine him within his house until he surrendered the computer. He didn't have an option, he surrendered it.
19. The Claimant states that it is clear that the Respondent hoodwinked him into executing the contract containing the probation clause which had not been agreed on so as to use it as a basis for the unfair termination of his employment.
20. On 4th April 2017, the Respondent's Marketing Manager, Ms. MaryAnn, wrote him a short message reminding him that he wasn't supposed to be using the Company car, and directed that he vacates from the house he was occupying by the following day. His plea that he be given more time did not attract any response.
21. The Claimant contended that the Respondent's action of attempting to abruptly and unlawfully evict him, render him destitute, confiscate his alien card, medical insurance and car were inhuman



- and degrading, contrary to Article 25 of *the Constitution* and in breach of express provisions of the Employment Acts and *Land Act*.
22. The Claimant further stated that during his tenure, he performed his duties and obligations diligently and identified systemic weaknesses, mismanagement and loopholes that affected the Company's performance. The Managing Director, got extremely uncomfortable with the findings, leading him to engage in retaliatory actions while taking advantage of the Claimant's vulnerable position as a foreigner.
 23. That his summarily dismissal from employment was not only unfair, illegal and unlawful but also malicious, unreasonable and contrary to the rules of natural justice.
 24. In his evidence under cross-examination, the Claimant asserted that the numerous email correspondences between him and the Respondent, clearly indicate what the agreed terms of employment were. His email of 7th July 2016, categorically expressed what his expectations were.
 25. The Contract of employment was executed several months after he had started working. He executed the same as a result of harassment. The Contract that he signed embodied a clause for medical cover and house allowance for him. Further, he was also given a motor vehicle to use. The allegations in his pleadings to the effect that all these were not availed to him, were factually inaccurate, therefore.
 26. His immediate supervisor was the Marketing Manager. Unfortunately, the manager could have meetings with the Claimant's team without involving him.
 27. The Claimant further testified under cross-examination that he was served with the termination letter a day after executing the backdated contract. The Respondent had assured him that the agreement was just a formality. Further, it was to be used to process documents for his wife to aid her not to be deported.
 28. The Claimant stated further that through his email dated 28th March 2017, he complained that what the Respondent was offering wasn't what they had agreed out of the negotiations. As of 28th March 2017, he had worked for six months, without any written agreement.
 29. He vacated the house not peacefully. The Marketing Manager, the security guards and armed policemen demanded that he leave.
 30. In his evidence in re-examination, the Claimant stated that he was pressured to sign the contract. The Respondent was holding his wife's documents. Deadlines for her to put her immigration documents in order were fast approaching, yet the Respondent was not bothered to move the process. He feared that his wife was likely to become an illegal immigrant.
 31. He asserted that the 1st draft agreement that he received from the Respondent for action had everything wrong. He returned it while pointing out the shortcomings. As of the 28th of March 2017, he hadn't signed any contract. In the negotiations, there was no discussion on a probationary period.

PARA 32.

There were no discussions about his performance with his supervisor.

Respondent's case

33. The Respondent presented one witness, Ms. Jaqueline Chele to testify on its behalf. The witness adopted her witness statement dated 12th May 2022 as her evidence in chief. The witness stated that on or about June 2016, the Respondent sought to engage an automobile engineer in the capacity of Head of Aftersales. The functions of the holder of this position would include management and running of



service workshops, accident and body repair shop, parts operation, commercialization of the aftersales business units, technical training and support, and manufacturer relationships. The duration of the term would be 2-5 years, with the possibility of renewal.

34. The Respondent engaged the Claimant on referral from Paulo Jorge Goncalves. Further, the Claimant represented himself as having the requisite qualifications and experience.
35. The witness further stated that after negotiations, the parties came to an agreement and the Respondent drafted a contract for employment for execution. One of the terms of the said contract was that there would be a probation period of six months.
36. The witness asserted that during the probation period, it was discovered that the performance of the claimant was not up to expectations. The Claimant was given enough time to prove that he was competent as had been brought forth in his documents, but as the probation period came to an end, it was clear that his work didn't improve to the expected standards.
37. In a meeting held on the 30th of March 2017, the Claimant was informed of the Respondent's intention not to confirm him into employment. The termination was on account of a lack of capability on his part to perform his job satisfactorily. The terms of separation were spelt out to him. He was to receive one month's salary in lieu of notice and salary for much.
38. He was supposed to hand over all the facilities that he was enjoying. He was however very uncooperative. He declined the offer and stormed out of the meeting. The Respondent was ready to pay for an air ticket for himself and his family at the date of his choosing but he didn't allow the Respondent's team a chance to make this proposal.
39. Cross-examined by the witness admitted that Mr. Mwende the Managing Director head hunted the Claimant. In his email dated 28th June 2016, Mr Mwende indicated that the contract period would be 2-5 years, renewable. The email of 5th July 2016, doesn't mention a probationary period.
40. The witness further admitted that in one of the emails by MR. Mwende indicated to the Claimant that they were preparing a contract, and requested certain documents from the Claimant to enable the completion of the process. There is no email correspondence indicating that the contract was forwarded to the Claimant.
41. In her further testimony, the witness confirmed that the Claimant started working on the 4th of October 2016.
42. The Claimant wrote an email protesting that the contract had been altered by the Respondent and therefore he required some clarification on various issues.
43. The witness further testified that as of 28th March 2017, the parties were still corresponding on a draft contract. In an email of this date, the Claimant indicated that there was no agreement on probation.
44. She stated that she was aware that on the 1st of October 2016, the Claimant wasn't in Kenya. This gives an implication that the agreement was backdated. Further, the agreement was executed on the 29th of March 2017. The agreement was expected to reflect the terms that had been agreed on earlier.
45. The witness stated that the Respondent slated a meeting where it was to explain to the Claimant its intention to terminate his employment on account of unsatisfactory performance but the latter stormed out of the meeting. She added that there is nothing on the Respondent's record to show that he was invited to the meeting. Further, there is no document from which it can be discerned that his areas of weakness had been pointed out to him. The termination letter does not set forth the reason for the termination.



46. Pressed further on the issue of performance, the witness stated that she was not in the position to testify on it as she was not in the employment of the Respondent when the events leading to the Claimant's termination occurred.
47. The witness stated that though through his email dated April 4, 2017, the Claimant sought for more time to enable move houses, the Respondent didn't respond to the email.

Claimant's Submissions

48. The Claimant identified four issues for determination in this matter, thus; whether the contract of Employment dated 1st October is valid; whether the termination /dismissal of the Claimant from employment was unfair; whether the Claimant is entitled to the reliefs sought; costs of the suit.
49. The Claimant's Counsel submitted that it is common cause that the contract of employment was executed on the 29th of March 2017. Further, the contract was backdated to 1st October 2016, a date when he had not arrived in the country. The Respondent didn't give any plausible reason why the backdating was necessary. The only reasonable conclusion that can be made is that it was actuated by ill motive.
50. Counsel further submitted that the Claimant executed the contract of employment under undue influence, misinformation, coercion and immense pressure. All these factors make the contract void and invalid. To demonstrate that the circumstances of the matter point to the presence of undue influence on the Claimant to execute the contract, reliance was placed on the case of Ahmed Mohammed Noor vs Abdi Aziz Osman [2019] eKLR.
51. Counsel further submitted that the Respondent took advantage of the Claimant's weak position as a foreigner to intimidate the Claimant into signing the contract. Further, the Respondent misrepresented crucial facts to the Claimant to procure his signature on the contract, for instance, it lied to him that the contract he was executing was only for updating his record at the Respondent's and that there was another contract to be incorporated where the terms negotiated and agreed on were to be embodied.
52. It was further submitted that the Respondent's conduct was fraudulent. Fraudulent in the sense that it meets the description of being unconscionable dealing in contract law, unfair use of power arising out of parties' relative positions and resulting in an unconscionable bargain. See Black's Law Dictionary, 10th Edition
53. On whether the termination/dismissal of the Claimant from employment was unfair, the Claimant's Counsel submitted that in order for the termination of an employee's employment to pass the fairness test, the must establish by evidence that the same was on the basis of a valid and fair reason[s] and upon following fair procedure.
54. The termination letter that the Respondent issued the Claimant was silent on the reasons for the termination of the latter's employment. The letter only informed the Claimant that his employment was terminated forthwith.
55. Counsel further submitted that Section 41 of the [Employment Act](#) enjoins the employer contemplating termination of an employee's employment to first explain to the employee the reasons for which the termination is considered. The explanation must be in a language of the employee's understanding , and in the presence of another employee or shop floor union representative of his choice. The employee and his companion are entitled to make representations in defence which must be considered before the termination is decided.



56. The Claimant submits that even if he was on probation, as alleged, the Respondent was obliged to comply with the procedural safeguards contained in Section 41 of the Act as was held in the case of *Monica Munira Kibuchi & 6 others vs Mount Kenya University* [2021] eKLR where a three-judge bench held that Section 42 (1) would be unconstitutional in so far as it excludes an employee holding a probationary contract from the provisions of Section 41 of the Act.
57. The Respondent's witness testified that the Claimant's employment was terminated due poor performance. However, pressed to give details on the alleged poor performance she was unable. She explained her inability as stemming from the fact that she was not part of the team that undertook the disciplinary process against the Claimant.
58. It was further submitted that the evidence on record demonstrates that prior to the termination, there was no communication to the Claimant regarding any poor performance. The Respondent didn't prove that it had an employment policy or practice on how to measure good performance as against poor performance, or measures that were in place to enable them to assess the performance of each employee, or measures that were taken to address poor performance if they had the policy. To support this submission reliance was placed on the Court of Appeal decision in *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR.
59. The Respondent failed to discharge its legal obligation. It failed to demonstrate that the termination of the Claimant's employment was with a valid and fair reason, therefore. Further, it didn't prove that the process leading to the termination was in adherence to the canons of procedural fairness embedded in Section 41 of the *Employment Act*. To fortify the point that procedural fairness was lacking and the consequence thereof, reliance was placed on the cases of *Joseph Mwaniki Nganga vs United Millers Limited* [2022] eKLR; and *Peter Kamau Mwaura & Another vs National Bank of Kenya* [2020] eKLR.
60. It was submitted that the Claimant's employment was terminated without notice and that there was no payment in lieu thereof. He is entitled to notice pay as it is a statutory right. To support this point, Counsel relied on the provisions of Section 49 (1) (a) of the Act, and the cases of *Phanice Naliaka vs National Cereals and Produce Board* [2022] eKLR and *Orsborn Obaigwa Nanga vs Gusii Water & Sanitation Company Limited* [2022] eKLR.
61. The Claimant's Counsel submitted that at the time of the termination, the Claimant had served only 6 months of his 24-month contractual term. As the termination was unfair, the Court should exercise its discretion to award him salary for the remainder of his fixed term contract i.e. Kshs. 13,230,676.80, being 18 months' salary. The Claimant relies on the Court of Appeal case of *Minnie Mbue vs Jamii Bora Bank Limited* [2017] eKLR to support this submission.
62. The Claimant submitted considering the circumstances of and the factors set out in Section 49 [4] of the *Employment Act*, the Respondent should be condemned to pay him a compensatory amount of 12 months' gross salary for unfair termination. The Court should consider that; the Claimant did not act in any way that would warrant or contribute to his unlawful dismissal; the Claimant had been in the Respondent's service for 6 months prior to his unfair dismissal; the Claimant had 18 months left on his contract of employment; the Claimant had left his employment in Angola in the expectation that he would be in the Respondent's employ for at least 2 years and moved his family to Kenya; there are not many job opportunities available to the Claimant as he is a foreigner; and the Claimant had to incur a lot of expenses to secure the safety and comfort of his family after being unceremoniously kicked out of the Company house.
63. Finally, the Claimant seeks a repatriation allowance as he left



his home country to settle in Kenya at the behest of the Respondent. The Respondent catered for all his travel and accommodation arrangements in the country, but barely 6 months into his stay in the country, he was unceremoniously kicked out of his home and forced to surrender the house keys, car keys and other company property. As the Respondent had assured him that he was entitled to a return air ticket to the country of origin once a year during his employment, this Court should find that he is entitled to repatriation allowance.

64. As costs follow the event, the Claimant submits that he should be awarded costs of this suit.

Respondent's Submissions

65. The Respondent's Counsel identified three issues for determination thus; whether the Contract of Employment entered into by the parties and dated 2016 is indeed invalid; whether the termination of the Claimant's Employment Contract was unconstitutional; and whether the Claimant is entitled to any of the reliefs sought in the claim.
66. Counsel submitted that the Claimant has asserted that the contract is in on the prime ground that it was executed under undue influence and that the terms it embodied such as remuneration were way different from what had been agreed in the negotiations. The Claimant cannot be heard pushing for invalidation of the contract as he acquiesced to the terms. He continued to offer services dutifully to the Respondent for the entire duration of his probation, receiving the salary that he knew was allegedly less than the amount he had been allegedly promised.
67. The Claimant didn't put forth sufficient evidence on his allegation that he executed the contract following undue influence. He didn't show any specific incident or element from which the undue influence can be discerned. As was held in the case of Ahmed Noor v Abdi Aziz Osman [supra], a person alleging coercion must demonstrate what steps he or she took to avoid a contract into which he or she to have he alleges to have been coerced.
68. It was submitted that the decision of Monica Munira and 6 others vs Mt Kenya University and Anor. [supra], cannot be used in the instant matter to the prejudice of the Respondent. The declaration that Section 42 (1) of the *Employment Act* 2007 was unconstitutional came in three years after the act complained of. When the Respondent engaged the provisions, Section 42 in terminating the Claimant's employment, it acted on a valid law. The judicial decision cannot act retrospectively. To support these submissions, reliance was placed on the decision in Supreme Court holding in Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] KLR.
69. On whether the Claimant is entitled to the reliefs sought, the Respondent submits that the claim herein should fail for the above-stated reasons, and the Respondent should not be punished for following the law. In any event, the Claimant was invited to discuss his performance but decided to storm out of the meeting.
70. In the alternative and without prejudice to the foregoing, the Respondent states that the Claimant can only be entitled to one month's salary in lieu of notice per the contract that he signed. The Court was urged to note that all through, the Respondent has been ready and willing to settle the notice pay.
71. As the Claimant was terminated at the end of his probationary period and confirmation into employment, there cannot be any justification to award the Claimant salary for the remainder of his contract period.



72. On the Claimant's claim for the compensatory relief for 12 months' salary as compensation for unfair termination, the Respondent submitted that such an award can only be made for exemplary service. The Claimant's service was not exemplary, which is why his position was not confirmed.
73. Finally, the Respondent submits that the claim for repatriation allowance must also fail since the same is not quantified, contrary to the law that claims of this nature must be specified. In the alternative and with no prejudice to the foregoing, the Respondent has always been willing to pay for the Claimant's flight tickets to his country of origin, and since he already returned, the Respondent is willing to reimburse him in full for these expenses.

Issues for Determination

74. I have carefully considered the pleadings, evidence, and submissions filed, by both parties, and the following issues emerge for determination;
- I. Whether the contract of employment expressed to be dated 1st October 2016 was valid.
 - II. If the answer to [a] above is in the negative, what is the effect of the same on the nature of the employment relationship between the Claimant and the Respondent?
 - III. Whether the termination of the Claimant's employment was unfair.
 - IV. Whether the Claimant is entitled to the reliefs sought.
 - V. Who should bear the costs of this suit?

Whether the Contract of employment expressed to be dated 1st October 2016 was valid.

75. The Respondent contended that the Claimant executed a contract of employment dated 1st October 2016. The employer-employee relationship between it and the Claimant was anchored on the contract. It supplied the terms and conditions of employment for the Claimant. Further, the actions complained of by the Claimant rightfully flowed from the contract.
76. The Claimant on the other hand asserted that the executed contract was not a true reflection of the terms that were agreed between him and the Respondent. The execution was influenced by misrepresentation, fraud, undue influence and coercion. These factors vitiated the contract. It couldn't therefore be a basis for any valid action.
77. For a contract to be valid and enforceable, there is the requirement of essential elements such as offer, acceptance and consideration, inter alia must be present, whereas vitiating factors must be absent. Black's Law Dictionary [8th Edition] defines the word "vitate" as follows:
- "To make void or voidable, to invalidate either completely or in part."
78. Vitiating factors are those factors which may impair or undermine the validity of a contract and render it either void or voidable. A contract that is void has no legal effect. It is as if the contract was never made. A voidable contract, on the other hand, is on which a party [i.e. the innocent party] has the option to rescind or have declared invalid by the Court. Until this option is exercised, the contract continues on foot and remains valid and legally binding.
79. Imperative to state that those factors that vitiate contracts generally can similarly vitiate an employment contract. The Claimant asserted that he executed the contract under coercion. Coercion can be taken to mean any kind of threat or pressure put upon a person to get him to perform an act which he could



ordinarily not perform. In the context of an employment contract, the term connotes the use of a threat or pressure to make a person enter into a contract.

80. In my view, coercion vitiates consent and automatically invalidates the contract. In the case of *Pao On v Lau Yiu Long* [1973] 3 WLR 435, Lord Scarman stated;

“there must be coercion of will such that there was no true consent.....it must be shown that the contract was not a voluntary act”

81. To determine whether there was coercion or not, a five-point criterion is used. In the case of *Riskie V Sony of Canada Ltd* [2015] ONSC 5859 [CanLII][SCJ], the Supreme Court of Canada identified the five points to determine whether or not the employee who was alleging coercion was put under duress to agree to a change in his employment conditions, thus;

- I. Did the party alleging duress protest at the time the contract was entered into?
- II. Was there an alternative course open to the party alleging coercion?
- III. Did the party receive independent legal advice?
- IV. After entering into the contract, did the party take steps to avoid it?
- V. Was the pressure illegitimate?

82. This Court notes the Claimant’s uncontroverted evidence, and that indeed, the Respondent’s witness admitted in her evidence under cross-examination, that the Claimant through email protested the fact that the Respondent had unilaterally brought into the contract, terms and conditions, that had not been agreed on during the negotiations.

83. Considering the circumstances in which the Claimant found himself, it would not be difficult for a reasonable man to hold that the Claimant did not have an option, he had to sign the contract. He was a foreigner who had quit his former employment excited to join what he expected to be a well-paying job. A foreigner who had just moved into a new country and was employed without first being given a written contract, one whose wife’s immigration documents were in the hands of the Respondent’s Officers who caused him to sign the agreement. The fate of her wife’s residence status was literally in their hands.

84. It is my view, that in the circumstances of the matter, the Claimant did not have an opportunity to seek Counsel of a legal expert. The Respondent didn’t allege and or place forth evidence that the contract was transmitted to the Claimant before the date of execution, for his consideration and decision.

85. No doubt, the pressure on the Claimant was illegitimate. The Respondent knew very well that it had incorporated into the contract matters that were outside what was agreed upon in the negotiations, and that it could use the contract the following day as the basis to terminate the Claimant’s employment. The Respondent as the employer acted in bad faith.

86. This Court hasn’t lost sight of the fact throughout the negotiation process which was largely through email correspondences, not a single of them indicated that a probationary period was contemplated, or brought on board the issue. Further, the Respondent through its email dated 4th September 2016, wrote to the Claimant stating “In the meantime, we are preparing an employment contract for you. Please send us your particulars; passport number, address, et al. Please let us have your spouse’s and children’s details.” This gives me the undoubted impression that the correspondence had culminated in a consensus on the terms that were to be in the contract.



87. In light of these premises, and the denial by the Claimant that the contract executed was a true reflection of what the parties had agreed on the onus was on the Respondent to demonstrate to the Court that there was consent prior to the above-stated date, that the probationary term be incorporated in the agreement, or if there was thereafter, when? This it failed to.
88. In the upshot, I am persuaded by the Claimant that the contract was executed under coercion and that the same was not reflective of the true intention of the parties.
- If the answer to [a] above is negative, what is the effect of the nature of the employment relationship between the Claimant and the Respondent?
89. Having found as I have hereinabove that the contract of employment that the Claimant was invalid, the question that springs up then is, what was the nature of the employment relationship between the Claimant and the Respondent? In my view, the contract was not based on any written contract. Further, it was a month-to-month contract of service terminable by a twenty eight days' notice as contemplated under the provisions of Section 35 of the *Employment Act*.
90. The Claimant was therefore an employee entitled to all those expansive protections and rights that were ushered in post-2007 when the new crop of statutes concerning employment and labour relations were enacted.

Whether the termination of the Claimant's employment was unfair.

91. The Claimant asserted that the termination of his employment was unfair, as the process engaged by the Respondent didn't adhere to the prescripts of procedural fairness embedded in Section 41, and as the same was not on account of a fair and valid reason. True, as submitted by Counsel for the Claimant, termination of an employee's employment can only pass the fairness test where the employer demonstrates by evidence to the requisite standards of the *Employment Act*, that there was procedural fairness in, and a fair and valid reason[s] for, the termination. The Court of Appeal in the case of Pius Macha Isundu v Lavington Security Guards, [2017] eKLR stated;
- “There can be no doubt that the Act, which was enacted in 2007, places a heavy legal burden on employers in matters of summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [Section 43]- Prove that the reasons were valid and fair [Section 45]- Prove that the grounds are justified [Section 47[5]] among other provisions. A mandatory and elaborate process is then set up under Section 41, requiring notification and a hearing before termination.”
92. The two aspects [procedural fairness and substantive justification] are statutory. The employer no longer has a free hand to terminate an employee's employment without cause and adherence to fair procedure and hide behind the fact that it made the requisite notice pay or that it was willing to make the pay.
93. Section 41 of the employment provides a mandatory procedure that must be adopted by an employer contemplating terminating an employee's employment. The provision obligates the employer to explain to the employee in a language that he or she understands, the reason[s] behind the intention, give the employee and or an accompanying colleague, or a trade union representative, an opportunity to make representations on the reasons and consider the representations before taking a decision. The onus is on the employer to prove that the termination procedure embraced these components.



94. The Respondent contended that the Claimant's assertion that it didn't adhere to procedural fairness must fail for two reasons. First, at the time of the termination, the provisions of section 42 of the Employment Act had not been declared unconstitutional. Therefore, the protection and rights under section 41 of the Employment Act, were not available to him. I am not persuaded by this argument. The probationary clause that the Respondent puts reliance on, purportedly flowed from the contract that this court has voided. This Court's finding hereinabove regarding the nature of the contract of employment between the two, militates against the argument.
95. Secondly, it contended that the Claimant was invited to a meeting where his poor performance and the Respondent's intention were to be explained to him, but he stormed out of the meeting. The Respondent didn't provide any evidence to show when, and that indeed, the Claimant was invited to the meeting. The Respondent's witness in her evidence under cross-examination admitted that she had no evidence to demonstrate this.
96. It was the Respondent's duty to demonstrate that the edicts of procedural fairness were complied with. The premises herein above brought forth, indicate that it didn't. Holding that the termination was procedurally unfair, becomes inevitable.
97. As indicated hereinabove, the procedure set out in section 41 is mandatory, and non-adherence has a consequence on the termination or dismissal, in the case of *National Bank of Kenya v Samuel Nguru Muntonyi*, [2019]eKLR the Court held;
- “We fully adopt the above position in law that the Bank ought to have invoked 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 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.”
98. I now turn to consider whether the termination was substantively fair. For an employer to successfully argue that he terminated an employee's employment with substantive justification, he must discharge the legal burdens that the Employment Act has placed upon him, the burden to prove the reason[s] for termination, section 43 and that to prove that the reason[s] was fair and valid, 45 of the Act.
99. The Respondent advanced the reason for the termination as poor performance of the Claimant during his probationary period. Having found as I have hereinabove, that in the circumstances of this matter, the Claimant was not an employee who was not under probation at any time, it is not difficult to conclude as a result that the Respondent didn't have any valid and fair reason to terminate the Claimant's employment.
100. Even if for argument's sake, one was to state that the Respondent was able to show that poor performance or incapacity was the reason for the termination of the Claimant's employment, still the termination will be adjudged substantively unfair, as the Respondent will fall at the second hurdle, demonstrating that the reason was valid and fair.
101. It is not enough for an employer to allege that he terminated an employee's employment on account of poor performance. Courts in various judicial pronouncements have laid down what an employer asserting that he terminated an employee's employment due to poor performance must prove, for the



Court to find the reason valid and fair. In the case of Jane Samba Mukala vs Oltukai Lodge Limited [2010] eKLR, 225, the court observed;

“Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of nothing 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. Section 5[8] further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.”

102. The position was echoed in the case of National Bank of Kenya v Samuel Nguru Mutonyi [2019], where the Court of Appeal stated;

“The reason advanced by the Bank for terminating the Respondent’s employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010; [2010] LLR 255 [ICK] [September 2013] the observed as follows;

- a. Where poor performance is shown to be the reason for this, the employer is placed at a high level of proof as outlined in Section 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 what 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 once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the grounds 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.

..... We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee’s contract as restated in the Janet Nyandiko case[supra] and the observation of the ELRC in Jane Samba case[supra]. We find no basis for faulting the Judge’s finding that an appraisal ought to have been conducted on the Respondent’s work performance in 2014 to confirm whether the Respondent had Before termination. In the absence of such proof, the termination of the Respondent’s employment with the bank was unfair.”



103. Certainly, there is no gainsaying that the termination of an employee's employment must be elaborately explained and justified. The Respondent's evidence didn't address this Court on the factors elaborated in the above-cited decisions. From her evidence, one cannot deduce that the Respondent had a performance appraisal mechanism for its employees; that the Claimant was appraised against some set targets that were made known to him and which he had to achieve; that the Claimant was appraised on those targets using the appraisal mechanism; that he didn't perform satisfactorily and by what levels; that his poor performance was brought to his attention; and that despite the notification, the situation of poor performance persisted.
104. Absent this proof, I could have no hesitation in finding that the termination of the Claimant's employment was devoid of substantive justification.

Whether the Claimant is entitled to the reliefs sought.

105. The injunction orders sought in paragraphs [a] and [b] of the Statement of Claim are long overtaken by events. I will have no reason to delve into them.
106. The Claimant sought inter alia payment of 3 months' salary in lieu of notice. Having found as I have hereinabove that the Claimant's employment was terminable under the law by one month's notice, I see no basis on which I can grant an order for notice pay other than as contemplated under Section 35 of the Act, one month's salary in lieu of notice. Under this head, the Claimant is awarded, KShs. 1,041,300.00.
107. The Claimant further sought for compensatory relief under the provisions of Section 49[1][c] of the Employment Act, for unfair termination. The authority bestowed upon this Court under this provision of the law is discretionary. It is exercised depending on the peculiar circumstances of each case. The law caps the maximum amount awardable under the provision at twelve months' gross salary. Again, whether the Court shall award the maximum amount or a portion thereof or nothing at all, is determined on a case-to-case basis.
108. I have carefully considered the revealed circumstances that; the Claimant was head-hunted to join the Respondent's employment, and he had to separate from his former employment to join the Respondent; that his wife too had to separate with her employer to join to come to stay with him in Kenya; that the Respondent's representations influenced these and fueled a legitimate expectation that he was to be under a fixed -term contract of three years; the fact that the Respondent cunningly ensured that no contract was executed until a day to the termination of the Claimant's employment; the inhumane manner the Respondent treated the Claimant, his wife and children upon the termination; the Respondent breached the canons of procedural and substantive fairness in a manner that reflects impunity and lack of care, and hold that the Claimant is entitled to the compensatory relief to the maximum extent contemplated under law.
109. Consequently, under the provisions of Section 49[1][c] of the Employment Act, I award the Claimant twelve months' gross salary, KSHS. 12, 495,600.00.
110. The Court cannot avail the remedy sought for salary payment for the remainder of the contract period, for two reasons; The Court has already voided the contract and held that the contract of service between the Claimant and the Respondent was month-to-month. Secondly, the compensatory relief awarded hereinabove was sought as an alternative relief, having granted the same it will be improper for the Court both the alternative and the main relief.
111. In the upshot, Judgment is hereby entered for the Claimant in the following terms;



- I. A declaration that the contract expressed to be dated 1st October 2016 was invalid.
- II. A declaration that the employment relationship between the Claimant and the Respondent was month to month in nature terminable by a twenty eight days' notice under the provisions of Section 35 of the Employment Act.
- III. A declaration that the termination of the Claimant's employment was both substantively and procedurally unfair.
- IV. One month's salary in lieu of notice, KShs. 1, 041,300.00
- V. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, twelve months' gross salary, KShs. 12, 495,600.
- VI. Interest on the sums awarded above, at court rates from the date of this Judgment till full payment.
- VII. Costs of this suit.

READ SIGNED AND DELIVERED THIS 23RD DAY OF FEBRUARY 2024.

.....

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. GaKunga holding brief for Mr. Owino for Claimant.

Mr. Waweru holding brief for Mr. Okeyo for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE

