Opondo v Standard Group PLC (Employment and Labour Relations Cause E734 of 2021) [2024] KEELRC 342 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 342 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E734 OF 2021

K OCHARO, J

FEBRUARY 16, 2024

BETWEEN

PETER O OPONDO ..... CLAIMANT

AND

THE STANDARD GROUP PLC ..... RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 31st August 2021, Mr. Peter Opondo initiated legal proceedings against the Respondent, seeking redress for various grievances stemming from the termination of his employment contract. The litany of reliefs sought by the Claimant includes a declaration of unfairness, unlawfulness and illegality of his termination, as well as compensation for the same, unpaid allowances, salary for the unexpired term of the contract, gratuity, and damages for unfair labour practice.

2. The statement of the claim was filed contemporaneously with the Claimant's Witness Statement dated 31st August 2021, and documents under a list of documents of the even date.

3. Following the service of summons to enter appearance, the Respondent entered the appearance and filed a replying memorandum alongside its witness statement, denying the Claimant's allegations in their entirety.

4. After the close of pleadings, the matter was eventually heard on the 12th of April 2023, with both parties presenting their respective cases.

5. The Parties obliged the Court's directions on the filing of submissions. This judgment is therefore with the benefit of each party's submissions.

The Claimant's case

6. It was the Claimant's case that he is a reputable editor, media strategist and consultant in the media industry in Kenya and Sub-Saharan Africa. He has vast experience as a media executive in leading broadcasting, print and digital media, experience of over 20 years. Prior to joining the Respondent, he had worked with several media organizations.

7. The Claimant stated that due to his extensive experience, qualifications and expertise, by a contract of employment dated 27th January 2021, the Respondent employed him as the Editor, Strategy & Content [Broadcast] Grade 10. The contractual monthly salary was agreed upon at KShs. 1,000,000/-. He commenced his contractual duties on the 1st of February 2021. The contract of employment was a three-year fixed-term renewable contract. The contract was also governed by the Respondent's terms of service for senior Executives.

8. The Claimant stated that under clause 10 of the contract of employment, he was in the first instance placed under a probationary period of six months. Further, confirmation was subject to satisfactory performance and submission of the two reports that were specifically mentioned in the contract of employment.

9. He contended that during his probationary period, his performance was exemplary as evidenced by his diligent execution of duties and the fact that the Respondent's management assigned him very critical roles in the organization. Among his notable achievements, Mr. Opondo highlighted his involvement in critical organizational functions, including formulation of a KTN News revamp strategy, delivery of a weekly column in the Wednesday Standard Newspaper, and participation in a senior management mid-year business review conference.

10. The Claimant stated that on 16th July 2021 while undertaking his normal duties and without notice, he received a letter dated 16th July 2021 which informed him of the Respondent's decision to terminate his contract of employment with effect from 16th July 2021 on account of alleged unsatisfactory performance.

11. The Claimant asserted that moments before receiving the letter dated 16th July 2021, the Respondent's Human Resource Manager informed him that the Editor in Chief to whom he was reporting did not think he was the right person for the job. Furthermore, the manager suggested that he had the option to voluntarily resign to protect his professional reputation, otherwise, he was to be terminated by the Respondent. He politely turned down the said suggestions as they lacked a legal and factual basis.

12. Upon receiving the letter of termination, he was asked to clear with the Respondent and further advised that he would be paid his final dues at the end of July 2021. He obliged as evidenced by the Clearance form on record.

13. The Claimant averred that pained, hurt, distressed and humiliated, he complied with the Respondent's commands and left employment abruptly. He was not offered an opportunity to appeal against the decision.

14. The Claimant further contended that the termination was not preceded by; any notice that the contract of employment would be terminated; notification of any instances of unsatisfactory or poor performance; his being subjected to a performance appraisal and or a performance improvement plan; issuance to of the alleged unsatisfactory performance and; information on how the decision to terminate his employment was arrived at.

15. He further asserted that the termination of the contract of employment was malicious, unlawful and unfair in that; he was not afforded a hearing before the said termination; the Respondent cited the probationary clause to effect the arbitrary termination barely 15 days to end the probationary period; the Respondent failed to provide reasonable evaluation, instructions, trainings or guidance to enable him render satisfactory performance and; the Respondent failed to notify and advise him of the aspects in which they considered he had failed to meet the required performance standards.

16. He stated that he left gainful employment to join the Respondent's workforce having been promised security of tenure of at least three years, only to be dismissed by the Respondent from employment when he had just settled in its employment. This turn of events has caused him great loss and damage as it has left him with the tag "dismissed for unsatisfactory performance," unjustifiably. The media industry is competitive, the tag will impede his getting another employment.

17. Lastly, it is contended that vide a letter dated 19th July 2021, the Respondent erroneously, maliciously and falsely indicated that the Claimant had left employment to pursue other interests. In his view, this was an act that was only intended to cover up the arbitrary and malicious dismissal.

18. The circumstances of this matter place him on the path of entitlement to all the reliefs he has sought.

19. When cross-examined, he testified that he executed a contract of employment. Clause 10 provides for a probationary period of six months. Confirmation into employment was subjected to satisfactory performance. The confirmation would come within the probationary period.

20. He reiterated that the Human Resource Manager told him that his immediate supervisor had expressed that he was not the right person for the job.

21. He further testified that the termination letter was placed before him before the option to resign was suggested to him. The Human Resource Manager told him that if he opted to resign, the termination letter could be withdrawn. That is how the Respondent handled situations like his, for senior Managers.

22. He admitted that his assertion that he has failed to secure another employment owing to the separation is not supported by any documentary evidence in the form of applications for employment to different organizations.

23. Clause 11 of the contract provided for a termination notice or payment in lieu thereof. Though the Contract provided for gratuity, entitlement to it was subject to the occurrence of specific events.

24. In his evidence in re-examination, the Claimant testified that Clause 11 speaks to a clear month's notice. However, he was not issued with the contemplated notice.

25. On the issue of changing jobs, the Claimant stated that there was nothing wrong with it. The Respondent was in fact the 111 employer to give him a senior Management job. The fact that he managed to change jobs severally has made him advance himself in the media industry. The change in jobs has not at any time been a result of a dismissal from employment.

The Respondent's case

26. The Respondent's case was presented by Joy Kaguri, its Human Resource Manager. The witness stated that the Claimant was indeed employed by the Respondent as the Editor; Strategy & Content [Broadcast] Grade 10 for three years effective 1st February 2021.

27. The Respondent contended the contract of employment was a three-year fixed-term contract, renewable. For it to be renewed, the Claimant was required to express the willingness to have the same

renewed in writing not later than 6 months before the expiry. Further, he was entitled to a remuneration of Ksh. 1,000,000/-, and an annual bonus in line with the Performance Bonus Policy or the Board's discretion.

28. The witness further stated that the contract of employment entitled the Claimant to 25 working days of paid leave per annum accruing at a rate of 2.08 days a month. He was to serve under a probationary period of 6 months. His employment could be terminated during the probation period either by the Claimant or the Respondent by giving twenty-eight days' notice or pay in lieu of such notice. Confirmation into employment was subject to satisfactory performance.

29. Following internal measures, the Respondent's company reduced the salaries of its employees, the Claimant included. A decision was taken to reduce his gross monthly salary from Ksh. 1,000,000 to Ksh. 810,000 retroactively, effective 1st February 2021. The decision was communicated on 16th February 2016. The Claimant accepted the decision.

30. The witness stated that the Claimant's employment was terminated due to unsatisfactory performance during the probationary period. The termination was founded on the probationary clause. Further, he was paid all his terminal dues, i.e. leave days earned and outstanding as well as pay gin lieu of notice. Additionally, he was also issued with the Certificate of Service.

31. She argued that the Claimant's employment was not unfairly terminated as his employment was terminated during the probationary period. His confirmation into employment was subject to a satisfactory performance, which he failed to achieve. As the termination was done in conformity with the contractual terms and legally, the reliefs sought by him are unmerited.

32. In her evidence under cross-examination, the witness testified that though she has asserted in her witness statement that there were meetings and conversations between the Claimant and his supervisor, the assertion doesn't find support in any document.

33. The witness testified further that the Human Resource Department of the Respondent keeps records of employee payroll, leave details, and performance appraisals.

34. She further told the court that for the services he rendered in June, and July 2021, he was paid a salary was KShs. 1 million for each. The pay slips for the two months are a testament to this.

35. The Respondent has appraisal Procedures. The Procedures are detailed and documented. The Procedure envisages meetings and conversations between the employees and supervisors. They do envisage the Performance Improvement Plan [P.I.P]. The Human Resources Department is the facilitating department. In this matter, there are no documents from which the Claimant's performance appraisal can be discerned.

36. She further testified that the Claimant was to report to the Editor in Chief who was his supervisor. The Supervisor has neither testified in this matter nor provided any documents that speak to the Claimant's performance. Only the termination letter does mention unsatisfactory performance.

37. The witness contended that the process leading to the termination of the Claimant. There was a valid reason for the termination. He had been indicted for poor performance. There was no hearing extended to him.

38. In her evidence in chief the witness stated the Claimant was terminated on the strength of the provisions of Clause 10 of the contract. As an employee who was still under probation, he was not entitled to a hearing.

The Claimant's Submissions

39. The Claimant's Counsel identified six issues for determination thus;

    i. Whether the Claimant was entitled to procedural and substantive fairness before termination.

    ii. Was the Claimant's termination arbitrary, unlawful and unfair? If so, should the Court award twelve months' salary as compensation for the unfair termination?

    iii. Is the Claimant entitled to salary pay for the unexpired contractual period?

    iv. Whether the Claim for house allowance is merited.

    v. Is the Claimant entitled to damages for violation of his right to fair labour practices?

    vi. Is the Claimant entitled to gratuity?

    vii. Who should bear the costs

40. It was argued that the Respondent's position that the Claimant was not entitled to procedural and substantive fairness as he was an employee under probation is unfounded. Section 42 [1] of the *Employment Act* 2007 relied upon by the Respondent has repeatedly been found unconstitutional. Reliance was placed on the case of Monica Kibuchi & 6 others vs Mount Kenya University & Another [2021] eKLR, the case of Otieno & Another vs Council of Legal Education [2021] eKLR, as well as the case of Evans Kiage Ochwari vs Hotel Ambassadeur Nairobi [2016] eKLR in fortification of his submissions.

41. Section 42[1] having been declared unconstitutional, became a nullity from the date of inception or enactment and not from the date of the judgment that declared it as such. It cannot be available to the Respondent, therefore, to argue that since the declaration of the provision as unconstitutional came after the termination of the Claimant's employment, the declaration is not applicable in this matter. To support these submissions, reliance was placed on the case of Otieno v- Council of Legal Education [2021] eKLR.

42. Under sections 41,43, and 45 of the *Employment Act*,2007 as read together with Articles 27, 41, and 47 of *the Constitution* and as shown by decided cases, the Claimant was entitled to both substantive and procedural fairness, and it was immaterial that the probationary period was to lapse on 30th July 2021.

43. The Court was urged to note that the Claimant was terminated without the notice contemplated under clause 10 of the contract. He had only 14 days remaining to the end of the probation period. The termination was unlawful as the Claimant was given a shorter notice than the contractual notice.

44. On the 2nd issue, Counsel submitted that where the employer alleges that the termination of an employee was on account of poor performance, the onus is on that employer to demonstrate existence of the poor record of performance. To support this submission reliance was placed on the case of Fredrick Owegi vs CFC Life Assurance [2014] eKLR, as well as the case Jane Samba Mukala vs Ol Tukai Lodge Limited [2013] eKLR where it was held:

> "Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

It is imperative on the part of the employer to show what measures were in place to enable them 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."

45. Reliance was also placed on the case of Kenya Science Research International Technical & Allied Workers Union vs Stanley Kinyanjui & Magnate Venture Ltd [2010] eKLR and the case of Agnes Yahuma Digo vs PJ Petroleum Equipment Limited [2013] eKLR in fortification of his submissions.

46. It was further submitted on this point that the Claimant demonstrated in his evidence, which evidence was not rebutted that; he was not made aware of any standards that would be applicable in evaluation during the probation period; his performance was not evaluated or appraised during the probation period; he never discussed his performance with his supervisor; and he was not informed of any shortcomings in his performance and given a chance to remedy the same, if at all there was any.

47. The Claimant further submitted the evidence of the Respondent's witness' evidence on the allegation of underperformance supports his evidence as summarised hereinabove.

48. The Claimant concluded that the termination of his employment on the allegation of unsatisfactory performance was unfair, arbitrary, and unlawful, given that his performance was neither evaluated nor assessed by the Respondent.

49. On the reliefs sought it was submitted that the Claimant is entitled to compensation for the remainder of the term of employment. This Court should arrive at this conclusion considering the facts that; the termination of his employment was so sudden; the termination was without any demonstrated fair and valid reason; and that the malicious, unprocedural and unlawful termination, has placed him in a position where he cannot get another job in the media industry, owing to the impression created of him as a non-performer. To buttress the submissions that he is entitled to the relief, reliance was placed on the case of Kenya Methodist University vs Kaungania & Another [2022] eKLR, where the court held:

> " The last issue before us is that of the remedies merited by the Respondents. Since the termination of their contract was unlawful and unfair, it is our view that they were entitled not only to the pay for the period of the remainder of their contract but also to compensation and the three months' pay in lieu of notice as per the terms of the contract, arising from the provisions of section 50 of the *Employment Act*. The said section obliges Courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination of the employment of an employee."

50. Similarly, in the case of Narry Philemon Onaya-Odeck vs the Technical University of Kenya [2014] eKLR where the Court held:

> " The remedies thus under section 49(1) may be awarded in singular or multiple terms. Each case must be looked at on its own merits and particularly the pleaded orders. In this case, the claimant asserted his rights to benefit from the full benefit of his 3 years contract that was prematurely terminated at no fault of his own.
>
> The claimant had a monthly gross wage of kshs.216,100.00. In the 3-year contract of service, the claimant only served for 10 months and thus a remainder of 26 months was due. He has not been able to secure new employment noting that he had just retired from his previous employment at the University of Nairobi and based on his age, the respondent gave him a

3 years contract instead of 5 years. For the remainder term of the contract, the claimant is hereby awarded the sum of Kshs.5,618,600.00."

51. On the claim for unpaid house allowance, it was further submitted the contract of employment didn't make any provision for this allowance. The Respondent's witness confirmed in her evidence that the Claimant was neither given accommodation nor paid a house allowance. Section 31 of the *Employment Act*, and Regulation 4 of the Wages [General Wages Order], make a house allowance a statutory entitlement, where accommodation has not been provided, or where the salary is not shown to be consolidated and inclusive of a house allowance.

52. The foregoing submissions were supported by the decision in the cases of Grain Pro Kenya Incl Ltd vs Andrew Waithaka Kiragu [2019] eKLR, and Ayana Yonemua vs Liwa Kenya Trust [2014] eKLR.

53. For the relief of gratuity, the Claimant submitted that the contract of employment between him and the Respondent provided for gratuity in clause 13. Had the Respondent not terminated his employment unfairly and callously, at the end of the 3 years, he would have earned Kshs. 4,590,000.00. Employing the maxim Ubi jus ibi remedium, as did the Court in the case of John Bosco Munyao Nzumai vs Zheng Hong [K] Limited [2021] eKLR, this court should find that the Claimant is entitled to gratuity prorated to the six months he served the Respondent.

54. Lastly, it was submitted that the Claimant sufficiently demonstrated that his rights under Articles 41 and 47 of *the Constitution* were violated in the circumstances of this matter. As held in the case Monica Munira Kibuchi & 6 others v Mt. Kenya University & another [2021] eKLR, to deny an employee due process amounts to a violation of the right and fundamental freedom to fair labour practices, the Claimant urged this court to award him Ksh. 1000,000. as compensation for the said violation and his right not to be discriminated against. To buttress these submissions reliance was placed on the case of Simon Gitau Gichuru vs Package Insurance Brokers Ltd [2021] eKLR, and the case of County Government Workers Union vs Narok County Government & Another [2021] eKLR where the court awarded the Claimant Ksh. 1,000,000.00 for violation of the Claimant's constitutional rights.

55. Lastly, it is that costs follow the event. Having demonstrated that the termination of his employment was procedurally and substantively unfair, and therefore successful in his claim, the relief of costs should be availed to the Claimant.

The Respondent's Submissions

56. The Respondent's Counsel filed submissions on behalf of his client on the 10th of July 2023. He distilled three issues for determination thus;

    i. Was the Respondent bound to comply with section 41 of the *Employment Act* before the termination of the Claimant's contract of employment?

    ii. Was the termination of the Claimant's contract arbitrary, unlawful, wrongful, illegal and malicious?

    iii. Whether the Claimant is entitled to the reliefs sought.

    iv. Who should bear the costs of the proceedings?

57. It was submitted that it was common cause that; the Claimant was employed with effect from 1st February 2021; the employment contract contained a probationary provision in clause 10 and; the probationary period of six months had not lapsed when the Claimant's employment was terminated.

58. The Respondent's Counsel submitted that the Claimant heavily relies on the provisions of section 41 of the *Employment Act*, 2007 and the decision in Monica Munira Kibuchi [supra] which declared Section 42[1] unconstitutional to advance his position that the termination of his employment was procedurally unfair. The Claimant's reliance on this decided case draws to the question of when a declaration of unconstitutionality takes effect. The Court should note that the declaration was in respect of a pre-constitution legislation. Additionally, the Court in the cited case acknowledged that the declaration could not be used to punish the Respondent who followed the law as was.

59. It was further submitted that it be unjust to punish the Respondent for a conduct which was based on an existing law, and, that courts are normally reluctant to allow a retroactive effect to flow from judicial decisions that declare certain statutes or sections thereof unconstitutional. To fortify this submission the holding in the case of Chicot County Drainage Dist vs Baxter State Bank, 308 U.S 371 [1940] was cited, thus;

> " The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125; Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett, 228 U.S. 559, 566, 33 S. Ct. 581, 584. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences, which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, -with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

60. Further reliance placed reliance on the Canadian Supreme Court decision in the case of Attorney General of Canada vs George Hilslop & 4 others [2007] SCC as well as the case of Otieno & Another vs Council of Legal Education [2021] eKLR.

61. Counsel for the Respondent submitted that the case of Otieno &another v Council of Legal Education [2021] eKLR relied on by the Claimant is distinguishable from the present one as it concerned amendments effected to the *Advocates Act* after the promulgation of *the Constitution* thus the Court of Appeal rightfully returned that such declaration took effect from the date of the enactment. However, the present case concerns the unconstitutionality of the pre-constitution legislation.

62. Counsel summed it up on this issue, the Respondent rightly relied on the applicable law as was and should not be condemned based on a declaration of unconstitutionality that set in after its actions. The Claimant cannot be heard to argue that he is entitled to derive a benefit from the provisions of Section 41 of the *Employment Act*.

63. Answering the question of whether the termination was arbitrary, unlawful, wrongful, illegal or malicious, it was submitted that contrary to the assertions by the Claimant, the Respondent's actions were within the confines of the law, as was before the invalidation of Section 42[1] of the *Employment*

Act. To buttress this position, reliance was placed on the case Danish Jalango & Another vs Amicabre Travel Services Limited [2014] eKLR as well as the case of Abdulkader M. Musani vs Flora Printers [2016] eKLR.

64. For the reliefs sought, the Respondent submitted that taking into account the relevant factors; the Claimant was only entitled to one-month salary as compensation.

65. Counsel for the Respondent further submitted that just like the issue of procedural fairness could not arise in the instant matter by reason of operation of 42[1], that of substantive fairness doesn't too. The provision ousts the provisions of Sections 43 and 43 of the Act which speak to substantive fairness. Therefore, the authorities cited by the Claimant relating to poor performance are distinguishable from the instant case as they related to contracts that did not fall under the province of Section 42 of the Act.

66. It was stated that the Rw1 in her evidence was able to demonstrate that performance appraisals within the Respondent Organization take two modes. First, it may be oral with an employee's supervisor and second in writing through the performance measurement tools. The Claimant had performance discussions with his supervisor where he was informed of his poor performance. This evidence was not controverted.

67. The Respondent urged the Court to conclude that considering the above premises, the termination of the Claimant's employment was fair.

68. Counsel for the Respondent submitted further that on his submissions hereinabove regarding the fairness of the Claimant's termination, the two declaratory orders sought by the Claimant in prayers [i] and[vi] of his statement of claim cannot be availed to him.

69. On the compensatory relief sought by the Claimant pursuant to the provisions of Section 49[1][c] of the *Employment Act*, Counsel submitted that should the Court get persuaded that the Claimant is entitled to the relief, then it should be enjoined to consider the factors set out under section 49 as considerable. This Court should consider, that the Claimant contributed to his termination as a result of his poor performance, the fact that he was in the Respondent's employment for only five months and that he has not demonstrated that he tried to look for alternative employment after the termination despite the existence of other media Houses where a similar role can be taken up. The Claimant can only be entitled to one month's salary as compensation for unfair termination.

70. The law doesn't envisage compensation for the remainder of the contractual period where the contract of service has been terminated prematurely. Further, the contract between the parties expressly excluded further obligations on termination. Compensation for an unserved period of a contract of service can only be available to where there is no termination clause in the contract permitting either party to bring the contract prematurely to an end. To bolster these submissions the holding of the Court of Appeal in the case of Chairman Board of Directors [National Water Conservation & Pipeline Corporation] vs Meshack M. Saboke & 2 Others [2019] eKLR was cited, thus:

> " The position in law, which we adopt fully, was stated by the court in the case of Directline Assurance Co. Limited versus Jeremiah Wachira Kihara (supra), that compensation for an unserved period of a contract of service is only available where there is no termination clause in the contract permitting either party to bring the contract prematurely to an end."

71. The claim for salary and house allowance for the unexpired period of the contract does not only lack basis in law but is also unjustified. Granting the benefits will equate to this Court travelling beyond the statutory remedies under Section 49 of the *Employment Act*. Equally, the Court will be drawn

into overcompensating the Claimant. The reliefs cannot be awarded on top of the compensatory relief under Section 49 [1][c].

72. On the claim for gratuity for 3 years, the Respondent submitted that the same is misconceived relief. Gratuity is a contractual benefit only payable when and how it is prescribed in a contract. This as was held in the case of H. Young & Company [EA]Limited v Javan Were Mbango [2016] eKLR. Clause 13 of the contract expressly provided when and how gratuity could be paid to the Claimant. The Claimant's claim for gratuity for the full contract period is misconceived as no gratuity can be payable for the unserved contract period. Further, under clause 13 gratuity could only be paid if certain conditions were met, inter alia, upon the Claimant serving for half of the contract period. No doubt, the Claimant didn't.

73. It was further submitted that the Claimant didn't precisely plead a violation of the right to fair labour practices by the Respondent. No basis was therefore laid for the general damages sought. The Claimant didn't seek any declaration to the effect that his rights were violated. The plea for general damages should be declined.

Analysis and determination

74. I have carefully considered the pleadings by the parties, their evidence and submissions, and distil the following issues as those that emerge for determination;

    i. Whether the termination of the Claimant's employment was procedurally was procedurally and substantively fair.

    ii. Whether the Claimant is entitled to the reliefs sought.

    iii. Who should bear the cost of this suit?

75. It is common cause that the Claimant was employed by the Respondent through a contract of employment dated the 27th of January 2021 as the Editor, Strategy & Content [Broadcast] Grade 10 at a monthly salary of Ksh. 1,000,000 for a renewable three-year period. Further, the contract embodied a probationary clause. The Claimant was to be confirmed into employment only upon satisfactorily completing the six months' probation period that was contemplated under the clause.

76. There is no contestation that the Claimant's employment was terminated on the 16th of July 2021, a few days before the lapse of the probation period on an alleged account of poor performance.

77. The Claimant advanced the case that the termination of his employment was not procedurally fair, and as Counsel for the Respondent correctly pointed out, this position was heavily anchored on the provisions of Section 41 of the *Employment Act*, and this court's three-Judge bench decision in the case of Monica Munira & others vs Mount Kenya University [2016] eKLR.

78. Time and again this Court has stated that section 41 of the *Employment Act*, 2007 provides the statutory structure for procedural fairness in the Kenyan situation. This statutory concept embodies three components, first, the information component, the employer contemplating terminating an employee's employment must inform him or her, of grounds arousing the intention, Second, the hearing component, the employer must give the employee to be affected adequate opportunity to prepare for and present his defence on the grounds, and thirdly, the consideration component, the employer shall consider the representations made by the employee and or the person accompanying him, before taking a decision.

79. The Claimant asserted that the statutory prescripts under section 41 of the Act were not at all adhered to, making the termination unfair in terms of section 45[2] of the Act. While taking this position, he

however didn't appear to have lost sight of the fact that the Respondent's assailed action did happen when section 42 [1] of the *Employment Act* 2007, hadn't been declared invalid and that the provision was couched in a manner that expressly ousted the applicability of the cannons of procedural fairness to probationary contracts. According to him, any implication that Section 42[1] had on Section 41 was erased when the three-judge bench declared the provision unconstitutional in the Monica Kibuchi [supra] case.

80. For easy understanding and to put the matter in context, it is imperative to fully set out the provisions of Section 42[1] and [4] of the Act, thus:

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."

81. According to the Respondent it will be unfair for this Court to find against it as it acted on what the controlling was at the relevant time in the past.

82. The rival positions taken by the parties raise the question of retroactivity of judicial decisions. What happens in situations when action has been taken in reliance on a statute or a section thereof and subsequently the court decides that the statute or the section is unconstitutional or does not authorise the action which was taken? This is the question that they want this Court to answer. The statute could be one under which considerable sums of money have been collected from taxpayers. It could be one authorising detention in custody or affecting the period during which persons may lawfully be detained in custody.

83. In my view, one sure consequence of retrospective invalidation of the actions, will be a host of civil claims, leading to substantial civil liabilities. In the labour space, the consequence will be the closure of entities and or a multitude of redundancies. It is for this reason that this Court is not persuaded by the Claimant's position that when a court pronounces a section of a statute unconstitutional, acts or decisions are generally treated as void abinitio. That the act or decision will be so treated even though until the Court's judgement it was presumed to be valid.

84. In the case of Chicot County Drainage Dist vs Baxter State Bank, 308 U.S 371 [1940] was cited by Counsel for the Respondent while expressing that there exists the theory as expressed by the Claimant, stated;

> " The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425, 442, 6 S.Ct. 1121, 1125; Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett, 228 U.S. 559, 566, 33 S.Ct. 581, 584. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences, which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, -with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the

statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

85. To avoid the undesirable consequences of retroactive effects of judicial decisions such as those I mentioned hereinabove, it becomes imperative that a balance be struck between the legitimate reliance interest of actors who make decisions based on the law as it is at the relevant time on the one hand and the need to allow constitutional jurisprudence to evolve over time on the other. The Supreme Court of Canada in the case of the Attorney General of Canada v George Hislop and 4 other [2007] SCC, held;

> " People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what *the Constitution* requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of *the Constitution* is no excuse for Governments. But where a judicial ruling changes the existing law or creates new law it may under a certain condition, be appropriate to hold the Government retroactively liable. An approach to Constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interest of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow Constitutional jurisprudence to evolve over time on the other."

86. Courts have expressly tempered the retrospective effect of their decisions and for good reason by holding that though declaring a statute or a section thereof unconstitutional could render acts and decisions that were based thereon invalid, the Court's order should not operate retroactively but rather should operate from the date of the judgment or a later date.

87. In the said decision, Monica Kibuchi & 6 others vs Mount Kenya University & Another [2021] eKLR, [supra] that the Claimant has heavily relied on, the Court categorically held:

> " In conclusion, the Court disposes of the Petition as follows: -
>
> a. To the extent that Section 42(1) of the *Employment Act*, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with articles 24, 41 and 47 of *the Constitution*.
>
> b) The Court will not declare that in terminating the Petitioners' probationary contracts, the Respondent violated their constitutional rights and Section 41 of the *Employment Act* since the Respondent relied on the provisions of Section 42(1) of the Act as enacted by Parliament, which expressly excluded persons holding probationary contracts from the provisions of Section 41."

88. In terminating the Claimant's employment, the Respondent was guided by the prevailing law [section 42 [1]], which had expressly ousted the protection embodied under section 41, from being enjoyed by employees under probationary contracts. It won't be fair to hold that it terminated the Claimant's employment unprocedurally, without adhering to the prescripts of section 41.

89. The Respondent contended that just like it ousted the applicability of the provisions of the *Employment Act* that relate to procedural fairness, section 42[1] too ousted the applicability of those sections that speak to substantive fairness, in probationary contracts. With great respect, this position taken is wholly wrong. A keen reading of 42[1] reveals unambiguously, that it speaks specifically to the applicability of 41. Section 41 as mentioned herein above sets the structure for procedural fairness. It doesn't at all relate to substantive fairness.

90. Having said as I have hereinabove, I now turn to consider whether or not the termination of the Claimant's employment was substantively justified. Section 43 of the *Employment Act* places a duty on the employer to prove the reasons for the termination of an employee's employment in a dispute regarding the termination of an employee's employment. In my view, it does not whether the employee is under a probationary contract or has already been confirmed into employment. Where the employer fails to discharge the burden contemplated under the section, the termination shall be deemed unfair by dint of the provisions of section 45 of the Act.

91. Section 45 of the Act imposes a further burden on the employer to prove that the reasons were fair and valid.

92. In the case of Naima Khamis vs Oxford University Press E.A Limited (2017) eKLR the Court observed:

> " On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination."

93. No doubt, the Respondent asserted the termination of the Claimant's employment, was prompted by poor or unsatisfactory performance. This is discernible from the termination letter which reads in part:

> " RE: Termination of employment
>
> The above is in reference to your contract of employment.
>
> As per Clause 10 of your contract of employment, which states...." You will be on probation in the first instance for a period of six months during which time, either the company or yourself can terminate the employment services by giving twenty-eight days' notice or pay in lieu thereof. Probation confirmation will be subject to satisfactory performance...."
>
> Accordingly, and as provided in clause 10 of your contract of employment, your services have been terminated with effect from 16th July 2021 due to unsatisfactory performance during your probationary period."

94. The Courts in various judicial pronouncements laid down, what an employer asserting that he or she 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 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. Section 5 (8) (c) 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."

95. Similarly, in the case of National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR where it was held:

The reason advanced by the Bank for terminating the respondent's employment was poor performance.

a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them 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 ground of poor performance, an employee must be called and 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."

96. Noting the twin legal burden on the employer hereinabove set forth [see sections 43 and 45], and the jurisprudence on termination on account of poor performance, I have carefully considered the evidence by the Respondent's witness and hesitate not to find that; it doesn't demonstrate that the Respondent had a system in place for appraising employees under probationary contract; the claimant was informed of clear and specific targets to achieve during the probation period; the Claimant ever had any conversations on his performance during the probation period; the Claimant was appraised using a particular system and targets and; the alleged underperformance was brought to his attention, urged and assisted to improve, but failed.

97. To me, it was not enough for the Respondent just to say that the Claimant was terminated on account of poor performance without bringing forth evidence to establish the above-mentioned factors. In fact, the witness's evidence under cross-examination is full of admissions on this.

98. It was her testimony in cross-examination that apart from the letter of termination, nothing else speaks to the Claimant's unsatisfactory Performance.

99. I have carefully considered the Claimant's detailed evidence on what he managed to do for the Respondent and or the critical roles that it assigned him during the probation period; attending at least two editorial Board, and two Executive Committee meetings during which he presented a clear and coherent KTN News revamp strategy; at request of the Editor Print, he demonstrated expertise in areas of strategy innovation and creative thinking by writing and delivering a weekly column of 1000 words on page 15 of the Wednesday Standard Newspaper Edition effective 21st April 2021 until July

2021 and; tasked to addressing a senior Management mid-year business review conference which was slated for 20th and 21st of July 2021 alongside the Group Chief Executive and the Editor in Chief, but for the unfortunate turn of events that followed. In the absence of any evidence rebutting this, one cannot be off the stand to conclude that the Claimant's evidence doesn't speak to an employee afflicted with poor performance.

100. In the upshot, I conclude that the termination of the Claimant's employment was absent of substantive fairness.

Whether the Claimant is entitled to the reliefs sought or any of the reliefs

i. 12 months compensation for the unfair termination.

101. The Claimant invited this Court to award him Ksh. 12,000,000/- as compensation for the unfair termination. I am cognizant of the fact that the 12 months' gross salary is the maximum awardable compensation provided for under section 49 (1) (c) of the *Employment Act*. A grant of compensatory relief under the section is discretionary, the extent too. It depends on the circumstances peculiar to each case. I have carefully considered how the Claimant's employment was terminated which in my view was in total ignorance of the stipulations of the law, the fact that I am not awarding the Claimant gratuity as shall come out hereunder shortly, the length of time that he served the Respondent [which factor minimizes what I could have awarded], that he didn't contribute in any manner to the termination, the competitive nature of the media industry as far as hiring is concerned and the fact that he had not secured another employment, and arrive at the conclusion that he is entitled to the compensatory relief and to an extent of 6 [six] months' gross salary, Ksh. 6,000,000.

ii. Unpaid House Allowance.

102. The Claimant also urged this Court to award him Ksh. 765,000 as compensation for house allowance for the period between February 2021 to July 2021. Section 31 of the *Employment Act* provides as follows:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)."

103. Looking at the letter of appointment, the subject contract, does not indicate whether the sum of Ksh. 850,000/- was inclusive of the house allowance. The Respondent didn't tender any evidence to demonstrate that it was. This drives me to be persuaded by the Claimant's position that the Respondent was not paying him a house allowance or availing accommodation for him and that his salary was not inclusive of the allowance, notwithstanding that the allowance is a statutory right under

the stated provision of the law. In Kenya Union of Sugar Plantation & Allied Workers v Butali Sugar, it Mills Ltd [2021] eKLR, Radido J. stated that –

> " The requirement to provide housing or an allowance to cover rent, in the view of the Court, is a general entitlement to all employees without distinction on type and nature of the contract, save for the exceptions on consolidation and agreement in a collective bargaining agreement as contemplated by section 31(2) of the *Employment Act*, 2007, or in any other law."

104. Similarly, in Grain Pro Kenya Inc. Ltd v Andrew Waithaka Karagu [2019] eKLR, the Court of Appeal expressed itself as follows on the contractual document and house allowance:

> " We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied Section 31(2)(a) of the *Employment Act* to exclude it."

105. Having found that the Claimant's salary did not include house allowance and the Respondent did not provide housing, the Claimant is entitled to house allowance. In Anna Yonemura v Luwa Kenya Trust [2014] eKLR and KUDHEIHA Workers v B.O.G. Maseno School for the Deaf [2013] eKLR, the Court used 15%. The Court of Appeal cited the two cases with approval in Grain Pro Kenya Inc. Ltd v Andrew Waithaka Karagu [2019] eKLR and stated as follows:

> " To us, 15% is a reasonable percentage that an employee spends from part of salary to pay house rent."

106. This Court is hereby bound by the above decisions and award the Claimant House Allowance as hereunder:

[15/100 X Ksh. 850,000 X 6months] = Ksh. 765,000.

iii. Salary Payable for the unexpired term of the contract.

107. The Claimant further urged this Court to award him Ksh. 30,000,000 as compensation for the unexpired term of the contract. There has been a debate for some time now on the subject matter, of whether or not an employee can be compensated for the remainder of the contract period, and a common position doesn't seem to have been attained. I have carefully considered the provisions of section 49 of the *Employment Act*, and I am of the view that they do not suggest in any way either expressly or implicitly that the list of remedies availed thereunder is exhaustive. In my view, whether the court can travel outside the list is dependent on the circumstances of each case.

108. Furthermore, Clause 11 of the Employment Contract which the Claimant executed provided in part:

> " Termination.
>
> This contract may be terminated by either party giving the other three months' notice or paying three months in lieu without further obligation arising on either party with respect to the remainder of the contract period."

109. It is as a result of this clause that I cannot move any further, but state that mine is to give effect to the contract by the parties and not to rewrite the same for them. I decline to make any award under this head. In so declining, I am further inspired by the reasoning in the case of Chairman Board of Directors [National Water Conservation & Pipeline Corporation] vs Meshack M. Saboke & 2 Others [2019] eKLR, thus:

> " The position in law, which we adopt fully, was stated by the court in the case of Directline Assurance Co. Limited versus Jeremiah Wachira Kihara (supra), that compensation for an unserved period of a contract of service is only available where there is no termination clause in the contract permitting either party to bring the contract prematurely to an end."

iv. Gratuity payment for three years

110. The Claimant further sought for Ksh. 4,590,000/- as Gratuity for the three years of service. Clause 13 of the employment contract provides payment of gratuity at the rate of 15% for every completed year of service and in case of termination before the lapse of the contractual period, gratuity payment was to be pro-rated accordingly provided the employee had served for more than half of the contract period. No doubt, as at the time of exit, the Claimant had not hit the half mark. The right to earn gratuity had not accrued in his favour. The claim under this head is hereby declined.

v. Unpaid House allowance for the remainder of the term of the contract.

111. The Claim under this head is rejected. The Court has it has not been shown any legal basis for the same. Further, the rejection is on the premise hereinabove on which I declined to award the relief for salary for the remainder of the contract period.

vi. Damages for unfair labour practices

112. It is a trite principle that in litigation where a party seeks relief on an alleged violation of *the Constitution*, Constitutional rights and fundamental freedoms, the party must plead with a reasonable degree of precision demonstrating the Constitutional provision[s] violated or threatened to be violated, or the rights and freedoms violated or threatened to be violated, and the nature of the alleged violation. This was so stated in the case of Anerita Karimi Njeru vs Attorney General [1979] eKLR.

113. In the case of Julius Meme Vs Republic [2004] eKLR the Court stated:

> " We would however, again stress that if a person is seeking redress from the High Court on a matter which involves *the Constitution*, it is important [if only to ensure that justice is done to his case] that he should set out a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

114. I have carefully scanned through the Memorandum of Claim by the Claimant and hold that he didn't with precision set out therein, how the alleged constitutional right was violated. I decline the invitation to make an award under this head.

Who should bear the cost of this suit?

115. The cost of the suit is to be borne by the Respondent.

116. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;

a. A declaration that the Claimant's termination was procedurally fair but substantively unfair.

b. 6 [six] month's compensation pursuant to section 49 [1] [c] of the *Employment Act* 2007.....Ksh. 6,000,000.

c. Unpaid House Allowance.....Ksh. 765,000.

d. Interest on the sums awarded hereinabove at court rates, from the date of this Judgment till full payment.

e. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 16TH DAY OF FEBRUARY 2024.

OCHARO KEBIRA

JUDGE

In presence:

Mr. Rapando for the Claimant

Mr. Pamba 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