Halar Industries Limited v Katanga (Employment and Labour Relations Appeal E098 of 2022) [2024] KEELRC 676 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 676 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E098 OF 2022

AN MWAURE, J

MARCH 14, 2024

BETWEEN

HALAR INDUSTRIES LIMITED .... APPELLANT

AND

MUTISYA KATANGA .... RESPONDENT

JUDGMENT

1. The Appellant not being satisfied by the judgment of the Honorable Senior Principal Magistrate filed this appeal vide a Memorandum of Appeal dated 9th July 2022 on grounds that:

    a. Thatthe learned magistrate erred in law and fact in holding that the Appellant did not follow due procedure as per the *Employment Act*, in terminating the employment of the Respondent herein.

    b. Thatthe learned magistrate erred in law and fact in finding that the Respondent was not awarded sufficient time to respond to his show cause letter issued to him by the Appellant.

    c. Thatthe learned magistrate erred in law and fact in holding that the Respondent was terminated on the day he was given his show cause letter instead of the day he actually was given his termination notice.

    d. Thatthe learned magistrate erred in law and fact in not appreciating the fact that the Appellant had sufficient reason in terminating the employment of the Respondent.

    e. Thatthe learned magistrate erred in law and fact in not taking into consideration the fact that the Respondent did accept the allegations that led to the termination of his employment.

    f. Thatthe learned magistrate erred in law and fact in awarding the Respondent four (4) months compensation when the Respondent was employed for a fixed term of three (3) months only.

g. Thatthe learned magistrate erred in law and fact in awarding the Respondent costs for the suit.

Appellant's Submissions

2. The trial magistrate went on to hold: "………there is no evidence offered by the Respondent (Appellant herein) to prove that due process was followed in effecting the Claimant's termination." It is the Appellant's submission that as per Section 41 of the EmSployment Act, the Respondent was clearly informed the reasons why it was considering to dismiss his services and was given an opportunity to respond.

3. That Appellant submitted that the Claimant/Respondent was issued with a show cause letter dated 4.5.2019 which clearly laid out the reasons why the Appellant was considering to summarily dismiss him from employment. The Claimant/Respondent was invited to a disciplinary hearing slated for 6.5.2019 as laid down in the show cause letter, the Claimant/Respondent responded and apologized for his poor performance in line with the accusations levelled against him.

4. The Appellant submitted that the Respondent did not raise any claim that he had been forced to write his apology to the allegations levelled against him in the show cause letter. Neither did the Respondent raise in his claim and pleadings that he was forced to issue a response or issue an apology, this was therefore an afterthought to try and counter the overwhelming evidence against him produced in court.

5. The Appellant submitted that the hearing was held on 6.5.2019 and it produced before court minutes of the hearing clearly detailing all who were in attendance and capturing the occurrences in the hearing. Further, the Claimant/Respondent was allowed to attend the hearing accompanied by a union representative or peer witness of choice, those in attendance appended their signature on the minutes affording the Claimant an opportunity to be heard as required by law.

6. It was submitted for the Appellant that the Respondent was present during the hearing as captured in the minutes and he accepted the allegations leveled against him and he did not raise any claim that he had been forced to accept them and issue an apology. The Respondent did not give any other response to the allegations in the show cause or intimate he had a different response.

7. It is the Appellant's submission that the it adhered to the provisions of section 41 of the *Employment Act* by giving the Claimant/Respondent an opportunity to respond to the allegations and affording him a hearing where he was able to fully express himself and offer any explanation to be considered before dismissal of his employment. Therefore, the trial magistrate erred in fact and in law in holding that the Appellant did not adhere to the law or follow due procedure as per the *Employment Act*, in terminating the employment of the Respondent herein.

8. The Appellant submitted that the employment and labor laws do not provide a clear timeline considered as enough time to enable an employee respond to the allegations leveled against them in a show cause or prepare for a hearing. Such determination is left to the employer's discretion considering the circumstances surrounding the whole disciplinary process, the employee may request for an extension of time to issue their response, prepare for a hearing or documentation.

9. The Appellant submitted that Respondent was issued a show cause letter dated 4.05.2019 which indicated he had 24 hours to respond to the allegations. It is well recorded in the typed proceedings before the trial court that during examination in chief and cross-examination, the Respondent accepted the fact the he was issued with the show cause letter and he was aware of the disciplinary hearing which was scheduled for 06.05.2019 and confirmed attendance.

10. The Appellant submitted that the Respondent did not raise any issues concerning the time allocated to issue a response or attend the disciplinary hearing; neither did he indicate he needed more time or requested to be granted more time. It relied on Henry Isaiah Onjelo v Maridadi Flowers Limited (2015) eKLR. It is the Appellant's submission that the trial magistrate erred in fact in holding that the Respondent was issued with a show cause letter a day to his disciplinary hearing when evidence shows that he was issued the letter 2 days prior.

11. The Appellant submitted that it is uncontroverted evidence that the show cause letter invited the Respondent to a disciplinary hearing on 04.05.2019, he attended the hearing and was afforded opportune time to respond which he did vide his response and apology dated 04.05.2019. The Respondent was issued a summary dismissal letter at the end of the disciplinary process which indicated the effective dated as 04.05.2019, this does not negate the fact that the Appellant took the Respondent through a disciplinary hearing as envisaged in the *Employment Act*.

12. It is the Appellant submission that the court does not indicate the Claimant/Respondent was not afforded his rights under the *Employment Act* and therefore cannot claim that the process is ineffective only because the effective date of dismissal was backdated. It does not negate all the processes undertaken by the Appellant and therefore cannot be the basis of holding the Respondent's dismissal was unfair and/or illegal.

13. The Appellant submitted that the trial court erred in fact and law in holding that the Appellant in indicating the effective date of the Respondent's dismissal as 04.05.2019 instead of 06.05.2019 when he was issued with the summary dismissal letter and after being taken through a disciplinary process in adherence to the provisions of the *Employment Act*.

14. The Appellant submitted that the Respondent during the disciplinary hearing and as captured in the minutes adduced before court together with his own response to the show cause letter agreed to having performed his duties negligently leading to poor production contrary to the provisions of his employment contract.

15. The Appellant submitted that the Respondent in his oral testimony in court on 03.11.2021 accepted and confirmed that he willfully neglected to perform his duties and he actually carelessly performed work, a fact which was corroborated by his response to the show cause letter and minutes if the disciplinary hearing adduced as evidence before the trial court.

16. The Appellant submitted that it has a fair and just reason to summarily dismiss the Respondent which was proven from the evidence adduced and from the Respondent's own testimony before court. Further, the Appellant followed due procedure before coming to the decision to summarily dismiss him.

17. It is the Appellant's submission that the trial magistrate erred in law and in fact in holding that the Appellant did not prove the reasons of termination especially given the fact that the Respondent accepted the allegations leveled against him and even issued an apology in response.

18. The Appellant submitted that the Respondent was employed as a machine attendant for a fixed period of 3 months from 01.04.2019 to 30.06.2019 which was confirmed by the Respondent during his examination in chief and recorded by the trial court at page 3 of the typed proceedings. The trial magistrate did not give reasons why he awarded 4 months damages yet he was on a 3 month fixed term contract.

19. The Appellant submitted that the trial magistrate erred in fact and in law in awarding damages more that the fixed term contract period the Respondent was employed. Further, when issuing damages to

the Respondent, the trial court did not consider that the Appellant followed die procedure and had a justifiable reason in summarily dismissing the Appellant.

20. The Appellant submitted that an employee is not entitled to notice when being summarily dismissed and hence not entitled to be granted notice pay. In the instant case, the trial court misdirected itself in awarding the Respondent notice pay where he had been fairly and justly summarily dismissed as per the provisions of the *Employment Act*.

Respondent's Submissions

21. It is the Respondent's submission that vide the evidence before the trial court, his dismissal was vide a letter dated 04.05 2019 while the disciplinary hearing was held on 06.05.2019. This implied that the Appellant dismissed the Respondent first from the employment and purportedly undertook a disciplinary hearing afterwards in breach of Section 41 (2) of the *Employment Act*, as due process was not followed.

22. The Respondent submitted that the Appellant accorded him limited time of 1 day to prepare, adduce and challenge the allegations against him during the disciplinary hearing offending the principles of due process. Further, that the Respondent was dismissed first from the employment and a disciplinary hearing came later which confirms the trial court's averments under paragraph 12 of its Judgement dated 08.07.2022.

23. It was submitted for the Respondent that although the *Employment Act* does not provide timelines within which one should appear for disciplinary hearing process, it is a matter of decency that a day or so is such a short time for such a process. The Appellant's show cause letter dated 04.05.2019 summoning the Respondent for a disciplinary hearing was insufficient as it did not grant the Respondent enough time to prepare for the disciplinary hearing which was scheduled on 6th May, 2019 at exactly 8:00 am.

24. The Respondent submitted that his dismissal letter was dated 04.05.2019 while the disciplinary hearing was held on 06.05.2019 and further, the Disciplinary Hearing Report dated 06.05.2019, stated that the Appellant completed the investigations as to the allegations it had labelled against the Respondent on 07.05.2019, one day after it conducted hearing process. Therefore, the logical explanation is that the Appellant realized that it had infringed on the employment rights of the Respondent, then went ahead to issue a show cause letter inviting the Respondent for a disciplinary hearing so as to cleanse the already flawed process.

25. It was submitted that the Respondent that the dismissal letter dated 04.05.2019 stated, "We write to inform you Mutisya Katanga of ID No 233XXXX of payroll No 213 on 04/05/2019 of your summary dismissal due to extreme negligence of work and poor productivity." The Appellant was expected to discharge the burden of proof in light of these grave allegations as against the Respondent before the trial court as per Section 43 (1) of the *Employment Act* which the Appellant failed to prove. Further, the Appellant cannot neglect the duty placed upon it under Section 43 (1) of the Employment Act 2007 to prove the allegations of extreme negligence of work and poor performance and start informing this Court that the Respondent accepted the said allegations. He relied in Appeal 199 of 2013, CMC Aviation Limited v Mohammed Noor [2015] eKLR.

26. It was further submitted for the Respondent that the investigations as to the allegations against the Respondent ended on 07.05.2019, yet the dismissal letter is dated 04.05.2019 and the hearing was done on 06.05. 2019, this indicated that the Appellant initially acted in apprehension, innuendos and with no sufficient reasons for terminating the Respondent's employment.

27. It was the Respondent's submission that the Appellant used to contract the Respondent for only 3 months and once the same expires it renews it again for another 3 months; this habit continued for 10 years and amounted to an unfair labor practice contrary to Articles 41 (1) and Article 41 (2) b of *the Constitution* of Kenya and Section 37 of the *Employment Act*. He relied on Civil Appeal No. 180 of 2017, Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR.

28. The Respondent submitted that the trial court exercised its discretion and rightfully awarded a 4 months compensation in favour of the Respondent based on the peculiar circumstances of the case which was before it. This discretion cannot be interfered with save for the special grounds and circumstances. The Appellant has not shown how the trial magistrate relied on the wrong principles to arrive at what they allege to be a whimsical and capricious.

29. The Respondent submitted that paragraph 9 of the Appellant's Service Contract Agreement Form states:

> "The minimum period of notice for the termination of contract by either party shall be one--month notice or a pay in lieu of notice period. Early termination of the agreement will not be accepted without a reasonable reason except by the management where there are grounds for immediate termination such as serious misconduct. The employer will be entitled to suspend employee on serious misconduct where there is a health and safety risk without prior notice."

The Appellant's could not demonstrate the reasons of terminating the Respondent's employment and could not adduce evidence to demonstrate the allegations against Respondent while dismissing him from employment vide a letter dated 04.05.2019. Therefore, the Appellant cannot evade paragraph 9 of its Service Contractual Forms to serve one month notice or pay in lieu of notice by grounds for the immediate termination.

Analysis and determination

30. Arising from the grounds of appeal, the following are the issues for determination:

    a. Whether the learned magistrate erred in law and fact in holding that the Appellant followed due procedure as per the *Employment Act*, in terminating the employment of the Respondent.

    b. Whether the learned magistrate erred in law and fact in not appreciating the fact that the Appellant had sufficient reason in terminating the employment of the Respondent.

    c. Whether the learned magistrate erred in law and fact in awarding the Respondent 4 months compensation when the Respondent was employed for a fixed term of 3 months.

Whether the learned magistrate erred in law and fact in holding that the Appellant followed due procedure as per the *Employment Act*, in terminating the employment of the Respondent.

31. Section 41 (1) of the *Employment Act* provides for the minimum procedural requirement before dismissing an employee, thus: -

> "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering

termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

32. In Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited (Employment and Labour Relations Cause 22 of 2019) [2022] KEELRC 1302 (KLR) (21 July 2022) (Judgment) the court held:

> " The claimant contended that the grievant was not given an opportunity to defend himself and going by the minutes produced before this Court, I agree with him that having been called to the disciplinary hearing, the Respondent at the very least ought to have allowed him cross examine the witnesses arraigned against him and also afford him an opportunity to give his side of the story. Mere invitation and appearing at a disciplinary hearing is not sufficient prove of procedural fairness. The employee must be given an opportunity to explain himself.
>
> I seek the support from the case of Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR where the court observed as follows;
>
> > "Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union. After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."
>
> In light of the foregoing, I am of the considered view that without affording the grievant a chance to air his representations during the disciplinary hearing meant that the dismissal was not done in accordance with a fair procedure as required by section 45(2)(c) of the *Employment Act*."

33. The minutes of the disciplinary hearing produced in the record of appeal does not show that the Appellant read out to the Respondent the allegations against him, gave him a chance to respond to the allegations and cross examine its witnesses if there was any. As expounded in Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited (supra), mere invitation and appearing at a disciplinary hearing is not sufficient prove of procedural fairness. The employee must be given an opportunity to explain himself.

34. The Appellant's assertion that the Respondent apologized and accepted the allegations is not enough defence as this was not clearly shown in the minutes of the hearing. The Respondent was not explained the allegations against him or any evidence in support of the said allegations presented before him

during the hearing to enable him respond. An employee will also easily apologize for fear of losing his job.

35. Further, the Appellant served the Respondent a notice to show cause letter dated 04.05.2019 which doubled as an invitation for a disciplinary hearing on 06.05.2019. The Respondent was to respond to the letter within 24 hours which clearly was unreasonably short period to prepare and to seek a willing and brave colleague as a witness.

36. Hon. Justice Rika held in Bongo v United Kenya Club (Cause 2318 of 2015) [2023] KEELRC 1286 (KLR) (31 May 2023) (Judgment) thus:

> "On 25th May 2015, the letter to show cause, containing 27 charges, issued upon the Claimant. He was required to appear before the Board on 3rd June 2015, ''to defend yourself against the allegations.'' The letter to show cause served as notification of the disciplinary hearing. There was no room, for the Claimant to first respond to the letter to show cause, and for the Respondent to consider if the explanation given by the Claimant, was sufficient to avoid escalating the process to a disciplinary hearing.
>
> The direct invitation to the disciplinary hearing, through a letter to show cause, can only support the assertion by the Claimant, that the Respondent went to the disciplinary hearing, with a prejudiced mind."

37. The Appellant's actions opined a prejudiced mind which was further evidenced by the fact that it issued the Respondent a dismissal letter dated 04.05.2019 while the disciplinary hearing was held on 06.05.2019 and investigation report is dated 07.05.2019.

38. In view of the foregoing, this court agrees with the Learned Magistrate that the Appellant did not follow due procedure as prescribed under Section 41 of the *Employment Act* and the claimant was therefore unlawfully dismissed from employment.

Whether the learned magistrate erred in law and fact in not appreciating the fact that the Appellant had sufficient reason in terminating the employment of the Respondent.

39. Substantive fairness is clearly laid down in Section 43, 45 (2) and 47(5) of the *Employment Act* which states:

Section 43 provides as follows:

> "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
>
> (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

40. Section 45 of the Act provides in part as follows: -

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove: -

a. That the reason for the termination is valid;

b. That the reason for the termination is a fair reason:

- Related to the employees conduct, capacity or compatibility; or

-Based on the operational requirements of the employer; and

-That the employment was terminated in accordance with fair procedure."

41. Section 47(5) of the Act stipulates as follows: -

" For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

42. Further, Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR the court held:

" In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

44. Commenting on this question, the Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR said as follows: -

" The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test."

The court, relying on an extract from Halsbury's Laws of England went further to comment as follows: -

" ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable

employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

45. Under section 44 of the Act, one of the grounds that would justify the finding of gross misconduct against an employee is the commission or suspicion of commission by an employee of a crime against the property or person of the employer. In relation to this ground and as has been rightly pointed out by counsel for the Respondent, it does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise. All that is required is for the employer to have justifiable and compelling grounds to suspect that the affected employee has engaged in acts that are criminal in nature and which affect the property or person of the employer.

Commenting on the parameters of section 44(4) (g), in Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR, the court observed as follows: -

> " The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil.......... all gave the Respondent reasonable and sufficient grounds to act against the Claimant."

46. The Appellant in the summary dismissal letter intimated that the Respondent was dismissed on grounds of extreme negligence and poor productivity. But there is no concrete evidence that the respondent was the only one who was responsible for the losses and the spoilt machine. The trial magistrate was right in finding the claimant was unlawfully terminated.

Whether the learned magistrate erred in law and fact in awarding the Respondent 4 months compensation when the Respondent was employed for a fixed term of 3 months.

47. In the case of Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union CA No 188 of 2014 the court stated:

> " Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

48. Section 50 of the *Employment Act*, as well as section 12(3) (vi) and (vii) gives the Employment and Labor Relations Court power to make an award in line with section 49 aforementioned. As already stated power to grant the remedies provided for under section 49 of the Act is discretionary. Such discretion must however be exercised judiciously, and in the words of this court in Kenya Revenue Authority & 2 Others vs Darasa Investments Limited [2018] eKLR ,Civil Appeal No 24 of 2018:

> " The court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."

49. Further, in Empire Feeds Ltd v King'ou (Appeal 6 of 2020) [2022] KEELRC 1501 (KLR) (23 June 2022) (Judgment) Hon. Lady Justice Stella Ruto held:

> " It is notable that the award of remedies under section 49 of the *Employment Act* is a question of judicial discretion, which is to be exercised prudently, bearing in mind that the objective of the remedies is to compensate the employee, and not necessarily punish the employer.
>
> The Court of Appeal in the case of Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR had this to say on the issue: -
>
>> "The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention."
>>
>> Section 49 (4) stipulates the considerations which the trial court must take into account before determining what remedy is appropriate in each case. Such considerations include, the length of the employment relationship, the circumstances of the termination, value of any severance payable, the extent to which the employee caused or contributed to the termination, failure by the employee to reasonably mitigate the losses attributable to the unjustified termination etc."

50. The Respondent in his evidence in chief testified that his contract was 3 months, however, the Appellant attached Service Contract Agreement Forms dated 01.10.2017 and 01.04.2019 showing that the parties routinely had a continuous engagement and the contracts were renewed. In view of this, court upholds the learned Magistrate's award of compensation of 4 months' salary.

51. Having established that the summary dismissal of the Respondent's employment was procedurally unfair, the dismissal was therefore unlawful. The court holds that the Learned Magistrate did not err in fact and in law by finding the respondent was unfairly and wrongfully terminated and secondly in awarding him 4 months' salary equivalent as compensation.

52. The costs of appeal are also awarded to the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE