



**Preissler & another v Daluga Investment Limited t/a Easygym Kenya & 2 others
(Cause 309 of 2020) [2024] KEELRC 473 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 309 OF 2020
JK GAKERI, J
MARCH 4, 2024**

BETWEEN

YVES PRESSLER 1ST CLAIMANT

WATCH IDEAS GENERAL TRADING AND CONTRACTING

WLL 2ND CLAIMANT

AND

DALUGA INVESTMENT LIMITED T/A EASYGYM KENYA . 1ST RESPONDENT

JAMES HOLDEN 2ND RESPONDENT

EAST AFRICA FITNESS LIMITED 3RD RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by a Memorandum of Claim dated 2nd June 2020 and amended on 4th November, 2021 alleging unfair and unlawful termination of employment.
2. The 1st Claimant was appointed by the 1st Respondent as Director of Operations on a contractual basis vide an employment contract dated 1st September, 2019 for a period of 4 years.
3. The 1st and 2nd Respondents also hired the 1st Claimant as a consultant for the 3rd Respondent vide a contract dated 1st September, 2019 on the basis of having successfully ran YP Business on consulting basis for the 1st Respondent which business is a division of the 2nd Claimant.
4. The employment contract required the 1st Claimant to relocate from Dubai to Nairobi for the duration of the contract period and the move was to be facilitated by the 2nd Respondent.
5. The 1st Claimant states that under the employment contract he was entitled to a monthly consolidated net salary of USD 1,500 to enable him secure reasonable housing whereas under the consultancy agreement he was to be paid a monthly fee of USD 10,700.



6. The 1st Claimant further states that he was entitled to transport/fuel of USD 50 per week, shipping cost amounting to USD 13,223, which has a balance of USD 3500, costs relating to shipping amounting to USD 10,000, relocation costs and health insurance cover.
7. The 1st Claimant states that he is entitled to benefit from the employee incentive plan of 5.5% of the total issued share capital of the East Africa Fitness Limited distributed across the 4 years contract period.
8. It is the 1st Claimant case that he discharged his duties honestly, faithfully and diligently to the best of his ability and even sourced for additional investors and suppliers who supplied goods on credit.
9. The consultancy agreement dated 1st September 2019 provided that it would be terminated upon termination of the employment contract or six months' notice or payment in lieu of notice or upon expiry of the term of the agreement.
10. The 1st Claimant states that following the reporting of the presence of Covid-19 in Kenya in mid-March 2020, he held a discussions with the 2nd Respondent and they agreed it was safer for him to return to Germany and work remotely as per the employment contract.
11. The 1st Claimant further states that he assured the Respondents that he would continue fulfilling his duties remotely and would ensure business continuity and the role his team would play while he was away.
12. The 1st Claimant states that the 1st Respondent withheld his salary for the months of January, March and April 2020.
13. The 1st Claimant states that he informed the Respondents that he had temporarily suspended his consultancy due to non-payment of salaries and consultancy fees which breached the agreement.
14. The respondents served the 1st Claimant with a Notice to Show Cause letter dated 2nd April, 2020 which he responded to.
15. Thereafter a virtual disciplinary hearing was held on the 27th April, 2020, which according to the 1st Claimant violated the principles of natural justice and fair hearing for want of independence.
16. The 1st Claimant states that he was summarily dismissed on the 28th April, 2020 for gross misconduct for suspending the consultancy agreement.
17. The 1st Claimant contends that his termination was unprocedural, unlawful, unfair and in contravention of the provisions of the law.
18. The Claimants seeks payment of his terminal dues as follows;
 - a. Payment of Outstanding salary for January, March and April USD 1,500 x 3= USD 4,500.
 - b. The guaranteed minimum settlement value per clause 10.4 of the employment contract amount USD 31,650.
 - c. Six Months' salary in lieu of notice as per clause 13.1.2 of the Employment contract USD 1,500 x 6 months Amount USD 9,000
 - d. Outstanding shipping expenses to Kenya as per clause 9.3.3 and 9.3.4 of the employment contract Amount USD 7000
 - e. Relocation cost out of Kenya as per clause 9.4 and 9.5 of the employment contract Amount USD 10,000.



- f. House renovation costs for the work done by Elma Contractors as per clause 8.1 of the employment contract Amount USD 4,902.
- g. Materials for the renovation of the 1st Claimants House Amount USD 7,500.
- h. Consultancy fee for Watch Ideas/Yves Pressler Business Consulting for the month of January 2020 as per invoice number 202 dated 12/3/2020 Amount USD 12,020.
- i. Consultancy fee for the month of March 2020 as per invoice number 203 dated 5/4/2020 Amount USD 7,133 .
- j. Six months Consultancy fees as per clause 3.2.2 of the consultancy agreement USD 10,700 x 6 Months USD 64,200.
- k. General damages of USD 503,400 being the amount of the money that the 1st Claimant would have earned but for the termination of the Employment Agreement and consultancy agreement.

Total Amount USD 661,305

19. The Claimant prays for;

- a. A declaration that the summary dismissal was unfair both substantively for want of valid reasons and procedurally for want of hearing.
- b. An award of USD 157,905 being terminal dues.
- c. An award of 12 months' salary as damages for unfair and wrongful termination of employment amounting to a sum of USD 18,000.
- d. General Damages of USD 503,400.
- e. Interest at court rate on (b) (c) and (d) above from the date of filling suit until payment is made in full
- f. A declaration that the 1st 2nd and 3rd Respondents violated the 1st Claimants right to fair labour practice
- g. An award of damages to the 1st Claimants for (f)
- h. Costs of the suit interests thereto until payment in full

Respondent's case

- 20. In Response to the Memorandum of Claim the Respondents filed a response to memorandum of claim dated 1st September 2020.
- 21. The Respondents states that the 1st Claimant's employment contract was conditional on the enforcement of the Consultancy agreement dated 1st September 2019.
- 22. It is the Respondent's case that one of the terms of the contract was that if the contract was terminated within 2 years from the date of commencement, the claimant would reimburse the respondent the cost of acquiring the work permit and relocation costs.
- 23. The Respondents states that the 1st Claimant deserted his place of work without his employer's permission and without a reasonable cause.



24. The respondents deny that the 1st Claimant organised or procured additional investment amounting to 50% of the total investment or credit facility amounting to 15% of the total investment.
25. It is the Respondents' case that it was the duty of the 1st claimant to ensure growth, progression and success of the business.
26. They state that the 1st Claimant informed the 1st Respondents employees and suppliers that he was no longer offering consultancy services.
27. The Respondents further state that the 1st Claimant failed to attend operation meetings scheduled by the 1st Respondent, deserted work, neglected to hand over reports and while communicating to suppliers he used derogatory language in reference to his superiors in the organization.
28. It is the Respondents' case that the 1st Claimant's employment was summarily terminated due to gross misconduct.
29. The respondents further states that the claimant's discontinuance of performance of the consultancy agreement dated 1st September 2019 was a serious jeopardy that contributed to his termination.
30. The Respondents further state that the 1st Claimant was accorded due process and a fair hearing prior to termination of his employment.
31. It is the Respondents' case that the 1st Claimant was issued with a notice to show cause which he responded to, was invited to a disciplinary hearing during which process the 2nd Respondent states that he was rude. That being dissatisfied with the 1st Claimant's conduct, a decision was reached to summarily dismiss him and elaborate reasons for the dismissal were given.
32. The Respondent denies that the 1st Claimant was entitled to any dues amounting to USD 173,900.
33. The Respondent states that the 1st Claimant was obligated to refund the respondent shipping expenses paid since the contract of employment was breached within the first two years of its commencement.
34. The Respondent urges the court to dismiss the claim with costs.

Claimant's evidence

35. The 1st Claimant testified as CW1 and adopted his written statement dated 29th May, 2020 that rehashes the contents of the Memorandum of Claim as his evidence in chief.
36. On cross-examination, the 1st Claimant stated that he had referred to two agreements, a consultant agreement and a employment agreement.
37. The witness stated that he called the 2nd Respondent and informed him that he was leaving the country due to the Covid-19 Pandemic and informed him when he arrived in Germany. He assured him that he would continue to working remotely. He stated that he had no evidence of the communication since his email was disabled.
38. The witness stated that his employment was terminated before the expiry of 2 years therefore the respondent ought to pay the relocation and permit costs.
39. The witness stated that he was not paid salary for the months of January, March and April 2020.
40. The witness confirmed that he received a notice to show cause, responded and attend a disciplinary hearing.



Respondent's evidence

41. RW1, James Holden, the Chief Executive officer of the 1st Respondent adopted his witness statement dated 6th September 2021 as his evidence in chief and produced the documents stated in the respondents list of documents.
42. The witness confirmed that he had engaged the Claimant to scout for a Director of Operations and one was found but not engaged and the Claimant assumed the role.
43. On cross-examination, the witness confirmed that the 1st Claimant had an employment contract and a consultancy agreement. That payment for work permit was approved on 19th March, 2020, but it was not paid for.
44. The witness further stated that he paid what was due to the 1st Claimant save for the salaries for the months he did not work.
45. That the Claimant left Kenya on 24th March, 2020 without a mutual agreement with the employer.
46. The witness confirmed that when the disciplinary hearing was being conducted on the 27th April, 2020, the 1st Claimant was still an employee of the company.
47. That he terminated the Claimant's employment on 28th April, 2020.
48. The witness also confirmed that he was the only person constituting the panel for the disciplinary hearing and the sole decision maker.
49. That for the Consultancy Agreement, the law governing the same was Kuwait law and parties had not waived the clause on the law applicable.
50. The witness confirmed that the employment agreement was signed on 10th March, 2020.

Claimant's submissions

51. The Claimant's counsel highlighted four issues for determination;
 - i. The 1st Claimant's employment comprised of both employment agreement and second agreement
 - ii. The 1st Claimant was unlawfully terminated
 - iii. There was a breach of the 1st Claimant's constitutional right to fair labour practice
 - iv. What reliefs are available to the Claimants?
52. On the first issue, the counsel submitted that the agreements were similar that no party could distinguish the different roles of the 1st Claimant under the employment contract and the consultancy agreement.
53. Counsel submitted that the two agreements mirrored each other and that offering consultancy services was an obligation in the employment contract.
54. Further, counsel submitted that the mere making of an employment agreement as a consultancy agreement cannot convert an employee to a consultant and relied in the holding in Peter Adams Ludaava vs Bonito Hotels Limited (2022) eKLR.



55. Counsel also submitted that the relationship between the 1st Claimant and the Respondents was one for Contract of service and that the Respondents being the drafters of the agreements are precluded from benefitting from any ambiguity arising in their tax planning tools. Counsel relied in the holding in *Mwangi Ngumo V Kenya Institute of management (2012) eKLR*.
56. On the second issue, counsel submitted that termination of the Claimant's employment was unlawful as the process was not fair and no valid reason was given for the termination.
57. Counsel submitted that the 2nd Respondent admitted as having been the complainant in the matter constituted the disciplinary panel and issued the termination letter yet natural justice dictates no person may judge his own case.
58. Counsel submitted that the 2nd Respondent's actions tarnished the disciplinary process as the hearing was biased and the claimants' right to a fair hearing was violated.
59. Counsel further submitted that the Respondents did not have a valid reason to initiate the disciplinary proceedings and that the 1st Claimant had every reason to complain about non-payment of his dues and those of the suppliers whose solution would have been payment and not unlawful termination.
60. Counsel urged that the 1st Claimant had a contractual right under the employment contract to not only work remotely but to be out of the country for an average of 1 week every month. He stated that while the 1st claimant was away he continued working remotely.
61. Counsel submitted that the 2nd Respondent admitted that it did not pay the 1st Claimant his salary for 3 months and he also informed members of staff not to engage him before he was issued with a notice to show cause and failed to renew his work permit and blocked his email access.
62. Counsel submitted that the 1st Claimant's dismissal was unlawful and was therefore entitled to receive a minimum settlement of USD 31,650, and is also entitled to 6 months' notice and maximum compensation for 12 months for breach of the agreements.
63. Counsel further submitted that the court ought to award the 1st claimant a sum of USD 21,500 which the Respondent unequivocally admitted to have owed the 1st Claimant.

Respondent's submissions

64. At the time the court was retiring to prepare this judgment, the respondents had not filed their submissions.

Findings and determination

65. The issues for determination are;
 - i. Whether termination of the Claimant's employment was fair?
 - ii. Whether the claimant is entitled to the remedies sought?
66. Before delving into the issues highlighted above, it is essential to determine whether the 1st Claimant had served under a Contract of service or a contract for service.
67. The 1st Claimant entered into an employment contract dated 19th September 2019 for the position of Director of Operations for a period of 4 years. Clause 3.7 of the employment contract stated "the Company is not obliged to fulfil the terms and conditions of this agreement if the consultancy agreement is not in force".



68. According to the employment contract, the 1st Claimant was entitled to a consolidated net salary of USD 1,500 per month.
69. Clause 10.4 of the agreement states that;
If the executive ceases to be an employee before a liquidity event due to a good leaver termination the minimum settlement value that the executive will be entitled to is USD 31,650 irrespective of whether the employee incentive plan would have been implemented or not.
70. Clause 10.5 states if the executive ceases to be an employee before a liquidity event for reasons other than a good leaver termination the executive shall forfeit his units.
71. The agreement further provides that the employment agreement shall automatically terminate upon termination of the consultancy agreement.
72. It is evident that there were two agreements between the 1st Claimant and the respondents, which were intertwined, and one could not operate without the other.
73. Section 2 of the *Employment Act*, 2007 defines employee as “a person employed for wages or a salary and includes an apprentice and indentured learner.”
74. In addition, Section 2 of the Act defines the phrase contract of service. It is an oral or written, express or implied agreement to employ or to serve as an employee for a period of time.
75. In *Ontario V Sagaz Industries Canada Inc.* (2001) SCC 59, *Jordon and Harisson Ltd V McDonald and Evans* (1952) 1 TLR 101 (UK) and *Ready Mixed Concrete (South East) Ltd V Minister of Pensions and National Insurance* (1968) 2 QB 497 among others, courts addressed the parameters a court ought to consider in determining whether a person is an employee or not.
76. Courts have applied various tests over the years such as the control test and the integration tests.
77. In the instant suit, the Respondent offered to engage the Claimant as a Director Operations of the 1st Respondent. On the other hand the Claimant was also engaged as a consultant of the 3rd Respondent for a period of 4 years both commencing 19th September, 2019.
78. From the foregoing reasons, it is evident that the 1st Claimant was an employee of the 1st Respondent and a consultant of the 3rd Respondent.
79. For purposes of this Judgment, the 1st Claimant has demonstrated the existence of an employer-employee relationship between himself and the 1st Respondent.
80. On the 1st issue, the court is invited to interrogate the fairness of the termination of the Claimant’s employment. In determining this issue, the court has to consider whether the respondents had a substantive justification to terminate the 1st Claimant’s employment and conducted the termination in accordance with a fair procedure as ordained by the provisions of the *Employment Act*, 2007.
81. The absence of both or one of these elements renders the termination of employment unfair within the meaning of Section 45 of the *Employment Act*, 2007.
82. Ndolo J. aptly captured the elements of a fair termination of employment in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, as substantive justification and procedural fairness. (See also *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR where the Court of Appeal made similar sentiments.)



83. Whereas the provisions of Section 41 and 45(2) of the *Employment Act*, 2007 address procedural fairness, those of Sections 43, 45(2), 45(5) and 47(5) deal with the substantive justification.

Reason for termination

84. The 1st Claimant was an employee of the 1st Respondent for a period of 7 months from the 19th September 2019 to 28th April 2020 when his employment was terminated.

85. On the 2nd of April 2020, the 1st Claimant was served with a notice to show cause alleging failure to exercise due care and attention in the performance of his work which amounted to gross misconduct.

86. The 1st Claimant responded to the show cause and was invited to a virtual disciplinary hearing on the 27th April, 2020 and on 28th April, 2020, he was summarily dismissed for gross misconduct.

87. The 1st Claimant testified that in the course of employment by the 1st Respondent he was consulting for the 3rd Respondent and both companies were owned by the 2nd Respondent. That the consultancy fee had not been remitted and he had temporarily halted the consulting services.

88. The 1st Claimant stated that his relocation to Germany was as a result of the reporting of the 1st COVID 19 case in Kenya on the 23rd March, 2020 which resulted in suspension of all international flights but he managed to get the last flight out of the country on 24th March, 2020.

89. The 1st Claimant further stated that he communicated to the 2nd Respondent via email of his departure and also stated that he would be working remotely as provide for in the employment contract.

90. The Respondent on the other hand stated that the 1st Claimant circulated emails stating that he had discontinued his services due to non-payment and made derogatory remarks against the employer which amounted to insubordination.

91. It is not disputed that the 1st Claimant was subjected to a disciplinary hearing but the bone of contention is the composition of the disciplinary panel which was constituted and consisted of the 2nd Respondent alone.

92. The 1st Claimant contends that the termination process was not fair and stated that the Respondents did not have a valid reason to terminate his employment and the disciplinary process was biased and could not have resulted in a fair outcome as the 2nd respondent constituted the disciplinary panel and issued the termination letter.

93. The 1st Claimant states that he was not accorded a fair hearing and the Respondent did not adduce evidence of the minutes of the disciplinary hearing for the court to establish how the decision to summarily dismiss the 1st Claimant was arrived at.

94. In determining the issue of termination of employment, the court is guided by the provisions of *Employment Act*, 2007 and case law.

95. Section 43(2) of the *Employment Act*, 2007 provides that;

“The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”

96. Second, Section 45(1) of the *Employment Act*, 2007 provides that;

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 reasons for termination was valid.
 - b. that the reason for termination is a fair reason.
97. Similarly, Section 47(5) of the *Employment Act*, 2007 provides that;

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.
98. These provisions are consistent that it is the obligation of the employer to prove that it had a valid and fair reason or substantive justification for the termination of employment.
99. In *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal explained the provisions of Section 43(2) of the *Employment Act*, 2007 as follows;

“. . . reasons for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract. For example, poor performance, insubordination and lack of loyalty are some of the grounds . . .”
100. The court is in agreement with these sentiments.
101. In the instant case, the Respondent alleged that the 1st Claimant breached the employment contract when he terminated the consultancy agreement, left the country and used derogatory language against the Chief Executive Officer.
102. On the other hand the Respondents through their witness confirmed that the Claimant had not been paid his January, March and April salary.
103. The employment contract entered between the 1st Claimant and the 1st Respondent confirms that termination of consultancy agreement automatically terminated the employment contract.
104. As the 1st Claimant confirmed that he terminated the consultancy agreement for failure of payment, the 1st Respondent has on a balance of probabilities shown that it had a valid reason to terminate the 1st Claimant’s employment and the court so finds.
105. Similarly, the 1st Claimant left the place of work in a hurry and without agreement with his employer as to how he would continue rendering services to the 2nd Respondent and had not planned to report back.

Procedure of termination

106. As adverted to elsewhere in this judgment, the 1st Claimant was on the 2nd of April 2020 issued with a notice to show cause which he responded to on the 7th April, 2020. On the 27th April, 2020, a virtual disciplinary hearing was held and on the 28th April, 2020, the 1st Claimant was summarily dismissed from employment.



107. In determining whether due process was followed, the court is guided by the provisions of Section 41 of the *Employment Act*, 2007 which prescribe the mandatory procedure to be complied with by an employer, in the termination of an employee's employment or summary dismissal.
108. Section 41 of the *Employment Act*, 2007 has four components, namely; the notification- the employer must notify the employee of his or her intention, and the grounds on which the intention is founded. Second, the hearing - the employer must accord the employee adequate opportunity to prepare and defend himself against the charges levelled against him, third, right of accompaniment- the employee has the right to be accompanied to the hearing by a colleague of his choice or a union representative. Such person must be present when the charges are explained to the employee. Lastly, the employer has to consider the representation(s) made by the employee and or the person-accompanying employee before making a decision.
109. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal isolated the elements of procedural fairness as follows;
- “It is our view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with ...
- Four elements must thus be discernible for the procedure to pass:
- i. An explanation of the grounds of termination, in a language understood by the employee.
 - ii. The reason for which the employer is considering termination.
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
 - iv. Hearing and considering any representations made by the employee and the person chosen by the employee.”
110. From the evidence on record, it is clear that the Claimant attended the Disciplinary hearing, however the disciplinary panel was not properly constituted as it comprised the 2nd Respondent only and its deliberations could not amount to a fair hearing as it lacked diversity and independence.
111. The 2nd Respondent was the accuser, witness prosecutor and the judge, all in one.
112. Relatedly, and as adverted elsewhere in this judgment, the respondent did not file minutes of the disciplinary hearing as evidence that the mandatory process of a hearing had been complied with.
113. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR the court stated as follows;
- “The failure by the Respondent to file these minutes certainly deprives the court of evidence that the Respondent complied with the procedural strictures set out in law. Accordingly, I find that the Respondent has failed to prove that the procedure adopted to release the Claimant was fair.”
114. From the foregoing, it is the finding of the court that the respondents have failed to discharge the burden of proof under Section 45(2)(c) of the *Employment Act*, 2007 or demonstrate compliance with the provisions of Section 41 of the Act and the dismissal of the 1st claimant on 28th April, 2020 was



unfair for want of procedural propriety as held by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (Supra)* as follows;

“ . . . On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”

Reliefs

115. Having found as above, the court proceeds as follows;

a. Declaration

116. Having found that termination of the 1st Claimant’s employment by the 2nd Respondent was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Terminal dues USD 157,905

i. Outstanding salary for January, March and April 2020

117. The Respondent admitted that the salary for the 3 months is outstanding and it is accordingly awarded USD 4,500.

ii. Guaranteed minimum settlement

118. The 1st Claimant did not demonstrate entitlement to this prayer as the same was only payable in the case of a separation before a liquidity event due to a good leaver and RWI testified that good leaver meant while in good terms or without blemish, evidence the 1st Claimant did not controvert.

The prayer is declined.

iii. Pay in lieu of notice

119. Having found that the Respondent had a substantive justification to terminate the 1st Claimant’s employment, the prayer for salary in lieu of notice under Clause 13.1.2 of the Employment contract is unsustainable and is declined.

iv. Outstanding shipping expenses USD 7,000

120. The 1st Claimant tendered no evidence of having shipped any goods or items to claim the USD 7,000

The prayer is declined.

v. Relocation costs out of Kenya

121. The 1st Claimant left the workplace without the employer’s consent or discussion as to how he would continue rendering services and contrary to Clause 51 of the Employment Agreement.

122. Similarly, he did not request for facilitation as he was in hurry to leave.

123. As his leaving was not preceded by mutual agreement, the prayer is declined.

vi. House renovation and materials USD 12,402

124. The 1st Claimant adduced no evidence of the renovations effected by the contractor or cost of the materials used in the renovation.



The claim is declined.

vii. Consultancy fees

125. It is common ground that the parties had a distinct employment agreement and a consultancy agreement which though intertwined were governed by laws of different jurisdictions.
126. While the provisions of the *Employment Act*, 2007 recognize employees, the statute has no provision for consultants or consultancy agreements.
127. Equally, whereas employment was in Kenya and governed by Kenyan law, the consultancy agreements on record were enforceable under legal regimes of other jurisdictions (England and Wales and the State of Kuwait), which the court cannot enforce.
128. The claim for consultancy fees invoices No. 202 and 203 is unenforceable and is declined.

c. 12 months compensation

129. Having found that termination of the Claimant's employment was unfair, the 1st Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.
130. In determining the quantum of compensation, the court has considered that the 1st Claimant was an employee of the Respondent for a fairly short duration of about 7 months only. Second, the 1st Claimant had no recorded incident of misconduct or warning. Third, the 1st Claimant substantively contributed to the termination of employment.
131. Finally, the 1st Claimant did not express his wish to remain in the employment of the Respondents or appeal the 2nd Respondent's decision to terminate his employment.
132. In the circumstances, the court is persuaded that the equivalent of 2 months' salary is fair.

d. General damages of USD 503,400

133. The 1st Claimant adduced no evidence of entitlement to general damages of any amount as the dispute between the parties is exclusively termination of employment and no violations of constitutional provisions or other rights were pleaded and proved for the remedy of damages to ensue.

The prayer is declined.

e. Declaration of violation of the right to fair labour practice

134. Other than establishing that termination of his employment was procedurally flawed for want of a fair hearing, the 1st Claimant has not proved any other violation and in particular of the provisions of Article 41 of *the Constitution* of Kenya, 2010.
135. The prayer is declined as is the prayer for damages for the same.
136. In the upshot, judgement is entered in favour of the 1st Claimant against the 1st and 2nd Respondent as follows;
 - a. Declaration that termination of the 1st Claimant's employment was unfair.
 - b. Salary for the months of January, March and April 2020 USD 4,500/=.
 - c. Equivalent of two (2) months gross salary USD 3,000.Total USD 7,500



- d. Costs of this suit.
- e. Interest at court rates from date of judgment till payment in full.

137 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF MARCH 2024

DR. JACOB GAKERI

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 *Civil 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.

