



**Karakacha v Transchem Pharmaceuticals Limited (Appeal E140 of 2022) [2024] KEELRC 1156 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1156 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E140 OF 2022**

**K OCHARO, J  
APRIL 26, 2024**

**BETWEEN**

**PAUL KARAKACHA ..... APPELLANT**

**AND**

**TRANSCHEM PHARMACEUTICALS LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment and Decree of Honourable Mr. D.M. Kivuti delivered on the 4<sup>th</sup> day of July 2022 in the Milimani Commercial Chief Magistrate’s Court at Nairobi in Employment and Labour Relations Cause No. E992 of 2020)*

**JUDGMENT**

**Introduction**

1. The appeal herein emanates from a dismissal of the Appellant’s suit hereinabove stated. In the suit, the Appellant had sought reliefs anchored on the cause of action, unfair termination, and others independent of the cause of action. In disposing of the appeal, the judgment herein shall condense the numerous grounds of appeal, into two broad questions for address, thus; whether the learned trial magistrate erred in law and fact when he held that the Appellant was fairly dismissed from employment, and whether the Learned trial Magistrate erred in law and fact when he failed to avail the reliefs sought by the Appellant or any of them, to him.
2. When the matter came up before this Court for directions on 14 March 2023, this Court ordered that the appeal be canvassed by way of written submissions, and gave timelines for the parties to file their respective submissions.
3. Both parties complied with the directions. The Judgment herein is with the benefit of the submissions, therefore.

The case before the Trial Court



**(i) The Appellant's case.**

4. It was the Appellant's case that he first came into the employment of the Respondent as a Salesman Driver in the Delivery department on or about September 2008. Despite serving diligently, which fact was evidenced by salary increments that he earned, and the absence of any disciplinary issues on his part during his 12 years of service, the Respondent summarily dismissed him from employment on 9<sup>th</sup> September 2020 under the pretext that he had stolen medicine from it and fraudulently delivered it to Nairobi West Hospital.
5. The Appellant stated that on 4<sup>th</sup> September 2020, Nairobi West Hospital, the Respondent's known client, made a purchase order for medicine. The Respondent's Store Department prepared the order, raised an invoice for the goods ordered, and transmitted the goods to the Dispatch Department for packaging and delivery to the customer. The goods that were sent to the latter department for dispatch, included extra medicine which had neither been ordered nor invoiced for.
6. The Appellant and his colleague, Moses Mwangi who worked at the Dispatch Department, packed the medicine, after which the Claimant delivered the same as instructed, to Nairobi West Hospital. On 9<sup>th</sup> September 2020, the Hospital alerted the Respondent that it had received more medicine than it had ordered. Subsequently, the extra medicine was collected by another driver from there and returned to the Respondent's pharmacy.
7. He alleged that the Respondent investigated the matter and it emerged that the over-delivery of the goods was a result of miscommunication between the store personnel and the dispatch and delivery department. The extra medicine was supposed to be delivered to the Respondent's OTC branch rather than Nairobi West Hospital.
8. The Appellant asserted that he did not author the over-delivery through negligence or in any manner, yet, the Respondent proceeded to terminate his employment. As a result, the summary dismissal was without fair or valid reasons. Additionally, the dismissal was without procedural fairness. Contrary to the requirements of Section 41 of the [Employment Act](#), the Respondent didn't issue him with any show cause letter, grant him adequate opportunity to prepare and make a representation on any accusations against him, and consider the representation before dismissing him.
9. The Appellant further asserted that at all material times, he was grossly underpaid, as the Respondent paid him monthly salaries below the minimum wages payable as stipulated under the relevant Regulation of Wages (General) Orders. Further, the Respondent never paid him house allowance.
10. He further stated that he earned Kshs. 11,000/- between September 2008 and December 2008; Kshs. 11,500/- between January 2009 and December 2009; Kshs. 12,658/- between January 2010 and December 2010; Kshs. 13,500/- between January 2011 and December 2011; Kshs. 14,500/- between January 2012 and December 2012; Kshs. 18,150/- between January 2013 and December 2013; Kshs. 19,450 between January 2014 and December 2014; Kshs. 21,452/- between January 2015 and December 2015; Kshs. 22, 533/- between January 2016 and December 2016; Kshs. 23,209/- between January 2017 and December 2019; and Kshs. 24,009/- between January 2020 and September 2020.
11. The claimant called one witness, Moses Mwangi Kariuki to testify in support of his case, whose testimony largely corroborated his.



**(ii) The Respondent's case.**

12. The Respondent presented four witnesses to testify to support its defence against the Claimant's claim. In sum, its case, as came out in its pleadings and the evidence of its witnesses was that on 4<sup>th</sup> September 2020, it received a purchase order for drugs from Nairobi West Hospital. Its Sales Executive prepared an invoice and the delivery of the drugs to the client.
13. On or about 4<sup>th</sup> September 2020, the Respondent discovered that there was a deficit with regard to the drugs that were meant to be delivered to its OTC branch. This was notwithstanding its records showing that the three drugs had been dispatched from its store. The drugs were physically missing. This prompted the Respondent to review CCTV footage to determine what had occurred. The review revealed that the Claimant and one Moses Mwangi Kariuki had packed the drugs as if they were part of a customer's [ Nairobi West Hospital] order, and removed them from the Respondent's premises.
14. The involvement of the Claimant and Mr. Mwangi in packing the drugs was peculiar. Peculiar, as it was outside the scope of their respective roles. The Claimant's role was strictly transportation, while Moses Mwangi Kariuki's was to counter-check invoices with packed orders.
15. The Respondent asserted that it summoned the two employees and asked them to explain why they packed drugs and removed them from the Respondent's premises without any invoice. The two argued that drugs were part of those that were purchased under the Nairobi West Hospital order and that the failure to include them in the Invoice was a mistake.
16. The Respondent contended that after hearing their explanations, it took a clear view that they had attempted to steal the drugs. They only returned the same to the Respondent, when their scheme was unearthed. As a result, it instructed the two to leave its premises and directed its security personnel not to allow them into the premises anymore.
17. According to the Respondent, it was summarily dismissed the claimant on the grounds of gross misconduct, and rightly so. The reason for the dismissal was fair and valid, therefore. Further, fair procedure was followed as the Claimant was granted an opportunity to be heard.
18. After hearing both the Appellant's and the Respondent's respective cases, the Learned Magistrate pronounced himself on the matter on 4<sup>th</sup> July 2022, holding that the dismissal of the Claimant was justified and fair. It agreed with the Respondent that the Claimant's and his colleague's conduct was not a result of any oversight on their part, but a deliberate systematic attempt to defraud it.

**The Appeal.**

19. Aggrieved by the decision of the Trial Court, the Appellant filed the present Appeal, setting forth six [6] principal grounds. That the Learned Trial Magistrate erred in law and fact:
  - a. By failing to consider the Statement of Claim, testimony, evidence and submissions of the Appellant in support of his Claim and/or the submissions of the learned counsel for the Appellant by finding in favour of the Respondent.
  - b. By finding that the Respondent had a valid reason to terminate the Appellant from his employment.
  - c. By finding that the Appellant's termination was lawful and justified.
  - d. In failing to find that the Respondent had not proven the alleged theft by the Claimant.



- e. In failing to find that due procedure was not followed by the Respondent while terminating the Appellant.
  - f. By being extremely biased against the Appellant and disregarding his submissions that:
    - i. The Respondent's Director admitted that she did not give the Claimant a notice to show cause letter outlining the allegations against him;
    - ii. Essential Respondent officials such as the Store Assistants and the Dispatch attendant were not summoned when making the enquiry as to the issue of the missing drugs.
    - iii. The Respondent did not give the Claimant an opportunity to be heard and /or even listen to the Claimant and his colleague. Instead, the said director instructed them to immediately leave her office and instructed the security personnel not to allow the Claimant in.
    - iv. That the Respondent did not adduce any evidence to prove that the Claimant and his colleague indeed stole the drugs in dispute/or even had the intentions whatsoever of doing so. As such, the Respondent terminated the Claimant based on invalid, unfair and unjustified grounds.
    - v. The Respondent failed to prove a valid and fair reason for terminating the Claimant.
    - vi. The Respondent's Managing Director (DW4) admitted to the Court that after reviewing the CCTV footage with the Claimant she did not want to listen to him and she immediately directed him to leave.
    - vii. That the Respondent's director (DW4) confirmed to the Court that the alleged theft had never been reported to the Police Station for investigation.
    - viii. That the said director further confirmed to the Court that the Respondent had not produced any minutes of any disciplinary hearing that was allegedly undertaken.
    - ix. That the Respondent's Director (DW4) admitted to the Court that the Claimant was not issued with any notice and neither was he paid salary in lieu of notice prior to his termination.
    - x. The Claimant was dismissed in disregard to the provisions of Sections 41 and 45 of the [Employment Act](#), 2007 which renders the termination process unfair and thus unlawful.
20. On the above grounds, the Appellant prayed for orders that: -
- a. This Appeal be allowed.
  - b. That this Honourable Court does set aside the entire judgment delivered on 4th July 2022 in the Milimani Commercial Chief Magistrate's Court in CMEL No. E992 of 2020 and be substituted with the orders sought in the Statement of Claim dated 13th October 2020 filed in the trial court, inter alia:
    - i. A declaration that the Appellant suffered unfair wrongful and unlawful dismissal from employment.
    - ii. One month's salary in lieu of notice Kshs.24,009.00
    - iii. Salary for days worked in September 2020 Kshs. 8,310.81



- iv. Compensation for leave days not taken (17 days) Kshs.15,698.19
  - v. Underpayment (May 2010 - September 2020) Kshs.526,973.85
  - vi. Housing Allowance (September 2008-September 2020) Kshs. 475,362.73
  - vii. Compensation for wrongful, unfair and unlawful dismissal of employment calculated at twelve months gross salary being Kshs. 288,000.00 which is calculated as 12x24,000
  - viii. Service Pay for the number of years worked from September 2008 to September 2020 (12x24,000x1/2) Kshs.144,000
  - ix. Cost of the Claim before the trial court and interest.
  - x. Interest on (ii)-(ix) above from the date of filing the suit until payment in full at court rate.
- c. The cost of this Appeal be borne by the Respondent.

### **Appellant's Submissions**

21. In his written submissions dated 29<sup>th</sup> March 2023, the Appellant argues that the Learned Magistrate, erred when he didn't appreciate that according to Section 45(2) of the *Employment Act*, termination of an employee's employment is unfair if the employer fails to prove: (i) that the reason for termination is valid; (ii) that the reason for termination is a fair reason and (iii) that the employment was terminated in accordance with fair procedure. Further, the law places the burden of proving the foregoing squarely on the employer. To support this submission, the Claimant relies on the case of Galgallo Jarso Jillo vs Agricultural Finance Corporation [2021] eKLR.
22. He states that an employer will be deemed to have had substantive justification for the termination of his employee's employment if he genuinely believed that the matters that informed the decision existed at the time the decision was taken. In the instant matter, as confirmed by the testimony of the Respondent's Managing Director, Lydia Muthoni Wahome, the reason for the Appellant's dismissal was attempted theft of medicine. However, the same witness acknowledged that the Appellant and his colleague explained that they thought that the drugs which did not have an invoice were an additional order for Nairobi West Hospital.
23. The Appellant argues that only the Store Assistant or the Dispatch Attendant were involved in the removal of drugs from the store and confirmation of the same using invoices. Therefore, the correct persons who could have been held to account for how drugs were extracted without invoices should have been these officers. They were vital. However, they were not summoned and/or called to explain the issue.
24. It was not in dispute that there was an order from Nairobi West Hospital on 4<sup>th</sup> September 2020, a fact that rendered the Appellant's account of events true, therefore. The Learned trial Magistrate failed to consider this pivotal point.
25. The Appellant stated that by reason of these premises, it comes out clearly that the Respondent lacked sufficient and reasonable grounds for dismissing him from employment. Further, the Respondent didn't adduce any evidence establishing that he indeed stole or attempted to steal drugs from it. The Appellant concludes that therefore, the dismissal was based on invalid, unfair and unjustified grounds. To buttress this point, the Appellant cites Mary Chemweno Kiptui vs Keya Pipeline Company Limited [2014] eKLR.



26. Lastly, the Appellant submits that the Respondent had a legal duty to establish that the summary dismissal was preceded by a fair procedure as dictated by Section 41 of the *Employment Act* 2007 and reinforced by the Court of Appeal decision in the case of *National Bank of Kenya vs Samuel Ngunyu Mutora* [2019] eKLR. The Learned trial Magistrate failed to interrogate the presence or otherwise of procedural fairness in the Respondent's decision to summarily dismiss the Appellant from employment. There was ample material before the trial Magistrate from which he ought to have concluded that there was no adherence to procedural fairness; the Respondent's witness [DW4] admitted that the Appellant was not served with and show cause letter; no disciplinary proceedings were undertaken against him. The meeting into which the Appellant was summoned by DW4 cannot be said to have been a disciplinary hearing; and there were no minutes from whence it can be deduced that there was a disciplinary hearing.
27. The Appellant argues that as the summary dismissal was unfair both substantively and procedurally, this Court should grant him those reliefs that he had sought in his Statement of Claim dated 13<sup>th</sup> October 2020.

### **Respondent's Submissions**

28. The Respondent submits that it discharged its burden of proof contained in Sections 43, 45, and 47 (5) of the Employment by proving on a balance of probabilities that it had a valid and fair reason for dismissing the Appellant. It had an elaborate and well-organized dispatch system. For each purchase order, there was an invoice clearly indicating the Customer who had placed the order. Each order was dealt with separately, therefore, eliminating the possibility of confusion. The Learned trial Magistrate didn't err when he didn't believe the evidence of the Appellants but found that the dismissal was on a fair and valid ground.
29. Answering the Appellant's submissions on procedural fairness, the Respondent submits that contrary to the submissions, the Learned trial Magistrate did consider the aspect. The Honourable Magistrate noted that the Appellant and his colleague were summoned to a meeting where video footage was played. Further, the Appellant himself testified upon being shown the footage, he was allowed to give his explanation, where he claimed that the happenings were a result of a mistake on his part.
30. On the remedies sought, the Respondent submits that the Appellant is not entitled to the same as the dismissal was on a fair and justifiable reason. Even if the Court holds that the termination was unfair, the Appellant cannot be granted a compensatory relief to the extent of 12 months' gross salary sought, as he caused or contributed to the termination through his conduct.
31. The Court is urged not to grant service pay as the Appellant was a contributor to the National Social Security Fund. Support for this submission is drawn from Section 35 (6) and the case of *Hosea Akunga Ombwori vs Bidco Oil Refineries Limited* [207] eKLR.

### **Analysis and Determination**

32. This being a first Appeal, I am obligated to reconsider the evidence, re-evaluate the same, and draw my own conclusions, however without losing sight of the fact that I neither saw nor heard the witnesses. See *Selle -vs- Associated Motor Boat Co.* [1968] EA 123, and *(Abdul Hameed Saif vs. Ali Mohamed Sholan* [1955] 22 E. A. C. A. 270.
33. As indicated hereinabove, the determination of this appeal revolves around two principal issues. I now turn to consider the same, but separately.



**(i) Fairness in the dismissal.**

34. It is not in dispute that the Appellant herein was employed by the Respondent as a Salesman Driver on or about September 2008. It is also not in dispute that his employment was terminated on 9<sup>th</sup> September 2020. However, what is heavily contested in this appeal is whether the Learned Trial Magistrate was correct in finding that the summary dismissal of the Appellant from employment was correct.
35. The *Employment Act*, 2007 recognizes situations where an employer can terminate the employment of an employee and the termination will be considered fair. Imperative to state, that fair termination may be understood as the termination of an employee's employment for a lawful reason or a reason permissible by statute, the *Employment Act*. On the other hand, cognizance should be taken of the legal position that Section 45 of the *Employment Act*, blanketly prohibits employers from unfairly terminating the employment of employees. According to the provision, termination of employment is unfair if it is without a valid and fair reason[s] and or arrived at without adherence to the statutory fair procedural cannons.
36. Whenever a Court is tasked to settle a controversy as to whether the dismissal of an employee was fair, two statutory aspects, substantive justification and procedural fairness and the legislative provisions that speak to the aspects are a must consider. I have carefully considered the brief Judgment by the Learned Trial Magistrate, and with due respect, it does not clearly address the aspects. Maybe an elaborate and clear judgment could have been possible if the Trial Court had adhered to the mandates for good Judgment writing by inter alia identifying issues for determination, and deciding thereon, upon the basis of the facts of the matter and the relevant provisions of the law.
37. In *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* the Court held that:
- “... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
38. Section 43 of the *Employment Act* places the onus of proving the reason or reasons for termination of employment on the employer, failure to which the termination shall be considered unfair.
39. The Respondent gave the reason for the dismissal of the Appellant, as his attempt to steal drugs. The Respondent explains that the Appellant, who was in the Respondent's transportation department, packed drugs that were not attached to any order and removed them from the Respondent's premises. The Respondent strongly asserted that this action by the Appellant was outside his authorized roles at the Respondent's. The fact that the Appellant and his colleague packed the drugs without any order and corresponding invoice was expressly admitted by them in their witness statements that were filed before the trial that Court.
40. Further, the Appellant didn't deny that he was employed in the Transport Department of the Respondent and that the department was not mandated with working on purchase orders and packing items for delivery. So, why was the Appellant involved in packing orders on the material day? In my view, he offered no plausible explanation for his actions.
41. The Appellant contended that the items were packed without a purchase order and the corresponding invoice was erroneously delivered to Nairobi West Hospital, but subsequently, returned on 9<sup>th</sup> September 2020. The Respondent discounted this, by stating that no excess drugs were supplied to



the Hospital on the 4<sup>th</sup> of September 2020 or at all and that none was returned to the Respondent as alleged by the Appellant. The Respondent tendered as evidence before the Trial Magistrate, the relevant purchase order and a Sales Invoice/Delivery Note Number SN005813386 to demonstrate this. I note that this evidence was not in any sufficient manner challenged by the Appellant.

42. In my view, the tone of the evidence of the Appellant and that of his witness, was that at all material times, for delivery purposes, a purchase order had to have a corresponding invoice. How then did they decide to get drugs out of the Respondent's premises without the raised invoice? is a question that required a clear answer from them, an answer which in my view, they failed to give.
43. As a result, of the foregoing premises, I am persuaded that the Respondent had every reason to genuinely suspect, that the Appellant and his colleague had attempted to steal the drugs. Consequently, I find that the Respondent discharged its legal burden under Section 43 of the Act, proving the reason for dismissal.
44. Summary dismissal is permitted by Section 44 of the [Employment Act](#) 2007, as follows: -
  - “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
  - (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
  - (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by her conduct indicated that she has fundamentally breached her obligations arising under the contract of service.
  - (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
    - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of her work;
    - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform her work properly;
    - (c) an employee wilfully neglects to perform any work which it was her duty to perform, or if she carelessly and improperly performs any work which from its nature it was her duty, under her contract, to have performed carefully and properly;
    - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to her employer or to a person placed in authority over him by her employer;



- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her employer or a person placed in authority over him by her employer;
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of her employer or her employer's property.”

45. Having found as I have hereinabove that the Appellant was suspected of attempted theft of medicine, the Respondent was justified to summarily dismiss him under Section 44 (4) (g) of the Act. The reason was fair and valid. The dismissal was substantively fair under Section 45[2], therefore. Any reasonable employer could have dismissed the Appellant under the circumstances.

46. At this juncture it is imperative to state the law under Section 41 of the *Employment Act* 2007, requires an employer contemplating to summarily dismiss an employee, to adhere to the mandatory procedure set out therein. The Section provides that:-

“Notification and hearing before termination on grounds of misconduct

- (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.”

47. The statutory procedure has three components; the notification component, the employer must inform the employee of the intention to dismiss and the reasons, the basis for the contemplation; the hearing component, the employer shall have to grant the employee affected, an adequate opportunity to prepare and make a representation on the reasons, put in another way, to defend himself against the accusations; the consideration component, the employer has to consider the representation by the employee and or the person accompanying him, before deciding to effect the contemplation. The absence of any or all of these components in the process shall render the dismissal procedurally unfair.

48. The Respondent asserted that its decision to dismiss the Appellant was preceded by a fair procedure as contemplated by the law. DW 4, Lydia Muthoni Wahome, the Respondent’s Managing Director, testified that on 9<sup>th</sup> September 2020 convened a meeting where the Appellant and his colleague, Moses



Mwangi Kariuki, were shown the relevant CCTV footage and asked to explain themselves. They both explained that they mistakenly thought that the drugs in issue were under an additional order by Nairobi West Hospital and that they made a mistake in delivering the same without an invoice. Immediately after the meeting, she asked them to leave the Respondent's premises thereby terminating their employment

49. In my view, the Respondent didn't undertake a process with all the ingredients as contemplated under Section 41 of the Act. The meeting that was held on 9<sup>th</sup> September 2020, cannot be equated to a disciplinary hearing. The Appellant was not informed, that the Respondent was contemplating dismissing him and, of the ground for the intention. There is no proof that the Appellant was given an adequate opportunity to prepare and defend himself against specific accusations. The right of accompaniment under section 41 was not extended to him. In the absence of any minutes, it is difficult to conclude that the Respondent did consider any representations, if at all.
50. My view above finds support in the Court of Appeal decision of Standard Group Limited v Jenny Luesby [2018] eKLR, where it held that:

“With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that there was an attempt made on 14th November 2013 in a meeting with the HR Director and respondent in the CEO's office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of section 41 were complied with...

It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination as defined in section 45 of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure. 'See Kenfreight (E. A) Limited vs Benson K. Nguti, [2016] eKLR.”

51. In the upshot, I hold that the dismissal of the Appellant was procedurally unfair and that the Learned Trial Magistrate erred in law in so not finding.

#### **(ii) Reliefs.**

52. Worth stating from the onset that the Learned Trial Magistrate erroneously treated the matter before him as though the reliefs sought thereby were wholly anchored on the cause of action, unfair dismissal. Reliefs like salary underpayments and compensation for earned but unutilized leave days are often reliefs sought independent of a cause of action for unfair dismissal. The trial Court ought to have drawn this line between the reliefs that the Appellant had sought, to arrive at a reasoned decision on the reliefs, unfortunately, it did.
53. The Appellant seeks one month's salary in lieu of notice (Kshs. 24,009.00); salary for days worked in September 2020; (Kshs. 8310.81); compensation for leave days not taken (17 days) Kshs.15,698.19; underpayment (May 2010- September 2020) (Kshs. 526,973.85); house allowance (September 2008-September 2020) Kshs.475, 362.73; and compensation for unfair termination calculated at twelve months gross salary (Kshs. 288,000.00); and service Pay for the number of years worked since September 2008 to September 2020 (12x24,000x1/2) (Kshs.144,000).
54. It was common cause that the Appellant's salary was payable at the end of each month. Therefore, according to Section 35 [1][c] of the Act, terminable with a twenty-eight days' notice. However, this Court has not lost sight of the fact that in situations of summary dismissal [see section 44[3]], the



employer is at liberty to terminate an employee's contract of service, without notice. Having found as I have hereinabove, that the Appellant's dismissal was substantively fair, I am not persuaded that the Appellant was entitled to notice pay.

55. There is no dispute that the Appellant was dismissed from employment on 9<sup>th</sup> September 2020. The Respondent has not challenged the assertion that the Appellant therefore, worked for nine [9] days, in that month, and that he was not paid for the service. As a result, I grant him a salary for these nine days worked in September 2020.
56. The Appellant asserted before the Trial Magistrate that separation, he had 17 earned but unutilized leave days. I have carefully considered the material before the Trial Magistrate and by the Respondent, and note that it didn't place forth evidence to dispel this claim by the Appellant. If at all the Appellant didn't have any outstanding leave days as he alleged, nothing could have been easier than for the Respondent as the custodian of employment records under Section 74 of the Act, to tender evidence to discount the Appellant's assertion. By reason of the premises, I come to an inescapable conclusion that the Appellant was entitled to compensation under this head. The Learned Magistrate erred in law when he didn't award the compensation. I think the error and failure flowed from the fact that he was blurred to see the relief as one that was sought not under the cause of action, unfair dismissal.
57. Independent of the claim for unfair termination, the Appellant claimed before the trial court that at all material times, the Respondent underpaid his monthly salary. In my view, this was not a claim anchored on the provisions of the Employment Act, it was anchored on Section 48 of the Labour Institutions Act. The section provides:
- “(1) Notwithstanding anything contained in this Act or any other written law—
- (a) the minimum rates of remuneration or conditions of employment established in a wage order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
- (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.”
58. In interrogating whether there were underpayments, the Learned Trial Magistrate was obliged to consider the various Wage Orders relevant to the period, the subject matter of the Appellant's claim. With great respect, the Honourable Magistrate did see the claim as anchored of a statute other than the Employment Act, and the necessity to consider the provisions of the Labour Institutions Act and the relevant wage orders. This, I conclude, led him to err in not granting compensation under the claim.
59. I now turn, to consider whether the Appellant was underpaid as he alleged. However, in so doing, I must not lose sight of the provisions of Section 90 of the Employment Act, which imposes a limitation of action on employment disputes. Therefore, I will confine my interrogation to the period, of 3 years immediately before the date of termination.



60. The basic minimum monthly wage for a salesman driver per the Regulation of Wages (General) (Amendment) Order 2017, which came into force on 1<sup>st</sup> May 2017, was Kshs. 29, 169. It is not disputed that between 1<sup>st</sup> September 2017 to 31<sup>st</sup> August 2018, the Appellant earned Kshs. 23,209/-. He was therefore underpaid by Kshs. 5,960/- for 12 months. The basic minimum monthly wage for a salesman driver per the Regulation of Wages (General)(Amendment) Order 2018, which came into force on 1<sup>st</sup> May 2018, was Kshs. 30, 627.45. It is not contested that between 1<sup>st</sup> September 2018 to 31<sup>st</sup> August 2019, the Appellant earned Kshs. 23,209/-. He was therefore underpaid by Kshs. 7, 418.45 for 12 months. Between 1<sup>st</sup> September 2019 to 31<sup>st</sup> August 2020, the relevant wage order was the same Regulation of Wages (General)(Amendment) Order 2018, which provided for a salary of Kshs. 30, 627.45. The Appellant was paid Kshs. 23,209 between 1<sup>st</sup> September 2019 and 31<sup>st</sup> December 2019, thereby being underpaid by 7,418.45 for 4 months; then Kshs. 24,009/- between 1<sup>st</sup> January 2020 and 1<sup>st</sup> September 2020, thereby being underpaid by Kshs.6, 618.45 for 9 months.
61. On the claim for House Allowance, it is trite that the same is paid at the rate of 15% of the basic salary. The Respondent contended before the trial Court that the Appellant’s salary was consolidated, inclusive of a house allowance. This the Respondent barely asserted without placing forth any document to in support. It didn’t therefore prove the assertion. The Learned Trial Magistrate erred in not awarding the Appellant the leave. However, in light of Section 90 of the Employment Act 2007 on limitations, the award shouldn’t be to the extent sought by the Appellant but three years [ 36 months].
62. On service pay, Section 35 (5) and (6) provides that: -
- “(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.”
63. The Appellant himself produced his NSSF Statement, bringing him under Section 35 (6) (d). He is therefore not entitled to service pay.
64. I now turn to compensation for unfair termination. This Court has already concluded that the Appellant was unfairly terminated by the Respondent. Section 49 (1) (c) of the Act bestows on this Court power to grant a compensatory relief in favour of an employee who has successfully assailed his or her employer’s decision to terminate his or her employment or summarily dismiss him or her from employment. Exercise of the power is discretionary, influenced by the circumstances of each case.
65. The Appellant prays for 12 months’ gross salary as compensation. The Respondent is adamant that the Appellant is not deserving of this compensation as he caused or contributed to his dismissal through the attempted theft of medicine.



66. Considering the Appellant's length of service, 12 years, how the summary dismissal was effected, without procedural fairness, the fact that liability herein attaches against the Respondent only on account that it failed to adhere to the canons of procedural fairness and the Appellant's contribution to his termination in that he attempted to steal medicine from the Respondent, I find that a compensatory award of 6 months' gross salary, shall be fair and just.
67. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
68. In the upshot:
- a. This Appeal is hereby allowed.
  - b. The Learned Trial Magistrate's Judgment is hereby set aside and substituted with this Court's, thus;
    - i. A declaration that the Appellant's dismissal from employment was unfair.
    - ii. Salary for days worked in September 2020 (30 627.45/30 x 9) Kshs. 9,188.10
    - iii. Compensation for leave days not taken (17 days) Kshs.17,355.30
    - iv. Compensation for Underpaid salary (1<sup>st</sup> Sep 2017- 1<sup>st</sup> Sep 2020) Kshs.249,783.35
    - v. House Allowance (1<sup>st</sup> Sep 2017-1<sup>st</sup> Sep 2020) 15% x 29169 x 12 months) + 15% x 30,627.45 x 24 months + 15% x 30,627.45 x 9/30) = Kshs. 164,141.05
    - vi. Compensation for unfair termination pursuant to Section 49[1][c] of the Act, (30,627.45 x 6) Kshs. 183,764.70
    - vii. Interest on (ii) – (vi) above at Court rates from the date of this Judgment until payment in full.
    - viii. Costs of the suit to be borne by the Respondent
    - ix. Certificate of Service to be issued to Appellant within 30 days of this Judgment.

**READ, DELIVERED AND SIGNED THIS 26<sup>TH</sup> DAY APRIL, 2024.**

**OCHARO, KEBIRA.**

**JUDGE**

In the presence of:

Ms Kyevea for Appellant

Mr. Machina for 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

