Wang'asia v Prime Steel Mills Limited (Cause 911 of 2018)
[2024] KEELRC 984 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 984 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 911 OF 2018

BOM MANANI, J

APRIL 11, 2024

BETWEEN

MARTIN WEKESA WANG'ASIA ..... CLAIMANT

AND

PRIME STEEL MILLS LIMITED ..... RESPONDENT

JUDGMENT

Background

1. The parties to this action had an employment relation until September 2017 when it ended. Whilst the Claimant's case is that he was employed by the Respondent in February 2014, the Respondent denies this fact.

2. Instead, the Respondent, in its Statement of Defense, avers that he (the Claimant) was first engaged as a casual employee in July 2017. Yet, at paragraph three (3) of the Respondent's witness statement (Godfrey Oduor), he avers that the parties entered into the employment relation in July 2014.

3. The Claimant's case is that on 27th September 2017, the Respondent's management summarily dismissed him from employment without following due process and for no apparent reason. In his evidence before court, he asserted that on this day, a Mr. Ravi orally informed him that his services had been terminated without indicating the reason for the decision.

4. Based on this evidence, the Claimant contends that the decision to terminate his contract was irregular and therefore unlawful. He asserts that he was not given an opportunity to be heard before the decision was made. Neither was he informed of the infraction he had committed.

5. Prior to this event, the Claimant avers that he had been working for the Respondent for six days in a week for the entire of his contractual term. He avers that he used to report on duty at 7 am and leave at 7 pm. However, he was not paid for overtime work.

6. The Claimant also avers that the Respondent used to underpay him. He avers that his daily wage was fixed at Ksh. 450.00. This amount would be collated and paid at the close of every week.

7. Further, the Claimant contends that during the duration of his service to the Respondent, he was not allowed to utilize his annual leave. As a result, he prays for commutation and payment of the accrued leave days.

8. The Claimant also avers that he was not paid house allowance for the duration of his service to the Respondent. Consequently, he prays that he be paid arrears of this allowance.

9. The Claimant further contends that he was forced to report on duty during public holidays. However, he was not compensated for doing this. As a result, he prays for compensation to cover accrued pay for work executed on public holidays.

10. In response, the Respondent denies the entire of the Claimant's claims. The Respondent denies that the Claimant: worked during public holidays; was underpaid; did not utilize his leave days; was not paid house allowance; or is entitled to service pay. The Respondent invites the Claimant to prove these assertions.

11. The Respondent contends that the Claimant was remunerated in accordance with the Wage Order that was in force at the material time. Therefore, the assertion that he was underpaid is unfounded.

12. Further, the Respondent avers that the Claimant was paid for the overtime work. As such, this claim is unfounded.

13. The Respondent contends that the Claimant's salary was consolidated. As a consequence, he was not entitled to house allowance as a standalone item.

14. Finally, the Respondent avers that the Claimant absconded duty in September 2017. Efforts to get to him did not yield fruit. As a result, his contract terminated.

Issues for Determination

15. After evaluating the pleadings and evidence on record, the following issues emerge for consideration:-

    a. When was the Claimant employed by the Respondent?

    b. What was the nature of the employment relation between the parties?

    c. Whether the Claimant's contract of service was unfairly terminated.

    d. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

16. On the first issue, the parties are in disagreement regarding when they entered into the employment relation. Despite the Respondent pleading that the contract was entered into in July 2017, its witness stated in his statement that the contract commenced in July 2014. In their submissions, counsel for the Respondent submit that the Claimant was hired in July 2014.

17. On the other hand, the Claimant contends that he was employed in February 2014. To establish this fact, he has produced a statement by the National Social Security Fund (NSSF) which shows that the Respondent is recorded as his employer as from the year 2014.

18. However, the said statement suggests that the Respondent began remitting the Claimant's NSSF contributions from July 2014. This is probably the reason why the Respondent's witness mentioned

that the contract of service between the parties commenced in July 2014 and not July 2017 as pleaded in the defense or February 2014 as asserted by the Claimant. Having regard to the evidence on record, I am inclined to accept the position by the Respondent's witness that the employment relation between the parties commenced in July 2014. It is so declared.

19. With respect to the second issue, the Respondent has averred that the Claimant was engaged on casual basis. In their submissions, the Respondent's lawyers argue that since the Claimant was hired on casual basis, he cannot claim compensation for unfair termination of his employment.

20. Section 37 of the *Employment Act* addresses the issue of conversion of casual contracts of employment into indefinite term contracts. If an employee who was engaged on casual terms works continuously for a period of one month or more or is tasked to perform a function that cannot be concluded within three months, his contract of service graduates from casual to indefinite term by operation of the law.

21. In the instant case, it is clear that the Claimant was employed by the Respondent in July 2014. The parties do not dispute the fact that thereafter, the Claimant continued to serve the Respondent, without interruption of the relation, up to September 2017. As such, by the time that the Claimant's contract was terminated, it had been converted into an indefinite term contract by operation of law. It is so declared.

22. The Claimant has asserted that the Respondent terminated his services without cause and without adherence to due process. He contends that on 27th September 2017, the Respondent's manager, a Mr. Ravi, informed him verbally that his services had been terminated without indicating why.

23. On the other hand, the Respondent contends that the Claimant absconded from duty. Efforts to trace his whereabouts and ask him to resume duty allegedly bore no fruit. As a result, his contract was considered as closed.

24. Sections 43 and 45 of the *Employment Act* require that in order for an employer to lawfully terminate the services of an employee, he must demonstrate that he has valid reason to support his decision and that the termination is processed in accordance with due procedure. On the other hand, section 41 of the Act requires the employer to notify the employee of the infraction that he is accused of and permit him the opportunity to defend himself before the decision to terminate his services is made.

25. Together, these provisions of statute place on the employer the duty to hear an employee before he (the employer) can close the contract of service between the parties. This applies to all scenarios including those that allow for summary dismissal under section 44 of the Act.

26. Because of the foregoing, it is a requirement that even in situations where an employee has absconded from duty, the employer must seek him out to show cause why his contract should not be terminated for failure to report to work. And hence the duty on the employer to endeavor to ascertain the whereabouts of an employee who has absconded duty before he (the employer) can terminate his (the employee's) services.

27. The obligation lies with the employer to convince the trial tribunal that he made reasonable attempts to trace the employee to no avail. This is usually by the employer showing that he either wrote to the employee or telephoned him or sent him text messages asking him to account for his absence and resume duty. The employer can use any reasonable means to reach the employee including through his relatives (James Okeyo v Maskant Flower Limited [2015] eKLR).

28. In my view, because the obligation to convince the trial tribunal that efforts to trace the absconding employee lies with the employer, it is desirable that he (the employer) documents the efforts made to trace the employee. Thus, it would be better if he (the employer) formally wrote to the employee

through his last known address asking him to show cause why his services should not be terminated for failure to report to work. Where the employer telephones or sends the employee text messages, it is desirable that extracts of the text messages be kept and where possible, data relating to the time that the telephone calls were made, the telephone numbers that were used to make the calls and the telephone numbers called be kept.

29. In the instant case, although the Respondent accused the Claimant of having absconded from duty and asserted that it made efforts to trace him in order to ask him to either resume duty or subject him to disciplinary action, it (the Respondent) presented no cogent evidence to support this assertion. Despite the assertion that the Respondent's officers sent the Claimant text messages, no extracts of the alleged messages were presented in evidence. Further, despite the assertion that the Respondent's officers telephoned the Claimant, no evidence of the telephone numbers that were allegedly used to call the Claimant or the telephone numbers that were called was tendered in court. As a matter of fact, the Respondent's witness conceded in cross examination that this evidence had not been availed.

30. Having regard to the evidence on record, I am not convinced that the Claimant absconded duty as asserted by the Respondent. And if he had, I am not convinced that the Respondent took reasonable steps to trace him in order to subject him to disciplinary action.

31. The evidence on record does not demonstrate that the Respondent had a valid reason to terminate the Claimant's contract of service. Further, there is no evidence that the Claimant's release from employment was processed in accordance with due procedure. Consequently, I declare that the Claimant's employment was terminate without cause and in contravention of due procedure.

32. Having regard to the foregoing, I find that the Claimant is entitled to compensation for unfair termination of his contract of service in terms of section 49 of the *Employment Act*. I note that there is no cogent evidence to suggest that the Claimant's conduct contributed to the decision to sever the employment relation between the parties. As a consequence, I award the Claimant compensation for unfair termination of his contract of service that is equivalent to his gross monthly salary for eight (8) months, that is to say Ksh. 16,011.00 x 8 months = Ksh. 128,088.00. The monthly salary of Ksh. 16,011.00 is informed by the fact that the Claimant's salary was understated as will be demonstrated in the next phase of this decision.

33. As I conclude on this issue, it is perhaps necessary to commend on a matter that the defense have raised in their submission. The Respondent argues that section 47 of the *Employment Act* places the burden of proof on an employee to prove that termination of his contract was unlawful. Based on this premise, it (the Respondent) asserts that the Claimant has not tendered evidence to show that he reported back to work on 28th September 2017. As such, his claim for unfair dismissal from employment is unsubstantiated and should fail.

34. It is true that section 47 of the *Employment Act* places the burden of demonstrating that an employee's contract has been unfairly terminated on him (the employee). However, all that the provision does is to require the employee to tender preliminary evidence to anchor his claim for unfair termination. Once this is done, the burden shifts onto the employer to justify the decision to terminate the contract.

35. This position has been made apparent in a series of decisions. In Peter Otabong Ekisa v County Government of Busia [2017] eKLR, the court observed as follows on the matter:-

> ''The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the

> employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities."

36. In the instant case, the Claimant adopted the witness statement that he had prepared and filed as his evidence in chief. In addition, he testified orally in court.

37. In his evidence, he stated that on 27th September 2017, a Mr. Ravi for the Respondent summoned him and informed him that his services had been terminated. He further stated that the said Mr. Ravi did not disclose the reasons for the decision. Further, the Claimant stated that he was not afforded a hearing before this decision was made.

38. To my mind, this evidence suggests impropriety in the Respondent's impugned decision. It suggests that the Respondent did not adhere to the requirements of sections 41, 43 and 45 of the *Employment Act* which call for both substantive and procedural fairness in terminating an employee's services. Therefore, I am satisfied that the Claimant established a prima facie case in terms of section 47 of the *Employment Act* which shifted the evidential burden to the Respondent to justify its decision.

39. Section 9 (1) of the *Employment Act* requires employment contracts whose tenure is three months or more to be reduced into writing. Section 9 (2) of the Act places the obligation of reducing such contracts into writing on the employer.

40. The written contract must contain the particulars that are enumerated under section 10 of the Act. These include: the names of the parties to the contract; the duration of the contract; place of work; hours of work; the employee's remuneration and the methodology for calculating it; the employee's leave entitlement; employee's entitlement to public holidays and or holiday pay.

41. Section 10 (6) of the Act obligates the employer to preserve details of the matters covered under it for a minimum of five (5) years post termination of the employment contract. In effect, this provision underscores the fact that, in law, the employer is presumed to have custody of the employment records.

42. Section 10 (7) of the Act obligates the employer to produce the written contract of service and information on the particulars set out in the section in any legal proceedings. If he fails to do so, this provision of statute expressly provides that the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on him (the employer).

43. Section 74 of the Act requires the employer to maintain records of an employment contract entered into under the Act. The records cover, inter alia the following: the employee's annual leave entitlements showing the number of days the employee has taken and the number of days that remain outstanding; sick leave; maternity and paternity leave; and particulars of house allowance where the employee's salary is deconsolidated. As such, this section, just like section 10 (6) of the Act places the burden of keeping employment records on the employer and not the employee.

44. Section 112 of the *Evidence Act* provides as follows:-

> ''In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

45. When looked at together, the above provisions place the burden of proving terms of a contract of service, particularly when it was supposed to have been reduced into writing but was not, on the employer. As indicated above, sections 10(6) and 74 of the *Employment Act* place the burden of maintaining and producing records of particulars of a contract of service in legal proceedings on the employer. Where he fails to produce these particulars, section 10 (7) of the Act places the burden of

proving or disproving any disputed fact in respect of the aforesaid particulars on him and not the employee.

46. These provisions gel with and are complemented by section 112 of the *Evidence Act*. Because the *Employment Act* requires the employer to maintain employment records on various aspects including the employee's remuneration, leave days, hours of work etcetera, he (the employer) in terms of section 112 of the *Evidence Act*, is deemed to have special knowledge of these particulars as they are expected to be in his custody. Therefore, the burden of proving whether these particulars have been met lies with him (the employer).

47. The foregoing was considered by the Court of Appeal in the case of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR. In respect of the employer's duty to keep records and produce them in judicial proceedings, the court observed as follows:-

> ''.....by virtue of Section 10(7) of the *Employment Act* the appellant was under a duty as the employer to produce written particulars of the respondent's employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent's allegation.''

48. The Claimant has alleged that he was underpaid salary for the duration of his contract with the Respondent. In his evidence, the Claimant stated that the Respondent used to pay him a daily wage of Ksh. 450.00. This was collated and then paid out at the close of every week as a consolidated package of Ksh. 2,700.00.

49. In response, the Respondent denied that it used to underpay the Claimant. According to the Respondent, the Claimant's salary was pegged on the applicable Minimum Wage Order that was in force at the time.

50. Despite the Respondent's contention that it was remunerating the Claimant as per the applicable Wage Order, it did not produce records to support this assertion. This is notwithstanding that sections 10 (6) and 74 of the *Employment Act* placed the burden of keeping employment records and producing them in judicial proceedings on the Respondent.

51. Further, it is noteworthy that the employment relation between the parties had subsisted for more than one year. Therefore, under section 9 (1) & (2) of the *Employment Act*, the Respondent was duty bound to reduce the contract in writing. However, there is no evidence that it (the Respondent) discharged this duty.

52. By virtue of section 10(7) of the *Employment Act*, when the Respondent failed to reduce the contract between them into writing, the burden of disproving the contention by the Claimant that he was underpaid lay with the Respondent. Alluding to this fact, the Court of Appeal in the Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra) stated as follows:-

> ''On the issue of underpayment, the first consideration would be the determination of the salary that was paid to the respondent. In light of the fact that the appellant failed to produce evidence on the terms of the respondent's engagement as envisioned under Section 10(7) of the *Employment Act*, we, like the ELRC, are inclined to accept the respondent's version, that is, that she was paid a monthly salary of Kshs. 4000.''

53. Because the Respondent did not provide evidence to demonstrate that it was paying the Claimant more than Ksh. 450 as his daily wage contrary to the latter's contention, the court must accept the Claimant's evidence that his daily wage was Ksh. 450.00. It is so declared.

54. The Claimant was employed in July 2014. At that time, the Wage Order that was in force was the one published as Legal Notice No. 197 of 2013.

55. From the evidence on record, the Respondent's enterprise was and is still located in Kitengela in Kajiado County. In terms of the above Wage Order, this location falls in the category of ''All Other Areas''.

56. The aforesaid Wage Order sets the minimum daily wage for machine attendants (inclusive of house allowance) under the above bracket to Ksh. 403.80. As the record shows, the Claimant's daily wage was Ksh. 450.00. This means that for the period that was covered by this Wage Order, the Claimant's daily wages surpassed the minimum daily wage inclusive of house allowance.

57. The above Wage Order was replaced by the 2015 Wage Order which was published as Legal Notice No. 117 of 2015. This Order came into force on 1st May 2015.

58. Under this Wage Order, the Claimant's daily wage was supposed to have been adjusted from Ksh. 403.80 to Ksh. 452.30 which was inclusive of house allowance.

59. As per the evidence on record, the Respondent continued to pay the Claimant a daily wage of Ksh. 450.00 instead of Ksh. 452.30 as from 1st May 2015. This means that the Claimant was underpaid by a margin of Ksh. 2.30 per day from 1st May 2015. Thus, the total underpayments per month from this date were Ksh. 2.30 x 30 days = Ksh. 69.00.

60. The above Wage Order was replaced by the 2017 Wage Order that was published as Legal Notice No. 112. This Order came into force on 1st May 2017.

61. The 2017 Wage Order adjusted the daily wage rate for machine attendants (inclusive of house allowance) from Ksh. 452.30 to Ksh. 533.70. Since the Claimant's daily wage remained at Ksh. 450.00 this means that he was underpaid by Ksh. 81.40 per day for the balance of his contractual term. This converts to a monthly underpayment of Ksh. 81.40 x 30 days = Ksh. 2,442.00.

62. It is noteworthy that the Respondent produced only one pay slip for July 2017 in an effort to prove that it settled the Claimant's overtime dues. However, it did not provide other payment records for the duration of the Claimant's employment in contravention of sections 10 (7) and 74 of the *Employment Act* as read with section 112 of the *Evidence Act*.

63. Importantly, this pay slip suggests that the Claimant earned gross salary of Ksh. 6,859.00 for July 2017 against an expected sum of Ksh. 16,011.00 (Ksh. 533.70 x 30 days) as per the 2017 Wage Order.

64. Consequently, I find that the Respondent underpaid the Claimant between 1st May 2015 and 27th September 2017 when his contract was terminated. Between 1st May 2015 and 1st May 2017, he was underpaid albeit by a small margin of Ksh. 2.30 per day totaling Ksh. 69.00 per month. Therefore, for this period, he was underpaid in the sum of Ksh. 69.00 x 24 months = Ksh. 1,656.00.

65. As noted earlier, from May 2017 to September 2017, the Claimant's salary was understated by a sum of Ksh. 2,442.00 per month. Therefore, for the five months between May and September 2017, he suffered underpayment of Ksh. 2,442.00 x 5 = Ksh. 12,210.00 Accordingly, I enter judgment in his favour for the aforesaid sum of Ksh. 1,656.00 + Ksh. 12,210.00 = Ksh. 13,866.00 to cover underpayments.

66. The Claimant has claimed for unpaid house allowance. However, it is noted from the aforesaid Legal Notices that the minimum daily wage rates provided by them were inclusive of house allowance. Therefore, once the issue of underpayments is addressed, the issue of unpaid house allowance is

concomitantly resolved. As a result, I decline to award any further sum to cover the claim for house allowance.

67. The Claimant has prayed for accrued leave dues. As was noted above, the obligation to keep leave records is placed on the employer.

68. Under sections 10(7) and 74 of the *Employment Act* as read with section 112 of the *Evidence Act*, the Respondent, who had special knowledge of the Claimant's leave entitlements, was expected to produce records to show how many leave days the Claimant was entitled to, how many of these days he had utilized and what was the balance if any. As the record shows, the Respondent did not discharge this obligation.

69. In the case of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra), the Court of Appeal observed on the issue as follows:-

> ''On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*.''

70. The Respondent's position in the instant case is on all fours with the Appellant's position in the above cited case. Like in the above case, the Respondent did not provide records to show that the Claimant had utilized his leave days. Yet, sections 10(6) & (7) and 74 of the *Employment Act* required the Respondent to keep these records and produce them in evidence.

71. In terms of section 10(7) of the *Employment Act* as read with section 112 of the *Evidence Act*, the burden lay with the Respondent to disprove the Claimant's assertion that he did not utilize his accrued annual leave. It (the Respondent) did not discharge this burden. As a result, I enter judgment for the Claimant against the Respondent for annual leave for three years between July 2014 and September 2017.

72. Between 1st July 2014 and 1st May 2015, the Claimant's monthly wage was Ksh. 450.00 x 30 = Ksh. 13,500.00. By virtue of section 28 of the *Employment Act*, the Claimant was entitled to annual leave for a minimum of 21 working days for every year worked. Inclusive of weekends, the annual leave would be for a duration of approximately one month. As such, I award the Claimant pay in lieu of annual leave for 2014-2015 at Ksh. 13,500.00.

73. Between 30th May 2015 to 1st May 2017, the Claimant's minimum monthly wage was supposed to have been Ksh. 452.30 x 30 = Ksh. 13,569.00. Thus, I award him Ksh. 13,569.00 x 2 = Ksh. 27,138.00 to cover accrued leave for the two years. The total award for accrued leave is therefore Ksh. 13,500.00 + Ksh. 27,138.00 = Ksh. 40,638.00.

74. As I finalize on the question of annual leave, it is important that I address a matter which the Respondent's counsel has raised in his submissions. Counsel argues that in any event, if it is true that the Claimant had not taken his annual leave, then he has forfeited it.

75. I believe that Counsel's argument is informed by section 38 (3) & (4) of the *Employment Act* which provides as follows:-

> ''Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1) (a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
>
> The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1) (a) being the period in respect of which the leave entitlement arose.''

76. My understanding of this provision is that where the employer elects to spread out an employee's leave days so that the employee cannot utilize the entire twenty one (21) days consecutively, he must ensure that the employee has at least two (2) weeks of uninterrupted leave days. In such case, the employee must utilize the balance of the leave days within eighteen (18) months from the date the leave accrued. In my view, the section does not imply that an employee who has not taken leave generally should forfeit it.

77. With regard to the claim for pay for work executed during public holidays, the Claimant did not specify the public holidays in question. In the absence of these details, it would be difficult for the Respondent to zero in on records on those specific dates and provide them to court. As a result, this aspect of the claim is declined.

78. As regards the claim for overtime pay, I have noted from the pay slip that was produced by the Respondent for the month of July 2017 that it (the Respondent) had factored the Claimant's overtime in his pay, at least for that month. This is shown through an entry in the pay slip that is marked as OT 1. This evidence tends to suggest on a balance of probabilities that the Respondent used to address the Claimant's overtime pay at the close of the month. On the basis of this evidence and absent evidence to the contrary, I am convinced that it is more probable than it is not that the Claimant's overtime pay was factored into his monthly pay and settled. As a consequence, I decline the claim for overtime pay.

79. The Claimant has also prayed for service pay. This entitlement is provided for under section 35 (5) of the *Employment Act*. However and by virtue of section 35(6) of the Act, service pay is not payable to employees who are contributors to the NSSF.

80. The record shows that the Claimant was a registered contributor to the NSSF for the entire of his engagement with the Respondent. Therefore, he is not entitled to make this claim.

81. The Claimant has prayed for pay in lieu of notice to terminate his contract of service in terms of sections 35 and 36 of the *Employment Act*. As noted earlier, there is no evidence to suggest that the Respondent had valid grounds to terminate the Claimant's employment. Similarly, there is no evidence to suggest that the Respondent upheld due procedure in the process including by issuing the Claimant with the requisite notice to terminate his contract or salary in lieu of such notice. In the premises, I award the Claimant the sum of Ksh. 16,011.00 being pay in lieu of notice to terminate his contract in terms of section 36 of the *Employment Act* and in terms of what was expected to have been his exit salary.

82. I award the Claimant interest on the amounts awarded at court rates from the date of this judgment.

83. I ward the Claimant costs of the case.

84. The award is subject to the applicable statutory deductions under section 49 of the *Employment Act* where applicable.

Summary of the Award

85. The court finds and awards as follows:-

a. The Claimant was employed by the Respondent in July 2014.

b. The Claimant's contract of service was unfairly terminated by the Respondent.

c. The Claimant is awarded compensation for the unfair termination of his contract that is equivalent to his gross monthly salary for eight (8) months, that is to say Ksh. Ksh. 128,088.00.

d. The court finds that the Respondent underpaid the Claimant for part of the duration of the contract between the parties. Accordingly, the Claimant is awarded Ksh. 13,866.00 on account of underpaid salary.

e. The claim for house allowance is declined.

f. There is no evidence that the Claimant was permitted to utilize his annual leave as and when it fell due. As such, the Claimant is awarded Ksh. 40,638.00 to cover the accrued leave days for the three years that he was in the service of the Respondent.

g. The claim for compensation for work performed during public holidays is declined.

h. The claim for overtime is declined.

i. The claim for service pay is declined.

j. The Claimant is awarded Ksh. 16,011.00 in lieu of notice to terminate his contract.

k. The Claimant is awarded interest on the amounts awarded at court rates from the date of this decision.

l. The Claimant is awarded costs of the case.

m. The award is subject to the applicable statutory deductions as required under section 49 of the *Employment Act*.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.