



**Munyite v Harambee Sacco Society (Cause 671 of 2019)  
[2024] KEELRC 1287 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1287 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 671 OF 2019**

**JK GAKERI, J**

**MAY 27, 2024**

**BETWEEN**

**SALOME MUNYITE ..... CLAIMANT**

**AND**

**HARAMBEE SACCO SOCIETY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the suit by way of a Memorandum of Claim dated 2<sup>nd</sup> October, 2019 alleging that the Respondent unfairly terminated her employment.
2. The Claimant avers that she was employed by the Respondent on 12<sup>th</sup> June, 1996 as a Clerical Officer and rose through the ranks to the position of Accounts Assistant at a gross salary of Kshs.102,554/= per month.
3. The Claimant further avers that in 2018 the Respondent underwent a restructuring and the Claimant was redeployed to the Operations Department, Credit Section on the 16<sup>th</sup> May, 2018 and her duties included receiving sink funds claims and applications and ascertaining the information contained in the claims applications among others.
4. The Claimant states that the Sink fund enabled members to make application of funds following the demise of a family member for purposes of covering funeral expenses.
5. The Claimant avers that on the 23<sup>rd</sup> July, 2018, she was issued with a notice to show cause alleging negligence of duty and fraudulent payment of burial expenses to member No. M/N011998.
6. The notice indicated that an Internal audit had been conducted on the Sacco's sink fund claims and revealed that on 9<sup>th</sup> May, 2017 a Ms Veronica Syokili Mulwa applied for Kshs.50,000/= towards her late mothers burial expenses.



7. The Claimant avers that she responded to the show cause letter on the 26<sup>th</sup> July, 2018 and was interdicted from duty on 11<sup>th</sup> September, 2019 and attended a disciplinary hearing on 28<sup>th</sup> January, 2019.
8. The Claimant states that after the disciplinary hearing, she requested for a copy of the disciplinary hearing minutes but the Respondent declined to provide the same.
9. It is the Claimant's case that her employment was maliciously and unfairly terminated on 13<sup>th</sup> March, 2019.
10. The Claimant avers that she lodged an appeal on 19<sup>th</sup> March, 2019, was heard on 2<sup>nd</sup> April, 2019 and received a communication from the appeal panel on 26<sup>th</sup> April, 2019 upholding the decision to terminate her employment.
11. The Claimant alleges the termination was unfair as she was not issued with the investigation report which was the basis of the allegations made against her nor provided with the minutes of disciplinary hearing which she would have relied upon for preparation of the appeal.
12. It is the Claimant's case that the reasons for termination were unfounded, unfair, erroneous, unreasonable and actuated by malice.
13. The Claimant prays for;
  - i. A declaration that the act of the Respondent withholding the evidence forming the basis of termination of employment is unfair, unlawful and against the rules of natural justice.
  - ii. A declaration that the act of discrimination in the place of work on basis on the Claimant's age is unconstitutional, unlawful and illegal and amounts to a breach of contract of employment and deprivation of property.
  - iii. A declaration that the Claimant's termination was unfair and unlawful.
  - iv. 12 months' pay for unfair dismissal at Kshs.1,230,648/=.
  - v. 3 months' notice pay in accordance to CBA at Kshs.307,662/=.
  - vi. Service pay 3 months for every year worked for 23 years at Kshs.7,076,226/=.
  - vii. Leave pay 64 unpaid leave days at Kshs.298,338/=.
  - viii. Pay of days worked from 1<sup>st</sup> March 2019 to 13<sup>th</sup> March, 2019 Kshs.60,593/=.
  - ix. 25% discount on outstanding loan balance Kshs.1,654,388/=
  - x. Medical cover benefits until 31<sup>st</sup> December, 2019
  - xi. Reimbursement of half pay illegally withheld for the period the Claimant was on interdiction at Kshs.307,662/=.
  - xii. General, aggravated and exemplary damages for deceit, fraudulent misrepresentation and loss of career.
  - xiii. Cost of the suit and interest thereon at courts rates



### **Respondent's case**

14. In response to the Memorandum of Claim, the Respondent filed memorandum of reply, counter-claim and set off dated 8<sup>th</sup> October, 2020.
15. It is the Respondent's case that an internal audit report dated 4<sup>th</sup> July, 2018 was submitted to the management and the report implicated the Claimant of financial malpractice thus necessitating the issuance of the notice to show cause dated 23<sup>rd</sup> July, 2018.
16. The Respondent avers that it had no obligation to inform the Claimant when the audit was being conducted as its only obligation is to share with the Claimant its findings and give her an opportunity to defend herself.
17. The Respondent further avers that the purpose of interdiction was to pave way for investigations and once they were done, she was invited to the disciplinary hearing.
18. It is the Respondent's case that the letter of dismissal was grounded on the Claimant's own admission.
19. The Respondent states that the Claimant was lawfully dismissed from service and the terminal dues payable after taking into consideration the liabilities is Kshs.1,104,974.56
20. The Respondent avers that the Claimant was its employee and was summarily dismissed on the 13<sup>th</sup> March, 2019 on an account of negligence of duty which led to a fraudulent payment of Kshs.50,000/=.

### **Counter claim**

21. The Respondent avers that prior to dismissal, the Claimant was indebted to the Respondent as follows;
  - a. Jisaidie 72 Loan Kshs.1,104,974.56
22. The Respondent states that the Claimant declined to clear the loan or otherwise respond as to how she intended to settle the same.
23. The Respondent prays that;
  - a. The Claimant's claim be dismissed.
  - b. The Respondent's counter claim for Kshs.1,104,974.56.
  - c. In the alternative the sum of Kshs.1,104,974.56 be set off from any amounts awarded in favour of the claimant herein.
  - d. The Respondent be awarded costs of the claim.

### **Claimant's evidence**

24. The matter proceeded for hearing on the 28<sup>th</sup> March, 2023 when the Claimant testified in support of her claim by adopting the written witness statement dated 27<sup>th</sup> June, 2019 as her evidence in chief.
25. On cross-examination, the witness stated that her job description involved receiving applications for sink funds and ascertaining the correctness of the documents.
26. She also stated that she was involved in receiving sink funds claims or applications and recording all claims cheques received from CIC insurance company.



27. The witness confirmed that she was charged with financial malpractice in the processing sink fund application relating to Miss Veronica Mulwa who was claiming funeral expenses on behalf of her late mother.
28. The Claimant testified that she received the sink fund application and documents which included copy of the burial permit, copy of the Identity Card and claim form.
29. The witness stated that she verified the documents before processing the claim and that no money was lost as a result of the claim and that she was not negligent in any way.

### **Respondent's evidence**

30. Mr. Willy Tanui, the Respondent's Human Resource Officer testified in defence of the Respondent.
31. The witness testified that he was the Branch Manager, Mombasa and his duties were to manage the day –to –day activities of the branch.
32. On cross examination, the witness confirmed that he was aware that the Claimant was interdicted for three months and was invited for a disciplinary hearing on the 23/01/2019.
33. The witness further confirmed that he was aware that the Respondent's Human Resource manual provided that sufficient information be given to the employee and stated that he was not aware why the Claimant was not given the investigation report.
34. RWI testified that he was aware that the Claimant appealed against the dismissal and that she was not given a copy of the proceedings or minutes of the disciplinary hearing.
35. The witness further confirmed that during application of Sink funds, the documents needed were the burial permit, copy of Identity card and the application form.
36. The witness stated that Veronica Syokili confessed having provided fake documents, but availed no evidence of the alleged confession.
37. The witness stated that the Claimant was not given the 2 months' notice as provided in the CBA that runs from January 2019 to December 2022 yet she was an employee during the said period.

### **Claimant's submissions**

38. The Claimant distilled the following issues for determination;
  - i. The Claimant's dismissal by the Respondent was not premised on a valid reason.
  - ii. The disciplinary process by the Respondent was procedurally unfair
  - iii. The claimant is entitled to the reliefs sought.
39. On the first issue, counsel submits that termination of the Claimant's employment was not premised on a valid reason. Counsel urges that it is trite law in employment and labour relations in Kenya that termination of employment should be based on genuine, valid and fair grounds as provided under Section 43(1) of the *Employment Act*, 2007.



40. Counsel relies on the holding in *National Bank of Kenya v Attorney Njue John* (2019) eKLR where court affirmed the finding that termination of the Claimant's employment was not premised on a valid reason and stated as follows ;
- "Section 45 of the Act.....in terms of the said section a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employees conduct, capacity, compatibility"
41. Counsel submits that the Respondent accused the Claimant of negligence of duty and loss of funds through payment of fraudulent sink fund claim. Counsel urges that the investigation report did not state that the Respondents lost any funds.
42. Counsel further submits that there was no negligence of duty on the part of the Claimant as she particularly paid homage to the burial permit, letter from the chief and Veronica Syokili's identity card.
43. Reliance is made on the holding in *Teresia Wanjiru Ndegwa vs Barclays Bank Ltd* (2016) eKLR where the Claimant has been accused of gross negligence and fraud by the Respondent analogous to the instant case. The court found no link between the alleged fraud and the claimant and found the termination to have been substantively unfair.
44. Counsel further submits that the claimant acted reasonably in the case of Veronica Syokili and verified the details of the applicant and her late mother. That the disparity the Respondent identified was the surname which in the Veronica Syokili's Birth Certificate read as Josphine Mwia Kyunga and the late mother's Identity card read as Josephine Mia Mulwa. The name Mulwa was that of the deceased's Husband.
45. It is the Claimant's submission that her termination of employment was premised on an invalid reason.
46. On the second issue, counsel submits that the Claimant was taken through a procedurally unfair process that did not meet the threshold provided under Section 45 of the [Employment Act, 2007](#) for the following reasons;
- i. The Claimant was not supplied with the investigation report before the disciplinary hearing and therefore her right to challenge the evidence was put in jeopardy.
  - ii. Failure to provide the Claimants with minutes of the disciplinary hearing together with the recommendations which were required in the preparation of the appeal.
  - iii. The disciplinary committee was not constituted as per the requirements of the Respondent's Human Resource Manual.
  - iv. The investigations report was the basis of the charges yet the Claimant was not supplied with it
  - v. The Claimant was not provided with the minutes of the disciplinary hearing together with the panellists' recommendations and comments despite the Claimant requesting for the same.
47. Reliance was made on the holding in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR where the court found that the Respondent had subjected the Claimant to an unfair disciplinary hearing and declared the termination unlawful.
48. Counsel submits that failure to supply the Claimant with very document that was the basis of the charges levelled against her denied that claimant a reasonable opportunity to prepare her defence.



49. Finally, counsel submits that having established that the Claimant was unfairly terminated she is entitled to the reliefs sought as set out in Section 49 of the [Employment Act, 2007](#)

### **Respondents Submissions**

50. Counsel for the Respondent highlighted the following issues for determination;
- i. Whether the Claimant's dismissal from employment was not premised on a valid reason.
  - ii. Whether the disciplinary process by the Respondent was procedurally unfair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
51. On the first issue, counsel submits that termination of the Claimant's employment by the Respondent was premised on a valid reason, namely; failure to conduct basic verification of documents submitted to her.
52. Counsel urges that the findings of the internal audit implicated the Claimant and the report states that the documents that were presented by Veronica Syokili had some inconsistencies and the Claimant should have confirmed their genuineness before processing the payment.
53. Reliance was made on the holding in *Galgalo Jasro Jillo v Agricultural Finance Corporation (2021) eKLR* where the court stated as follows;

“In terms of Section 43 of the [Employment Act](#), an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that in fact it did not”.

54. Counsel further submits that had the Claimant merely conducted due diligence with respect to the documents supplied to her before making the payment, the dismissal from service would not have been necessary.
55. In sum, Counsel submits that the Respondent had a fair and valid reason to warrant the Claimant's dismissal.
56. On the second issue, counsel submits that the Claimant was accorded every opportunity to defend herself against the allegation levelled upon her. It is submitted that the Claimant appealed against the dismissal to the Disciplinary Appeal Committee which upheld the decision of the disciplinary committee.
57. Counsel urges that the Respondent complied with its Human Resource Manual to the letter making the Claimant's dismissal from service procedurally fair.
58. Counsel relied on the sentiments of the court in *Simon Karuga Waweru v Twiga Stationeries Limited (2019)* where the court held as follows;

“In this cause, the Claimant was served with internal memo charging him with absenting from work without permission, which he responded admitting that he absented himself from work on 9.6.2014 after lunch and reported back 10.6.2014. In a number of previous decisions, I have held that whenever an employee admits misconduct in a response to a



show cause letter, the employer is not bound to conduct any further disciplinary hearing. In this case I dare repeat that any demand for an oral hearing under section 41 of the Employment Act was superfluous in the face of the said unequivocal admission by the Claimant that absconded duty on 9.6.2014”.

59. On the 3<sup>rd</sup> issue, counsel submits that the Claimant is not entitled to the reliefs sought as the dismissal was substantially and procedurally fair.
60. As regards the counter claim, the Respondent submits that the Claimants has an outstanding loan with the respondent and urges the court to set off the loans with any award made in her favour.
61. It is the Respondent’s submission that the Claimant was lawfully dismissed on an account of negligence of duty occasioning the loss of society’s funds.

### **Analysis and determination**

62. It is common ground that the Claimant was an employee of the Respondent serving in the Operations Department, Credit Section until 13<sup>th</sup> March, 2019 when her employment was terminated.
63. The issues that commend themselves for determination are;
  - i. Whether termination of Claimant’s employment by the Respondent was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Whether the Respondent is entitled to the counter claim.
64. As correctly submitted by counsel, the provisions of the Employment Act, 2007 and case law are unambiguous that for a termination of employment to pass muster, the employer is required to prove that it had a valid and fair reason to terminate the employee’s employment and conducted the same in accordance with a fair procedure.
65. The provisions of Sections 41, 43, 44 and 45(2) and 47(5) of the Act set out the essentials of a fair termination of employment as emphasized by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR.
66. In Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR, the Court of Appeal stated as follows;

“ . . . From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. 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.”
67. Finally, in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Ndolo J. underscored the need to establish a substantive justification for the termination and procedural fairness for a termination to pass the fairness test.



## Reason for termination

68. It is common ground that the Claimant's employment was terminated on 13<sup>th</sup> March, 2018. The termination letter read in part;
- “...as an employee you owed your employer a duty of care and it was also your responsibility to confirm authenticity of the claim documents submitted to the society before processing the claim so as not to abet fraudulent sink fund claims and expose your employer to loss of funds”.
69. The Claimant responded to the notice to show cause vide letter dated 26<sup>th</sup> July, 2018 admitting that to err is human.
70. Section 43 of the *Employment Act*, 2007 provides;
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
  2. The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
71. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal held that;
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist”, causing it to terminate the employee's services. That is a partly subjective test.”
72. These sentiments are consistent with the band or range of reasonable responses test captured by Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91 as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . .”
73. The provisions of Section 43(2) of the *Employment Act*, 2007 require the employer to establish that it had reasonable and sufficient grounds for its belief.
74. In the instant case, “Internal Audit Report” dated 4<sup>th</sup> July, 2018 availed by the Respondent reveals that there were inconsistencies in the documents presented for processing of sink fund for Veronica Syokili.
75. The recommendation that the payment to Veronica Syokili may have been fraudulently processed as she presented documents had irregularities leaves no doubt that the investigator's findings were inconclusive.
76. It is not in dispute that part of the Claimant's duties was to receive and process sink fund applications and did so in this case having been furnished with the requisite documents.
77. In her response to the notice to show cause, the Claimant explains the different names were explained by way of an affidavit which was provided and had all the necessary documents including a letter from



- the chief were availed. The Internal Audit Report states that there was no Death Certificate which was not one of the requirements for purposes of the application.
78. Similarly, the Report isolated the different serial numbers on the identification card used by the applicant which only document examiner or a trained person could discern.
79. It is unclear to the court why the Head of Audit and Risk was not categorical in his report that money had been lost or that the Claimant was negligent.
80. Strangely, the overall recommendation is for management to ensure that “processing of sink fund is done when all the required documents are availed” yet the Claimant had all the prescribed documents.
81. From the foregoing, it is the finding of the court that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant’s employment as the Internal Audit Report it relied on is reticent on what the Claimant did not do or what additional thing she ought to have done in the circumstances.

### **Procedure**

82. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts of termination of employment.
83. The essentials of procedural fairness have been underscored and elaborated in legions of decisions. For instance in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal stated as follows;
- “ Four elements must thus be discernible for the procedure to pass muster:-
- i. an explanation of the grounds of termination in a language understood by the employee;
  - ii. the reasons 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 are made;
  - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
84. Needless to belabour, Section 41 of the Act prescribes the minimum requirements which an employer must abide by in the termination of employment.
85. In the words of Mbaru J. in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* (Supra);
- “ . . . Where an employer fails to follow these mandatory provisions whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair . . .”
86. As regards the procedure employed by the Respondent, the Claimant faults the Respondent for failure to supply her with the Internal Audit Report dated 4<sup>th</sup> July, 2018 from which the charge of negligence of duty was based and drawn.
87. RWI confirmed on cross-examination that a copy of the report was not provided.



88. Equally, the Claimant testified that she requested to be supplied with a copy of the minutes of disciplinary hearing to enable her prepare of the appeal but her request was not honoured.
89. It is a precept of fair hearing that the accused be supplied with the evidence and documents the accuser will rely on at trial so as to prepare for the hearing.
90. The Claimant was entitled to the documents in order to prepare for her defence, which the Respondent curtailed thereby denying her the right to fair hearing.
91. The Respondents witness, Willy Tanui, in his evidence testified that he was not aware why the Claimant was denied these documents, which ought to have been supplied to her prior to the hearing.
92. For a hearing to be considered fair, a party ought to be supplied all the documents they require in order to prepare defence.
93. In *Postal Corporation of Kenya V Andrew K. Tanui (Supra)*, the Court of Appeal stated inter alia;  

“The board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting.”
94. The Respondent’s failure to supply the Claimant with the Internal Audit Report prior to their hearing and minutes of the disciplinary hearing prior to the appeal rendered the termination of the Claimant’s employment procedurally flawed and thus unfair within the meaning of Section 45 of the [Employment Act](#), 2007.

## **On the reliefs sought**

### **i. Declaration**

95. Having found that the Respondent had failed to prove that it had a valid and fair reason to terminate the Claimant’s employment or employed a fair procedure, the declaration sought that the termination of employment was unfair is merited as is the declaration that the failure to avail relevant evidence to the Claimant was unfair and contrary to the tenets of natural justice.

### **ii. Damages/Compensation for unlawful termination**

96. Having found that the termination of the Claimant’s employment was substantively and procedurally unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007.
97. The Court has considered the fact that the Claimant was an employee of the Respondent for a duration of about 23 years, which is a long time. The Claimant expressed her wish to remain in the Respondent’s employment when she appealed against the termination decision. The Claimant served the Respondent diligently and her contribution to the termination of employment was nominal.
98. In the circumstances, the court is satisfied that the equivalent of seven (7) months’ gross salary is fair compensation.



### **iii. Declaration on discrimination**

99. The Claimant adduced no evidence of the alleged discrimination as neither the written witness statement dated 27<sup>th</sup> June, 2019 nor the oral evidence adduced in court alluded to or made reference to the particulars of discrimination.
100. In the absence of supportive evidence, the declaration sought is unmerited and is denied.

### **iv. Three months' salary in lieu of notice**

101. Having found that the termination of employment was unjustifiable, the Claimant is entitled to two (2) months' salary in lieu of notice in accordance with the terms of the CBA in place at the time of her termination.
102. The Claimant is awarded two months' salary in lieu of notice.

### **v. Service pay**

103. The Claimant sought service pay at 3 months for every year served. However, the Claimant adduced no evidence to justify entitlement to service pay which is provided for under Section 35(5) of the Employment Act, 2007 and is not payable to employees who were members of the National Social Security Fund. The Claimant's payslip on record reveals that she was a member of the fund.
- The prayer is declined.

### **vi. 25% discount on the outstanding loan balance**

104. The Claimant is seeking a 25% discount on the outstanding loan balance of Kshs.1,654,338/= but did not adduce evidence to explain why the loan should be discounted. No basis was laid for the claim and it is declined.

### **\* vii. Leave days**

105. The Claimant seeks payment for 64 outstanding leave at Kshs.298,338/=.
106. Regrettably, neither the written witness statement nor the oral evidence adduced in court make reference to the particulars of the days and in particular when they accrued and why leave was not taken. The prayer is declined.

### **viii. Days worked from 1<sup>st</sup> March, 2019 to 13<sup>th</sup> March, 2019 Kshs.60,593/=**

107. In her witness statement, the Claimant states that she worked for the Respondent until 13<sup>th</sup> March, 2019, when she received a letter of termination of employment and is thus entitled to the salary due upto that date.
108. Having found that the termination was not substantively justifiable, the Claimant is awarded salary upto 13<sup>th</sup> March, 2019.

### **ix. Medical Cover benefits**

109. The Claimant seeks medical cover benefits until 31<sup>st</sup> December, 2019 but did not adduce evidence why the same should be extended by court order. The claim has also been overtaken by events and it is declined.



**x. Reimbursement of withheld salary during interdiction**

110. Having found that termination of the Claimant's employment by the Respondent was neither substantively justifiable nor procedurally fair, it is only fair that the withheld half pay be paid to the Claimant and it is awarded Kshs.307,662.00.

**xi. General, aggravated and exemplary damages.**

111. The Claimant has not demonstrated entitlement to general damages.

112. As explained in *Rookes v Banard & others* (1964) AC 1129 and succinctly captured in *Obonyo & another V Municipal Council of Kisumu* (1971) EA 91, exemplary damages are awarded in defined circumstances.

113. Needless to gainsay, exemplary damages are not compensatory in nature and are seldom awarded in termination of employment contracts.

114. The Claimant tendered no evidence to demonstrate that her termination fell within the instances which would entitle her to exemplary damages.

The prayer is declined.

**xii. Counter claim**

115. The Respondent counter-claims against the Claimant for Kshs.1,104,974/=, being an outstanding loan with the Respondent.

116. In her evidence, the Claimant acknowledged the existence of the loan. In the circumstances, the Claimant shall continue servicing the outstanding loan with the Respondent as she had been paying while in employment.

117. The prayer for set off is declined.

118. In the upshot, judgment is entered for the Claimant against the Respondent as follows;

- a. Declaration that refusal by the Respondent to avail documents it relied upon to charge and prosecute the Claimant was unfair and contrary to the principles of natural justice.
- b. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- c. Equivalent of 7 months' gross salary as compensation for unfair termination Kshs.717,878.00.
- d. Two months' salary in lieu of notice Kshs.205,108.00.
- e. Claimant to continue servicing the outstanding loan with the Respondent.
- f. Days worked in March 2019, 13 days Kshs.60,593.00
- g. Reimbursement of withheld salary Kshs.307,662.00.
- h. Costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 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 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 *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.

**DR. JACOB GAKERI**

**JUDGE**

