



Ponda v Royal Nairobi Golf Club (Employment and Labour Relations Cause 410 of 2017) [2024] KEELRC 2155 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2155 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 410 OF 2017**

K OCHARO, J

JULY 29, 2024

BETWEEN

MOSES SAMMY PONDA CLAIMANT

AND

ROYAL NAIROBI GOLF CLUB RESPONDENT

JUDGMENT

Introduction

1. Charging that the Respondent terminated his employment unfairly and unlawfully, the Claimant filed this suit seeking for the following reliefs;
 - a. A declaration that the termination was unfair and unlawful.
 - b. An order that the Respondent do issue a Certificate of Service to the Claimant per the legal requirements.
 - c. Payment in lieu of notice – KShs.110,000/-.
 - d. Damages for unfair, unlawful, and wrongful termination equivalent to twelve (12) months' salary – KShs.1,320,200/-.
 - e. Payment for the remainder of the contract period (14 months) – KShs.1,540,00/-.
 - f. Payment of accrued leave days (34-9)KShs.127,967.00.
 - g. Payment of salary for the worked days (21) for the month of October – KShs.77,000/-.
 - h. Interest
 - i. Costs of the claim



2. Through a Memorandum of Defence dated 15th November 2017, the Respondent resisted the Claimant's claim, contending that the termination of his employment was substantively justified and procedurally fair. His entitlement to the reliefs sought was denied.
3. The Claimant's case was heard, on the 12th October 2022, while that of the Respondent was on the 26th September 2023. At the hearing, the Claimant and the Respondent's witness adopted their respective witness statements as their evidence in chief and tendered the respective documents filed herein as their documentary evidence.

The Claimant's Case

4. The Claimant stated that he first came into the employment of the Respondent as a Procurement Officer, on a fixed term contract of two years under a letter of appointment dated 2nd November, 2015.
5. In March, 2016, he undertook as a text related to his stated position, prequalification for suppliers. At the end of the evaluation of suppliers process, the Board of the Respondent approved the list of prequalified suppliers. Subsequently, the Director in charge of procurement, Mr. Stanley Kirui did an email to the Board, him, the General Manager and the Secretary of the Board, forwarding a list of the prequalified suppliers. He was also furnished with a hard copy of the list.
6. In the same month, Mr. Stanley Kirui caused the list to be uploaded into the Respondent's system.
7. On the 24th September, 2006 he was informed that some items which were supplied by one of the suppliers had been rejected by the user Department (Food and Beverage) for the reason that they did not meet the required standards. The items had been supplied long before this date. As a result, he asked his team not to issue the items for sale until the matter was resolved.
8. Further, he was informed by the Director in charge that there were also some wines that were sub-standard and advised him to call the supplier to exchange the same or issue a credit note for the returned items.
9. In the process of the foregoing, Mr. Stanley Kirui demanded for the tender opening register and the list of pre-qualified suppliers to ascertain whether the supplier of the alleged sub-standard goods was pre-qualified. He ascertained; it was.
10. He called the supplier of the drinks complained of who promised to replace the items or if it was unable to, to issue a credit note. Eventually it issued a credit note.
11. The Claimant asserted that it was the duty of the accounts department to verify and sign invoices in acknowledgment that they were satisfied with all goods supplied.
12. It was his case that on 1st of October, 2016 he was issued with a letter of suspension. It was alleged that he had allowed a non-prequalified entity "Buckam Investments Suppliers" to supply goods to the Respondent. Further, he had tampered with Kenya Revenue Authority Stickers. He was given 15 days to respond to the accusations. A hearing had been slated for 17th October, 2016.
13. He stated that on 5th October, 2016, he responded to the letter and asked to be furnished with further information on the suppliers who were not pre-qualified, names of the substandard items supplied with tampered stickers and evidence to show that he had tampered with the said items.
14. On the same day, he went to hand over as was directed but found his computer locked and all documents removed from his station of work.



15. The Claimant stated that on 15th October 2016, two days to the appointed date for the hearing, the Respondent responded to his abovementioned letter. It informed him that the supplier in issue was Bukam Investments Suppliers.
16. In the letter, Respondent alleged that it had evidence by his colleagues to prove that he had tempered with the stickers.
17. He testified that on the 17th October, 2016, he asked for more time to enable him make a response and to get a representative to accompany him during the hearing but the panel insisted on proceeding. Thereafter on the 19th October, 2016 he received a text message from the Human Resource Manager informing him to attend to the Respondent's offices on 21st October 2021 for a decision on the matter. On the 21st October 2016, he availed himself as had been directed. The Chief Executive Officer informed him that his employment had been terminated. He was to be issued with a letter of termination of employment containing reasons for termination once it was ready. The letter was later issued to him.
18. No reasons(s) whatsoever was given to him for the termination of his employment.
19. The Claimant contended that the Respondent did not allow him to be accompanied by a colleague at the hearing.
20. He further stated that the Chief Executive officer totally refused to endorse his clearance form to enable him access his benefits from the Respondent club. She insisted that he provides some documents and items as a condition precedent to the endorsement of the clearance form, yet she knew that he was not in possession of them.
21. Cross-examined by Counsel for the Respondent, the Claimant testified that he was issued with a show cause letter. He responded to the same. Further, he was called for a disciplinary hearing. His employment was terminated after he had been heard.
22. He testified that prior to joining the Respondent he was working for Imalika Sacco. He separated with this former employer not under circumstances of acrimony and dispute.
23. The Respondent gave him a job description. His responsibilities included undertaking all procurement activities, and tendering processes, raising LPOs and drafting contracts.
24. It was not within his mandate to check stock levels. That was a responsibility for store keepers, specifically the Head Store Keeper.
25. The Claimant stated that it was his duty to maintain the register for prequalified suppliers, prepare contracts and hand them over to the Director Procurement.
26. The Claimant remembered an incident when adulterated Kenya Breweries Ltd products were found in the Respondent's stores. However, he was not involved in the adulteration exercise. As per the Respondent's policy, he was not charged with the responsibility to receive club items. It was not his responsibility to maintain an inventory of that which had been received. It was the duty of the Head of Procurement.
27. To his knowledge, Bukam Investments tendered for the supply of goods. It was prequalified and a letter to that effect issued on 20th May 2016. The letter was signed by the General Manager, Ernest Keya.
28. He further testified that the show cause letter, the disciplinary procedure and his response, revolved around the supplier and the counterfeit products that were found in the stores.



29. In his evidence under re-examination, the Claimant testified that he did not appeal, because he was not given documents that could enable him to.
30. He asserted that the show cause letter did not bring out in detail the accusations that were levelled against him. This is the reason why he was prompted to request for better particulars.

The Respondent's case

31. The Respondent presented one witness, Justus Kisina to testify on its behalf. The witness testified that he was the Respondent's Estate Manager, and had worked for the Respondent for about 27 years.
32. The Claimant's job description was:
 - i. Undertake the tendering, evaluation, placement and monitoring of portfolio of contracts and procurement services and coordinating, receiving, closing and analyzing bids;
 - ii. Manage stock levels and ensure that the stores were well managed;
 - iii. Maintain an approved register of suppliers;
 - iv. Prepare contract documents in line with award decisions.
33. The witness stated that the Respondent invited bidders to apply for various tenders for the 2016/2017 financial year. Once all the tenders had been received on or about the 16th March 2016, five of the Respondent's employees including the Claimant oversaw the opening of the tender envelopes and recorded the names of the bidders in the tender opening register, with each of the five, countersigning the entries. He was among the five.
34. On the 17th March 2016, the Respondent through its General Manager appointed 6 of its employees including the Claimant to oversee the evaluation and supplier pre-qualification exercise.
35. The witness stated that on the 22nd September 2016, a Sales Representative from Kenya Breweries Limited (KBL) acting within the scope of her marketing mandate and ensuring that the quality and authenticity of their products to their customers were not compromised, inspected the Respondent's premises to confirm to that KBL and affiliate products being served were authentic and, in the presence of the Respondent's representatives from the Finance and Food & Beverages departments, discovered that some were not.
36. Further, it was noted that there was counterfeit/adulterated stock. The Claimant as the in charge of purchases of all stock both local and international on behalf of the Respondent, as per Clause 6.1 of the Respondent's procurement manual, compiled a report in regard to discovery.
37. The witness stated that it was agreed between all persons who witnessed were involved in the exercise, that they would converge on 26th September 2016 to conduct further verification of stock. At the verification meeting, it was discovered that the stock that had earlier on been marked as counterfeit and quarantined on 23rd June 2017, were either missing or had their authenticity stickers tampered with.
38. The witness contended that as per Clause 12 of the Respondent's procurement manual, only the procurement officer was responsible for inventory management, only he, had the keys to the stores and authority to sanction any engagement with the Respondent's stock.
39. The witness stated further that it was established that the compromised products had been sourced from "Buckam Investments", whom as per the tender opening register, never tendered for any category in the 2016/2017 financial year.



40. As a result, the Claimant was suspended to pave way for investigations. The suspension letter also acted as a show cause letter regarding the Claimant to respond to the charges levelled against him in writing and report back on 17th October 2017 when the Respondent would decide on appropriate action to take.
41. The witness alleged that on the day when the suspension was to start, some documents were mysteriously set on fire near the Respondent's procurement offices. Upon scrutiny, after the fire was put off, it was discovered that they were procurement related documents.
42. On the same day the Respondent returned the compromised stock to "Bukam Investments" who issued a credit note without any protest.
43. Following the Claimant's suspension from work, the Respondent conducted extensive investigations culminating to a finding that there were irregularities in the procurement process.
44. The witness stated further that on or about the 5th October 2016, the Claimant wrote to the Respondent asking for better particulars, which were supplied under an email by Respondent dated 14th October 2016. Further, under the email, the Respondent sent to the Claimant a letter inviting him for a disciplinary hearing for 17th October 2016.
45. The witness stated that on the 17th October 2016, the Claimant attended the disciplinary hearing, where he was given a chance to defend himself and was thereafter invited to attend a meeting on 21st October 2021 for communication of the disciplinary committees' findings.
46. The witness alleged that he was present during the hearing and that he can confirm that the Claimant was given a chance to be accompanied by a colleague of his choice during the hearing.
47. The witness asserted that being dissatisfied with the Claimant's defence, the Respondent terminated his employment.
48. The Respondent calculated the Claimants final dues at Kshs.314,967/= and had the Claimant execute the final dues computation form.
49. The Claimant failed to tender any evidence before the disciplinary committee to prove that Bukam Investments was a pre-qualified supplier.
50. Cross-examined by Counsel for the Claimant, the witness testified, that it was expected of the Claimant to work in accordance with the Respondent's standard operations manual. The Claimant's general duties included procuring goods, invite tenders and ensure competitive bidding.
51. The Claimant was not supposed to receive the goods coming in. He was supposed to oversee. However, sometimes he could be there physically to confirm receipt of goods.
52. Though the Respondent had a stores controller, it was not in his province to hold keys to the store.
53. He referred to the letter dated 20th May 2016, addressed to Bukam Investments Ltd, the witness stated that the letter was communicating to them their success in the pre-qualification process. The letter was signed by the General Manager.
54. The suspension letter, sufficiently brought out the charges that were being levelled against the Claimant. The letter indicated that there was to be a hearing on the 17th October 2016.
55. The witness further testified that he attended the hearing. During the hearing, the Claimant was asked about the Kenya Revenue Authority stickers. At the hearing, the Respondent had the Human Resource Manager as a witness.



56. The panel relied on reports by clerks question the Claimant. The individual reports were not been presented to court.
57. Though the investigation report dated 17th October 2017 indicates that statements were taken from various witnesses, none of the statements obtain in the report.
58. The witness stated that the Human Resource Manager could answer on the sufficiency of the notice. He was not in a position to.
59. Pressed on his testimony concerning the mysterious fire, the witness stated that nobody saw the Claimant start the fire.
60. In the email dated 29th May 2016, by Mr. Lugan addressed to Stanely Kirui, one of the Respondent's Directors, the former urged that the Claimant be recalled.
61. In an email by Mr. Kirui, it was confirmed that the goods in issue had been supplied by a pre-qualified supplier. There was no supply by a non-prequalified supplier. Further, Mr. Kirui stated that he visited the store, went through the goods and did not discover any tampered stamps.
62. Mr. Kirui was not a witness during the disciplinary hearing.
63. The witness confirmed that in the email Mr. Kirui stated that the accusations against the Claimant were mere speculation. Mr. Kirui was the convener, procurement.
64. In his evidence in re-examination the witness stated that Directors were not involved in the day to day management of the club.
65. The witness confirmed that the signature on the letter dated 30th May 2016 was the General Manager's.
66. The witness testified that the Store Manager was responsible for control of stores, though he would delegate.

Analysis and Determination

67. I have carefully considered the pleadings by the parties, their respective evidence and submissions, and distil the following issues for determination;
 - a. Whether the termination of the Claimant's employment was fair.
 - b. Whether the Claimant is entitled to the reliefs sought.
 - c. Who should bear the costs of this suit?

a. Whether the termination of the Claimant's employment was fair

68. Confronted with a dispute where it is supposed to determine whether or not a termination of an employee's employment on account of misconduct, was fair, the court is enjoined to consider two statutory aspects, substantive and procedural fairness. Substantive fairness speaks to the decision itself whilst procedured fairness, to the procedure leading to the decision.
69. In the case of Galgalo Farso Jillo vs. Agricultural Finance Corporation (2021) eKLR, the court held and I agree;

“53. I therefore find that the Respondent had valid reasons to terminate the Claimant. However, as I have observed earlier in the judgment, the law is not just concerned about ascertaining the validity of the reasons for termination.



It is also concerned with ensuring that the employer processes the separation in a manner that is procedurally fair to the Claimant. Indeed, this position has now been made clear by the court in several pronouncements. For instance, in *National Bank of Kenya vs. Samuel Ngaru Mutisya (2019) eKLR*, the Court of Appeal (referring to its previous decisions) said that in determining whether a decision by the employer to terminate is just and equitable, “the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.”

70. I now turn to consider the two aspects and as they relate to the instant matter, separately as hereunder.

71. Sections 43, 45, 45(7) & 47(5) of the Act provide the legal basis for substantive fairness. Section 43 places a duty upon the employer in a dispute concerning termination of an employee's employment to prove the reason(s) for the termination. However, heed should be taken, the reason for the termination is only proved where the employer places forth evidence from which it can be discerned that in the circumstances of the matter, truly the reason existed. The standard is that on a balance of probabilities not beyond reasonable doubt.

72. Again, it is not enough for the employer to prove the reason(s), they must go further and surmount the hurdle of proving that the reason(s) was fair and valid as dictated by section 45 (2) of the Act. It is through this lens that I shall consider whether the Respondent has proved substantive justification for the termination.

73. There is no doubt that by its letter dated 30th September 2016, the Respondent suspended the Claimant from employment. The reasons for his exclusion from work were stated as;

- “(1). Procuring goods from vendors who are not in the list of pre-qualified vendors who supplied substandard items to the club.
- (2). Tempering with KRA stickers that were to be part of evidence for raised allegations.”

74. The court notes that as a result of the manner in which the suspension letter was couched, the Claimant and in my view prudently so, sought for better particulars through his letter undated. The letter was received by the Respondent on 5th October 2016. It read in part;

“.....However, to enable me properly exercise my right of self-defence, I kindly request you to furnish me with further and better particulars of the allegations made against me as follows;

Allegations 1

- a. Please provide the names of the vendors who are not on the list of the pre-qualified vendors but supplied sub-standard items to the club.
- b. Please provide the names of the substandard items supplied and when the same were supplied.

Allegation 2

- a. Please provide the names of the items whose KRA stickers were allegedly tempered with and the vendor who supplied them.
- b. Please provide evidence that I tempered with the said stickers.



I will be able to respond appropriately to the allegations immediately upon receipt of the requested particulars.”

75. Through its letter dated 13th October 2016, the Respondent wrote;

“.....pursuant to our letter dated 1st October 2016 and in response to your earlier request to be furnished with further information in regard to the allegations that were raised against you, find the detailed reasons for the same.

Allegation No.2

- a. Bukam Investment suppliers are the suppliers who allegedly were missing from the original list of suppliers and had supplied the items with the wrong stickers to the club.
- b. Attached are the names of the sub-standard items that were supplied to the club.

Allegations 2

- a. Attached is a credit note on the list of the items that were returned back to the supplier.
- b. We have eye witness record of staff who witnessed the tempered stickers.

You are hereby advised to avail in writing a response for these and the earlier allegations that had been made against you and you will be given the opportunity to state your case on 17th October 2016 at 10.00 a.m. before any further disciplinary decision is made

76. Undeniably, the two allegations formed the subject matter of the suspension, the notice to show cause and the communications between the Respondent’s CEO and the Claimant.

77. Time and again, this court has held that the reasons for the termination of an employee’s employment an eventually could be set out in a termination correspondence, must be seen to have a true connection with the pre-hearing and hearing events and more specifically the grounds forming the basis of the events, for instance investigatory suspension and issued show cause letter. It cannot be open to the employer to base its decision on matters that were not raised in a suspension letter (where an employee was placed on suspension, and or a notice to show cause (where one was issued). Pre-hearing events will always order an employee’s manner of defence against the accusations against him.

78. It will be against equity and justice contemplated under section 45 (7) of the Act, if employers were to be allowed to terminate employee’s employment or dismiss them from employment on grounds outside those that had been brought first at the stages mentioned above. Further any allowance as such will diminish the rights and protections that the post 2007 Employment and Labour Relations legal regime, accord.

79. I have carefully read the termination letter, and note that it brought out reasons for the termination of the Claimant’s employment that;

- “(1) You went against the procedures for invited tenders by accepting Bukam Investment who supplied substandard drinks to the club despite the fact that



they were missing on the list of prequalified suppliers. You were not able to provide documentation that substantiate that Bukam Investment was part of the tender process and even qualified suppliers.

- (2) Violated procedure 6.8 that states that “the club and its suppliers ought to conform to all legal obligations” of which this supplier failed by supplying to the club items that had the wrong stickers.
- (3) Failure to confirm the quality of the products supplied to the club which according to the procurement procedures of the club, it is your responsibility as the procurement officer to receipt goods and verify conformance in terms of quality which you failed to do the same and allowed substandard goods to be purchased and used by members in the club.
- (4) Being the custodian of the keys to the store, you failed to know the person that had accessed the celler store and tampered with the KRA stickers that had been identified as evidence.
- (5) you denied being involved in the destruction of documents that were found burning immediately after the suspension letter was issued to you, documents related to pre-qualification of suppliers that were under your custody.”

80. I take a clear view that the list of the grounds of termination of the Claimant’s employment, was expanded at the time the Respondent was taking its decision. Some of the grounds had not featured in the suspension letter and the show cause letter.
81. For avoidance of doubt, I have carefully compared the minutes of the disciplinary hearing, and get the sense that the grounds did not emerge as, points that the Claimant, or part of the charges, the subject matter of the disciplinary hearing, that the Claimant needed to defend himself on, and that could at the end of the day form a basis for the disciplinary action against the Claimant.
82. By reason of the premises, I come to the conclusion that the Respondent did not act in equity and justly when it based its decision on grounds that were outside those that were the basis for the suspension, the show cause letter, and that the Claimant was called upon to defend himself against.
83. The Respondent in a bid to demonstrate that Bukam Investment was not prequalified as a supplier tendered a list captioned “Tenders Opening Time 10.45 a.m.” on top of the caption the document is dated 2nd March 2016. True, this list reflects Bukam Investment’s name as absent.
84. I have really agonized over this list in light of the totality of the circumstances of this matter, including the dates obtaining there on, the letter which the General Manager wrote to the company communicating their success for the prequalification and the two lists tendered by the Claimant for prequalified, and wonder whether really it does discount the Claimant’s assertion that the company was prequalified and whether that is all that a reasonable employer could present in a hotly contested issue of prequalified suppliers as was in this matter.
85. The list is shown to have been witnessed on the 11th March 2016, long after the tenders were opened, I am unable to marry this with the Respondent’s witness’s evidence that the list was witnessed (and of course it could reasonably be expected) on the date of opening of the tenders.
86. In his statement, the Claimant had stated that the Respondent had a system where procurement matters inclusive its prequalified providers were kept, this evidence was not discounted. Nothing could



have been easier than the Respondent presenting a print out of its prequalified suppliers, to disabuse the Claimant's position.

87. Under his list of documents dated 25th October 2021, the Claimant presented two lists first a list dated 2nd March 2016, "2017 - 2018 pre-qualification of suppliers". The test bears, the names of the bidders, bidders representatives and their signatures, and the various categories of tenders and therefore what each bidder sought to be prequalified for. Second, a system generated list titled "summary per category". The company's name is present in the two lists. In my view the lists are elaborate and more convincing. The Respondent and or its witness did not discredit those lists.
88. The Claimant presented a letter dated 20th May 2016 addressed to Bukam Investments by the Respondents General Manager, the letter read in part:

"Re: RW9/14/2016/2017 – Supply of Wines, Spirits, Beer and Beverages

Following your application for pre-qualification for the above named category we do hereby write to notify you that your application was successful for the financial years 2016 – 2017.

However, we thank you for the interest in partnering with us to serve our members".

The authenticity of this letter was not challenged. In fact, the Respondent's witness testified under cross-examination that the signature it bore, was that of the General Manager.

89. As admitted by the Respondent's witness, one of the directors, the convener of procurement, wrote and required that the Claimant be recalled as the accusations against him were a product of speculation.
90. By reason of the premises foregoing, I hold that no reasonable employer could terminate his employees employment in the circumstances as were in the instant matter.
91. Though the Claimant was charged of tampering with KRA stickers, no witness was called to testify either at the disciplinary hearing or before this court to lay evidence towards establishing this. Further, I have considered paragraph 4 of the dismissal letter which states;

"4. Being the custodian of the keys to the store, you failed to know the person that had accused the celler store and tempered with the KRA stickers that had been identified as evidence."

In my view this suggests expressly that the Respondent charged goal posts or rather acquitted the Claimant from being the perpetrator, to a person who failed to note the perpetrator. Unfortunately for the latter the Claimant had not been called to defend himself. This leads to the conclusion that the reason was not fair and valid.

92. In sum, the Respondent failed to establish substantive justification for the termination of the Claimant's employment.
93. I now turn to consider whether the Respondent did conform with the strictures of procedure set out in section 41 of the *Employment Act*. The provision provides for procedural fairness, what a process leading to the termination of an employees employment must embody to be considered fair.
94. The procedure embodies three components, hearing component, the employer must inform the employee of its intention to take action against him or her, and the grounds stirring the intention. Second, the hearing component, the employee must be given adequate opportunity to prepare and defend himself against the accusations, put in another way, make a representation on the grounds.



Closely associated with this is the employee's right of accompaniment, which he or she must be allowed. Lastly, the employer must consider the representations made by the employee and or the person accompanying him, before a decision is taken.

95. The court notes that through the suspension letter, the notice to show cause letter and the letter in response to the Claimant's undated letter that asked for further and better particulars, the Claimant was informed of the two- accusation levelled against him. As a result, I hold that the 1st component was satisfied.

96. No doubt, the Claimant through his undated letter referred to hereinabove, sought for better particulars as regards the accusations that were levelled against him. This court notes that in response to the letter and more particularly, on allegation 2, the Respondent stated;

“.....we have eye witness record of staff who witnessed the tempered stickers”.

The record was not availed to him.

The witnesses were not presented to present any evidence at the disciplinary hearing.

I agree with the Claimant that this denied him an opportunity to prepare adequately for his defence during the hearing.

97. The court is cognizant of the principle that not every procedural misstep/infraction vitiates procedural fairness of a termination of an employee's employment or dismissal of an employee. See *Moses Ecpawa vs. Kenya Airports Authority (Civil Appeal E099 of 2021) (2024) KECA 828 (KLR)*. In my view, an unexplained failure by an employer to supply better particulars sought by an affected employer, as was in the instant matter, does not amount to a minor procedural infraction. Where the particulars are relevantly and genuinely sought such failure impedes an employee's right to fair hearing under section 50 of *the Constitution*, in the disciplinary process.

98. In the upshot, I hold that the dismissal was procedurally unfair.

Whether the Claimant is entitled to the reliefs sought

99. The Claimant's employment was one terminable by one month's notice or payment of one month's salary in lieu of such notice, under Clause 12 of the contract of employment. No doubt, the notice was not given. There was no payment in lieu of notice. Having found that the dismissal was both substantively and procedurally unfair, I hold that the Respondent should pay the Claimant one month's salary in lieu of notice pursuant to the provisions of section 36 of the *Employment Act*.

100. The Claimant further sought for compensation for unfair dismissal. Section 49 (1) (c) of the *Employment Act* bestows this court with the authority to make a compensatory award in favour of an employee who has successfully challenged his employer's decision to terminate his employment or dismiss him from employment. However, it is pertinent to state that the award is made discretionarily, depending on the circumstances peculiar to each case.

101. I have carefully considered; the manner in which the Claimant's was dismissed lacking in substantive and procedural fairness, the length of period that was remaining on his contract to the appointed date of elapse; and the length of service of the Claimant, and come to the conclusion that he is entitled to the compensatory relief contemplated under section 49 (1) (c) of the *Employment Act*, to an extent of five (5) months' gross salary.

102. The Claimant contended that at separation he had 34.9 leave days earned but unutilized. The Respondent neither proved that the days were not earned nor that if they were, they were utilized. The



Claimant's evidence was not rebutted. I award him compensation for the earned but unutilized leave days.

103. The Claimant contended that he was not paid for the 21 days worked in October 2016. The Respondent did not challenge this claim. The claim under this head succeeds.

104. In the upshot judgment is hereby entered for the Claimant in the following terms;

- a. A declaration that the dismissal of the Claimant from employment was unfair.
- b. One month's salary in lieu of notice – KShs.110,000/-.
- c. Compensation pursuant to the provisions of section 49 (1) (c) of the *Employment Act*,KShs.550,000/-.
- d. Payment on earned but unutilized leave days (349)KShs. 127,969.00.
- e. Payment for the days worked in the month of October 2016, KShs.77,000.00.
- f. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
- g. Costs of this suit.
- h. The Respondent to issue the Claimant with a Certificate of Service within 30 days of this judgment.

READ, DELIVERED AND SIGNED THIS 29TH DAY OF JULY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms Katara holding brief for Kithi (Mr.) for the Claimant

Mr. Okech for Ouma for the 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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

