



**Omenjo v Platinum Credit Ltd (Employment and Labour Relations Cause 2293 of 2016) [2024] KEELRC 2478 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2478 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2293 OF 2016  
K OCHARO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**CHARLES OOKO OMENJO ..... CLAIMANT**

**AND**

**PLATINUM CREDIT LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a Memorandum of Claim dated October 5, 2016, the Claimant sued the Respondent seeking against it the following reliefs and orders: -
  - a. Compensation for wrongful termination
  - b. Salary for 12 months
  - c. Salary from the suspension month of April to the dismissal month of July 2016
  - d. Severance pay
  - e. Leave days
  - f. General Damages
  - g. Exemplary damages
  - h. General damages for loss in career advancement
  - i. Costs of this suit
  - j. Interest on the above items
  - k. Any other or further relief that this Honourable Court may deem just and fit to grant.



2. In response to the Memorandum of Claim, the Respondent filed a Statement of Response and Counter-Claim dated 5<sup>th</sup> October 2017. In the statement of response, it denied the Claimant's claim of unfair dismissal and the reliefs sought, while through the counterclaim it sought judgment against the Claimant for a sum of Kshs. 4,297,000 with interest at 4.5% per month till full payment.
3. After hearing the parties on their respective cases, this Court directed them to file written submissions within specific timelines. the Claimant filed his dated 27<sup>th</sup> November 2023, while the Respondent filed theirs dated 12<sup>th</sup> April 2024.

### **Claimant's case**

4. The Claimant's case is that he was first employed by the Respondent in 2009. After the appointment, he served the Respondent dedicatedly and faithfully in various departments per the Respondent's terms of service. Salary increments and promotions characterised his tenure of service as a result. He last served as the in charge of the Nyanza region.
5. While serving in the stated position, he discovered unaccounted-for accounts and immediately reported the matter to his superiors. As a result, the Respondent commenced their investigations. To his surprise, on 8<sup>th</sup> April 2016, the Respondent suspended him from employment through a phone call. The suspension was not preceded by any inquiries. On 29<sup>th</sup> July 2016, he was informed that he was summarily dismissed and directed to collect his dismissal letter the next day.
6. The Claimant contends that dismissal from employment was unfair for the following reasons: the grounds for his dismissal were unreasonable and unfair; he was dismissed while the investigations were ongoing; he was not afforded a fair hearing; the proceedings against him were biased; the tenets of natural justice were affronted; and the provisions of the Employment Act 2007 and other labour laws, were contravened by the Respondent.
7. It was his case that after the dismissal, the Respondent neglected and or refused to pay his terminal dues. Owing to his unfair dismissal from employment, the opportunity to advance his career was suffocated, as a picture of him as an incompetent employee, was erroneously and unnecessarily created. At the time of his dismissal, he was earning a monthly salary of Kshs. 38,841/-.
8. Cross-examined by the Respondent's Counsel, the Claimant stated that he only worked for three years in the Respondent's Collections Department. However, cumulatively he was in the service of the Respondent for eight years.
9. The Claimant further testified that at the material time, there was a Memorandum of Understanding between the Respondent and Jaramogi Oginga Odinga University of Science and Technology. The Memorandum dictated that loans could only be granted only to its serving employees. The loans were advanced to them on the strength of their salaries. The repayment of the loans was through a check-off system.
10. The Claimant further testified that his email of 18<sup>th</sup> August 2015 [page 38 of the Respondent's] documents spoke to non-performing loans. Some of those clients who were not repaying were not at the time employees of the Respondent. However, they were contacted and given other channels of repaying, as they couldn't pay through their pay slips.
11. His role was limited to the collection by-product. Where an employee loses his or her job for one reason or the other, then his or her name shall not appear on the by-product.



12. He asserted that as a collection officer, it wasn't within his scope of duty to handle the documentation process. The duty fell under the Risk Management Department. They are the ones who were charged with the responsibility of generating the loan deduction forms. His role was to confirm that the deductions were effected. Further, to confirm that the payroll had received a deduction order sheet.
13. His claim for compensation for leave days earned but not utilized is based on the fact that due to the sensitivity of the position he was occupying, rarely could he be allowed to utilize his annual leave days fully. He could at most utilize two to three of his leave days in a year.
14. The Claimant admitted that he was issued with a suspension letter and that the letter expressly stated that there were ongoing investigations. However, there wasn't any notification as regards a disciplinary hearing.
15. The dismissal letter was served on him on 2<sup>nd</sup> August 2016. It did indicate the effective date of the dismissal.
16. In his evidence under re-examination, the Claimant stated that the Memorandum of understanding between the university and the Respondent was executed when he was still stationed in the Respondent's Nairobi office.
17. The Claimant further stated that the responsibility of assessing the suitability of individuals for the loans applied for didn't fall within his docket. The Risk Department could evaluate the suitability, and generate the necessary documents. His was to collect and submit the collection deduction orders.

#### **Respondent's case**

18. The Respondent presented four witnesses to testify on its behalf in this matter. The first witness was Benson Githuku [RW1], its Head of Collections. The witness adopted his witness statement as his evidence in chief and tendered in evidence, the documents filed herein by the Respondent as its documentary.
19. The witness stated that in the discharge of his responsibilities, the Claimant on several occasions directly communicated to him or members of his Department with himself in copy regarding facilities taken by staff at the Jaramogi Oginga Odinga University of Science and Technology, which was within his region.
20. The witness further stated that on diverse dates between December 2015 and January 2016, the Claimant forwarded lists of borrowers and scanned copies of cheques indicating that the university staff borrowers were duly servicing their loans and provided assurance to the Respondent to the effect.
21. It later dawned on the Respondent that out of the list of borrowers from the university, only one of them was actually employed at the university. The Claimant neither denied the position nor expressed remorse for his negligence that exposed the Respondent to risk. Instead, he tried to excuse his negligence through his email dated 28<sup>th</sup> March 2016, by stating that the University Council had decided to phase out the TPY grade and introduce the PP grade, which meant that TPY grade staff had to be assessed before being classified as PP grade. This was the reason why the borrowers were not reflected on the list of University staff.
22. The witness stated that ultimately the University staff loans were grossly underserved and the Respondent was unable to trace the purported staff borrowers. The Respondent suffered a loss of KShs. 4, 297, 000. The loans were proven unrecoverable.



23. The stated loss couldn't have occurred if the Claimant had not violated the position of responsibility and trust placed upon him. It is difficult to fathom why the Claimant booked loans from ghost-workers without conducting the necessary due diligence to verify that the borrowers were actually employees of the university.
24. The witness further asserted that the Claimant repeatedly covered for the ghost workers even when it became clear that they were improperly granted the facilities. This could signify that he was privy to the fact that indeed they were ghost workers.
25. Lastly, he expressed shock that the Claimant knowing very well the magnitude of the loss he occasioned decided to sue for compensation. According to him, it is the Respondent and not the Claimant who deserves compensation for the loss suffered.
26. Cross-examined by Counsel for the Claimant, the witness stated that the sole role of the Claimant was as Collections Officer.
27. Questioned on the lending process, the witness explained that once the sales agents identify a person[s] desirous of applying for a facility, they report to the nearest branch of the Respondent. The branch then forwards the matter to the desk of the Collections Officer. The Officer then makes the necessary inquiries from the employer[s] i.e. if there is an indication that the person[s] is an employee, to ascertain his or her employment status. After confirming, he presents the names to the Credit Department to process the disbursement of the loan.
28. The witness further stated that it was the duty of the Collection officer to ensure that the person[s] had the capability to repay the facility sought.
29. The witness further testified that the Credit Officer at the branch first appraises the applicant, before forwarding the matter to the Collections Officer for further appraisal. The Collections Officer is required to pick up the requisite details from the employer.
30. The witness stated that the Claimant was negligent in the manner he discharged his duties between 2014 and 2016. This notwithstanding, he received the 13<sup>th</sup> cheque from the Respondent. The loss was discovered after he had received the cheque.
31. The Claimant was taken through a fair process before his dismissal from employment. He was accorded a hearing. The witness alleged he attended one of those disciplinary hearing proceedings.
32. In his evidence during re-examination, the witness testified that part of the Claimant's job description was ascertainment of the creditworthiness of borrowers. Though he was not involved in the signing of the Memorandum of Understanding, he ought to have known that loans could only be given to university staff.
33. The internal audit that was carried out in 2022, reveals a higher figure than that which was contained in an earlier report. The figure in the 2022 report is inclusive of interest.
34. The 2<sup>nd</sup> Witness for the Respondent was Nafisa Sarkar, the Respondent's Human Resources Manager. The witness adopted the contents of her witness statement dated 7<sup>th</sup> October 2022, as her evidence in chief. The witness stated that the Claimant in his position was charged with the responsibility for ensuring that loan applications for his region were booked and confirmed with relevant authorities and himself before their disbursement.
35. In particular he was responsible for the loans taken by the staff at the Jaramogi Oginga Odinga University of Science and Technology.



36. As Collections Officer, the Claimant was put in a position of responsibility and trust; and charged with the task of confirming any loans applied for to the Risk Department via email to facilitate payment by the Respondent.
37. The witness testified that on diverse dates between 2014 and 2016, loan applications by the University staff were confirmed by the Claimant and paid out by the Respondent. Subsequently, a majority of the loans became non-performing and investigations conducted revealed that they had been fraudulently facilitated.
38. Upon being confronted about the fraud, the Claimant claimed that he had delegated his responsibility to a non-permanent staff called Caleb Onyango.
39. The witness asserted that the Respondent fully complied with the procedural requirements of the law in processing the Claimant's dismissal. He was furnished with a formal charge and taken through a disciplinary session where he was given a chance to defend himself against the charge. The disciplinary hearing took place on 2<sup>nd</sup> August 2016. Further, he was given access to documents that were critical to his defence, including the preliminary findings of the investigation into losses incurred by the Respondent due to his negligence in the discharge of his duties.
40. After the hearing, the Respondent took the view that the Claimant's representations on the charges were not made in good faith and were therefore not convincing. The Respondent was left with no other option than to dismiss him from employment.
41. In her evidence under cross-examination, the witness testified that the Claimant was suspended on 8<sup>th</sup> April 2016, pending investigations. The date on the summary dismissal letter was erroneously dated 29<sup>th</sup> July 2016. The disciplinary hearing took place on 2<sup>nd</sup> August 2016.
42. Pressed further under cross-examination, the witness testified that she didn't have any document from which it can be discerned that the Claimant was invited for a hearing and on which date he was. Further, the dismissal letter doesn't make any reference to any disciplinary hearing. In the dismissal letter, she indicated that investigations were ongoing. The grounds gained so far in the inquiry were enough to be a basis for the dismissal. The investigation revealed the loss of 4.2 million. The Claimant didn't agree with this figure.
43. The 3<sup>rd</sup> witness, Mercy Mutungi, the Respondent's Head of Credit, largely adopted the evidence by the other witnesses as regards the employment of the Claimant, and his responsibility as regards loan applications.
44. The witness stated that the Claimant in his position could directly communicate to her or members of her department with herself in copy regarding facilities taken by staff of the University. He could typically write to her department to confirm data sheets forwarded from his region, providing a guarantee that the loans were duly booked and following thereafter with requests for disbursement of the loan sums to the borrower[s].
45. On diverse dates between 2014 and 2016, the Claimant confirmed data sheets and authorized payments. Inclusive of interest, the cumulative amounts for the loans stood at KShs. 10,282, 360.00.
46. Subsequently, it occurred to the Respondent that a considerable number of the Borrowers listed under the University were neither on its payroll nor designated as employees.
47. In her view, the only explanation for loans being booked and payments authorized to non-employees must be that the Claimant was either callous, engaged in fraud, or dereliction of his duties to the extent that he didn't undertake the most basic due diligence.



48. The Claimant was taken through a disciplinary hearing held on 2<sup>nd</sup> August 2016. In his defence, he purported to blame a subordinate staff, Caleb Onyango. However, all the authorizations for payment made to her department were issued directly by the Claimant.
49. The loans granted to the university staff were grossly underserviced as the Respondent was unable to trace the purported staff borrowers. As a result, it suffered a loss of KShs. 10, 282, 360.00. The Claimant should compensate.
50. In her testimony under Cross-examination the witness stated that loan applications are first received by Credit Officers who review them. Once they are found to be compliant, a deduction sheet order is prepared and forwarded to the Collections Officer. Once the Collection Officer confirms, approval for disbursement is done.
51. The Memorandum of Understanding between the university and the Respondent stipulated that payment of the monthly instalments had to be from the borrowers' pay slips. Further, in case of any issue concerning the loans, the University had to be contacted.
52. Ms. Elizabeth Kyalo, the Respondent's Finance Director testified as its 4<sup>th</sup> witness. She stated that she prepared the audit report dated 3<sup>rd</sup> October 2022.
53. The witness stated that at one point there was a concern over the rate of non-performing loans that had been advanced to the Staff Members of the above-stated University. This necessitated a sample check. The check revealed that there was a need to carry out an audit. After the audit, a view was taken that either the Respondent was dealing with non-existent loanees or stage-managed clients. Upon contacting the University and making inquiries, it was revealed that some of the borrowers weren't its employees.
54. It was discovered that the approver of the documents was the Collections Officer. The role of the Collections Officer was that of trust. The Respondent disbursed the loans on the strength of his word. The Collections Officer handled the University file.
55. Cross-examined, the witness stated that the audit looked at the process not a particular department. The loan process involved many departments. The Claimant's department was the second last stage of the loan process.
56. The witness further testified that though documents were approved at the headquarters, some appraisals were done at the field level, for instance, whether an applicant was an employee of a specific entity. Such appraisal required the input of the Credit department on the one hand and the Collections Officer on the other.
57. The Respondent lodged a report with the police against some of its employees alleging that they committed fraud.

### **Issues for Determination**

58. I have carefully considered the pleadings, oral and documentary evidence, and submissions by both parties and the following issues emerge for determination: -
  - a. Whether the Respondent unfairly terminated the Claimant's employment;
  - b. Whether the Claimant is entitled to the reliefs sought; and
  - c. Whether the Respondent's Counterclaim is merited.



## Whether the Respondent unfairly terminated the Claimant's employment

59. Section 45[1] expressly prohibits unfair termination of employment of an employee, and Subsection [2] defines what could constitute unfair termination. Thus;

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- a. that the reason for the termination is valid;
  - (b) that the reason for the termination is fair—
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

60. It is, therefore, clear that a fair termination must embody two statutory components, procedural and substantive fairness. Where both or any of them are shown to be absent in termination of employment in controversy, Courts will always find and rightly so that the termination was unfair.

61. Uniquely, Section 47 (5) of the *Employment Act* 2007, places a neutral, sometimes referred to as reverse, burden of proof, on both the employee and the employer in a dispute concerning the termination of the employee's employment, placing an initial burden on the employee. The Section provides that that: -

- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

62. Looking at the wording of the section, it becomes clear that an employee's case can fail at the hurdle of him or her failing to establish that the termination of employment or dismissal from employment was unfair or wrongful, respectively. What the employee has to demonstrate to discharge the employee's burden contemplated in the section is now settled. He or she is enjoined to demonstrate, prima facie, that the termination summary dismissal did not accord with the provisions of Section 45 [2] of the Act.

63. I have carefully considered the Claimant's contentions and evidence on the lack of both procedural fairness in the process that culminated in the Respondent's decision and substantive justification for the decision to terminate, against the material placed forth in this matter in its totality, I am persuaded that prima facie he has managed to show that the dismissal was not in conformity with the edicts of the section of the law mentioned above.

64. It is pertinent to state at this point that once the employee discharges his or her burden contemplated in Section 47[5], the evidential burden shifts to the employer to prove; that the termination or summary dismissal was procedurally fair [Section 41 of the Act]; that the termination or summary dismissal was



on account of some specific reason[s] [Section 43 of the Act]; that the reason[s] for the termination or dismissal was valid and fair; and that the employer acted with equity and justice [ Section 45[7] of the Act].

65. I now turn to consider the first aspect; procedural fairness Section 41 of the *Employment Act* sets a mandatory procedure that must be adhered to by any employer contemplating terminating an employee's employment on grounds related to those matters set out in Section 45[2][b][i], employee conduct, capacity, and compatibility. The procedure encapsulates, three components, notification, hearing and consideration. This means, that the employer must inform the employee of the intended action against him or her and the reason[s] spurring the intention. After so doing, the employer must then allow the employee adequate opportunity to prepare and make representations on the ground[s], and the employer must consider the representations made before making a final decision on the matter.
66. Through a letter dated 8<sup>th</sup> April 2016, the Respondent placed the Claimant on an investigatory suspension. In the letter, it was expressly stated that he was to remain excluded from his place of work until the conclusion of the investigations. Further, upon conclusion of the investigation, he could be required to report to the Respondent's Headquarters. The Court notes that at no point was it communicated to the Claimant that the investigation had been concluded and summoned to attend the Headquarters, as a result.
67. Next, the Respondent issued a dismissal letter dated 29<sup>th</sup> July 2016. There is a serious controversy surrounding the letter. The Claimant contended that the dismissal was affected; before the investigation could be concluded; and without him being taken through any disciplinary hearing. The Respondent on the other hand asserted that the dismissal letter was issued after a disciplinary hearing held on 2<sup>nd</sup> August 2016. The date on the dismissal letter was just a clerical error.
68. This Court notes through its letter dated 15<sup>th</sup> March 2018, the Respondent wrote to the Payroll Manager, thus;

Request for Clients' Payroll Status

"Subject refers

Attached is a list of clients who applied for loan facilities with Platinum Credit Limited while with your institution.

We write to request for official communication from your good office in regards to their current payroll status.

Your prompt response will be highly appreciated."

69. The University responded through the letter dated 18<sup>th</sup> July 2018, Responded, thus;

"Your letter dated 15<sup>th</sup> June 2018 on the subject refers.

This is to inform you that only the following three [3] out of a list of twenty-eight [28] that you provided are our members of staff:

1. Mr Samuel Omondi Okeyo PF. No xxxx
2. Mr. Daniel Ounga Obuo PF. No xxxx
3. Dr. Francis Okello Odundo PF. NO.xxxx



70. It is clear that the Respondent continued with investigation even after it had dismissed the Claimant from employment. The continued investigation was on aspects vital in the Circumstances of the matter. Therefore, I agree with the Claimant's position on this.
71. The Respondent alleged that a disciplinary hearing was conducted against the Claimant on the 2<sup>nd</sup> of August 2016. The Claimant vehemently resisted this assertion. He further denied the purported minutes presented in evidence by the Respondent. This Court notes that the minutes are not signed. In my view, the tone of the document, and the manner it is coached, do not give them the character of minutes of a disciplinary hearing.
72. In my view, where the presence of a disciplinary hearing is contested as was in the instant matter, the obligation falls on the employer to demonstrate that the employee was; invited to attend a hearing for a specific date and time, at a specified place; informed through the invitation document the accusations levelled against him; and informed of his right of accompaniment under Section 41 of the Act. All the Respondent's witnesses admitted that they could tell whether or how, and when the Claimant was invited to the alleged disciplinary hearing. Nothing could have been easier than the Respondent, explaining when, and how the Claimant was invited. This coupled with the finding that the Claimant was dismissed before he could be notified that the investigation had been concluded and that the dismissal was effected while the investigation was ongoing, leads me to an inevitable conclusion that there was no disciplinary hearing as alleged by the Respondent.
73. I take a clear view, that the document tendered in evidence purported to be minutes of a disciplinary hearing was a product of the Respondent's ingenious attempt to sanitize the unfair procedure that it adopted in dismissing the Claimant from employment. This could explain why the dismissal letter predated the alleged disciplinary hearing.
74. In the upshot, I find that the Respondent failed to prove that the process leading to the dismissal of the Claimant was in accord with the statutory procedural edicts mentioned hereinabove. The summary dismissal was procedurally unfair.
75. I now turn to consider the 2<sup>nd</sup> aspect, substantive fairness. Section 43 of the *Employment Act, 2007* places an obligation on the employer in a dispute regarding the termination of an employee's employment, to prove the reason for the termination. However, it isn't enough for the employer to discharge this burden. There is a further burden under Section 45[2] which must be discharged by the employer, demonstrating that the reason[s] was fair and valid. Where the employer fails to discharge both of these burdens, the termination shall be deemed unfair.
76. The Respondent asserted that it dismissed the Claimant from employment for the reason set out in the letter dated 29<sup>th</sup> July 2016. It reads in part as follows:

“Please refer to our letter dated 8th April 2016 which stated that you were being suspended from your duties pending investigations in the fraud cases for Jaramogi Oginga Odinga University of Science and Technology (JOUST). The investigations are still ongoing due to the number of cases however an interim report states that Platinum Credit Ltd has lost Kshs 4,297,000 through the Non-Performing Loans in question. Your position as Collection officer was a position of responsibility and trust. You personally confirmed all these loans to the risk department via email therefore there was no question of doubting the credibility of those loans. Mr. Caleb Onyango who you have implicated in your report, was arrested and released on bail but his case is still ongoing. For this reason, you are being dismissed with immediate effect from Platinum Credit Ltd.”



77. The Suspension letter dated 8<sup>th</sup> April 2016 which is referenced in the dismissal letter reads as follows: -

“Your duty as Collections Officer is to ensure that loan applications received are booked and confirmed with the relevant Ministry and yourself before loans are paid.

During the period May 2014 to January 2016, a total of 24 fraud cases for the Jaramogi Oginga Odinga University of Science and Technology have been discovered which fall under your responsibility. In light of this, Management has decided that you are being suspended from your duties effective today 8<sup>th</sup> April 2016 pending investigations and you will report to Head office once the investigations are complete.

During your suspension, you will not be allowed to conduct any business on behalf of Platinum Credit Ltd in any capacity until investigations are complete.”

78. I get the reason for dismissal advanced by the Respondent as involvement in a fraudulent scheme that caused the Respondent to suffer financial losses. The Claimant contended that he was being sacrificed for infractions committed by others. That he was a whistle-blower. This Court notes that the Respondent expressed itself in the dismissal letter the loans in issue that were issued fraudulently. Further, Mr. Caleb Onyango was arrested and released on bail, regarding the fraudulent activities.

79. An allegation of fraud against an employee is a grave accusation. It can only be justified with sufficient evidence and not speculation. I have carefully considered the evidence of the Respondent’s witnesses on the Claimant’s alleged involvement in the fraud, and in my view, the evidence comes out as speculation. I cannot hold that the Respondent’s witnesses placed forth sufficient evidence geared towards establishing the commission of the fraud or involvement in a conspiracy to defraud the Respondent. No doubt, if he had been involved in the scheme, he could have been among those arrested. I conclude that he wasn’t because the Respondent didn’t believe or suspect that he was involved in any manner.

80. The Respondent choose the reason as the basis for the dismissal. This Court cannot go outside the reason and interrogate any other reason. I state this, because I discern, the Respondent’s witnesses’ evidence suggesting the ground of careless and improper discharge of duties on the part of the Claimant.

81. In conclusion, having held that Respondent’s evidence on the alleged fraudulent scheme, didn’t sufficiently demonstrate the Claimant’s involvement, I find that the reason advanced for the dismissal wasn’t fair and valid. As such, the dismissal lacked substantive justification.

#### **Whether the Claimant’s Counterclaim is merited**

82. For the reason hereinabove informing this Court’s decision that the dismissal of the Claimant was not substantively justified, I hold that the Respondent’s Counterclaim was not proved. Further, it has not escaped this Court’s mind that the amount sought in the counterclaim was in character a special damage. It needed to be specifically proved. It was not proved as such or at all.

#### **Whether the Claimant is entitled to the reliefs sought.**

83. The Respondent didn’t put forth any evidence to discount the Claimant’s, that it did pay him his salary during the four months of his suspension. The suspension letter declared that he wasn’t to earn any during the period.



84. The view of this Court has been that the law doesn't allow suspension with nil pay. Further, I have noted that the Respondent in the final settlement letter, included the salary for April to July 2016, an admission that indeed he was entitled to be paid. He should be paid the sum of KShs. 155,364 set out in the letter.
85. On the claim for unpaid leave days, I note that the Claimant's Contract of Employment made provision, under Clause 8 thereof, for 24 working days' paid leave for each completed year of service. This is consistent with Section 28 of the *Employment Act* 2007. The Respondent produced before the Court a breakdown of the leave days taken by the Claimant and emails confirming the same, which record has not been controverted by the Claimant. In the year 2016, the Respondent prorates the Claimant's leave entitlement between January and July 2016 at 14 days. They indicate that the Claimant already took 10 days, and therefore had a balance of 4 days. In their Final Settlement letter dated 2<sup>nd</sup> August 2024, the Claimant earned but unutilized leave days were stated as six. I consider, the compensation set out in the stated letter, under "plus leave accrued [6] days" as an admission, I grant the Claimant KShs. 9,710.
86. Imperative to state that there was no proof that the sums set out in the letter were ever paid to the Claimant.
87. The Claimant sought for exemplary damages. This type of damage is sparingly granted. Granted only where certain specific conditions that the law acknowledges, exist. The Claimant didn't place any evidence forth, to show that the conditions existed in the instant matter. The law as regards exemplary damages was aptly set out in the English case of *Rookes vs Barnard* [1964] I ALL ER 367, where it was held that there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff.
88. Section 49 (1) (c) of the *Employment Act* 2009 bestows on the Court power to grant a successful employee in litigation as is the instant one, a compensatory relief. The grant is discretionary, depending on the circumstances of each case. I have carefully considered the fact; that the Claimant had worked for the Respondent for approximately 3 years and 2 months; that inexplicably, the Respondent didn't adhere to the canons of procedural fairness and even attempted to mislead the Court by producing a document it held to be minutes of a disciplinary hearing while knowing that there wasn't a disciplinary hearing; this act amounted to an unfair labour practice; and that without any proved anchorage on its own policy or law, the Respondent arbitrarily withheld the Claimant's salary during the suspension, and award him four[4] months' gross salary as compensation. The Claimant's gross salary at the time of termination was Kshs. 38, 841/-.
89. It is trite law that per Section 51 of the *Employment Act* 2007, any employee whose employment has been terminated is entitled to a Certificate of Service as of right.
90. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the summary dismissal against the Claimant was unfair.
  - b. The Claimant be paid;
    - i. Unpaid leave days – 6 days Kshs. 9,710.
    - ii. Compensation for unfair termination  
(Kshs. 38,841/- x 4 months) Kshs. 155,364.23.00



- c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
- d. Interest on (b) above at Court rates from the date of judgment until payment in full.
- e. The Respondent shall bear the costs of this suit.
- f. The Respondent's Counterclaim is dismissed with costs.

**READ, DELIVERED AND SIGNED THIS 26<sup>th</sup> DAY OF SEPTEMBER 2024**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Ongombe for the Claimant

N/A for the Respondent

