



**Onyiego v Robinson Investment Limited (Cause 21 of 2016)  
[2024] KEELRC 2863 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2863 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 21 OF 2016  
DN NDERITU, J  
NOVEMBER 7, 2024**

**BETWEEN**

**RICHARD ONYIEGO ..... CLAIMANT**

**AND**

**ROBINSON INVESTMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a memorandum of claim dated 29<sup>th</sup> January, 2016 filed in court on even date through Maragia Ogara & Company Advocates. The claimant prays for a declaration that the termination was unfair and unlawful and that the respondent should be compelled to compensate him in the following –
  - a. Underpayments Kshs97,170.84/=
  - b. Arrears Kshs13,029.62/=
  - c. Notice Kshs157,326.42/=
  - d. Overtime pay Kshs150,603.18/=
  - e. Off duties pay Kshs30,927.42/=
  - f. Public Holidays pay Kshs2,400.00/=
  - g. Leave Kshs1,500.97/=
  - h. Compensation Kshs156,355.44/=Grand Total Kshs609,313.92/=



2. Together with the statement of claim was filed a verifying affidavit, a list of witnesses, and a list and a bundle of copies of the listed documents in support of the claim.
3. On 25<sup>th</sup> April, 2017 the claimant filed his written statement of even date and he subsequently filed further statements on 1<sup>st</sup> November, 2023 and 9<sup>th</sup> November, 2023.
4. On 10<sup>th</sup> March, 2016 the respondent entered appearance through Wachira Wanjiru & Company Advocates and subsequently filed a memorandum of reply to the claim dated 12<sup>th</sup> July, 2016. In the memorandum of reply the respondent prays that the claimant's cause be dismissed with costs for want of merits.
5. Alongside the statement in reply to the claim the respondent filed a bundle of copies of documents in support of the reply.
6. On 21<sup>st</sup> March, 2018 the respondent changed its legal representation and appointed Wachira Wekhomba Aim & Associates Advocates to act for it in place of the above-mentioned law-firm. Subsequently, on 17<sup>th</sup> March, 2019 the respondent further changed its representation and appointed Githiru & Co. Advocates in place of the afore-mentioned law-firm.
7. On 6<sup>th</sup> November, 2023 the respondent filed a written statement by Stephen Mogusu Nyangwono (RW1) who testified in support of its case.
8. The claimant's case came up in court for hearing on 29<sup>th</sup> November, 2023 and on 20<sup>th</sup> February, 2024 when the claimant (CW1) testified and closed his case.
9. The defence was heard on 20<sup>th</sup> February, 2024 when RW1 testified and the respondent's case was closed.
10. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Maragia, filed his submissions on 5<sup>th</sup> April, 2024 while counsel for the respondent, Mr. Githiru, filed his submissions on 3<sup>rd</sup> June, 2024.

## **II. The Claimant's Case**

11. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the claimant, and the written submissions by his counsel.
12. In his testimony in court, the claimant adopted his filed witness statements on record as his evidence-in-chief and stated that he was engaged by the respondent as a guard from December 2013, although he underwent training in November 2013, until when he was terminated on 11<sup>th</sup> January, 2016. He testified that he was engaged at a gross monthly salary of Kshs8,500/= which was an underpayment until he was unfairly and unlawfully dismissed.
13. The claimant alleged that he was dismissed when he requested that he be re-deployed to a workplace near his house or within the Nakuru CBD instead of Greensteads Early Years (Greensteads School) which is outside the town. He stated that he made the request because he could not afford to commute from Kaptembwa to Greensteads, as the respondent had allegedly stopped providing for transport as it used to when he joined. He alleges that he stopped going to work for lack of transport and he was asked to go home and await communication from the respondent, which never came. The claimant stated that having not received communication from the respondent, he went to check with the respondent's office but was ignored.



14. He stated that he did not abscond duty and his dismissal was wrongful and unlawful as he was neither called to report back to work by the management nor summoned to the labour office or issued with a warning letter.
15. It is on the basis of the foregoing that the claimant pleads and prays that the dismissal was wrongful and prays for the reliefs set out in the introductory part of this judgment.

### **III. The Respondent's Case**

16. The respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the head of human resources, and the written submissions by its counsel.
17. In his testimony in court, RW1 stated that the claimant was engaged at a starting salary of Khs8,500/- and never complained about it. He stated that the claimant was indeed overpaid as the minimum regulated wage outside a municipality was at the time Kshs6,223.60. He alleged that the claimant refused to work when he was deployed to Greensteads, as transport was available, although the respondent was not obligated to provide transport.
18. RW1 further stated that the claimant was called by the then operations manager, Mr. Kurgat, who has since left the respondent's employ, to report to work, but the claimant adamantly refused to resume duty. He stated that the claimant went on paid leave in 2014 and 2015.
19. In cross-examination, RW1 conceded that there was no dismissal letter or evidence on record that the claimant was called by Mr. Kurgat to report back to work. He stated that the demand letter dated 19<sup>th</sup> January 2016 was issued after the claimant had deserted duty on 11<sup>th</sup> January 2016, but a desertion notice was issued after 14 days.
20. He conceded that the minimum wage for a night watchman in 2015 within Nakuru municipality was Kshs11,330.10/= and Kshs10,116.15 in 2013.
21. He stated that there was no muster-roll to confirm that the claimant worked on public holidays and that no action was taken against the claimant for failing to report back to work.
22. In re-examination, RW1 stated that the claimant was not dismissed and hence there was no disciplinary hearing. He reiterated that the claimant deserted duty.

### **IV. Submissions by Counsel**

23. On the one hand, the claimant's counsel submitted on three issues – Whether there was employer-employee relationship between the respondent and the claimant and the period of such relationship; Whether it is the respondent who terminated the said relationship or that the claimant deserted duty; and, Whether the claimant is entitled to the reliefs sought.
24. On the first issue, it is submitted that the claimant underwent training to gain skills in security in November 2013, an apprentice, which made him to an employee by dint of Section 2 of the *Employment Act* (the Act). It is submitted that the respondent admitted that those on training are not paid, although the same does not mean those training as apprentices are not to be paid. Further, it is submitted that for the purposes of the cause, the period of employment ran from November 2013 to January 2016.
25. On the second issue, it is submitted that the claimant did not desert duty. It is further submitted that no evidence was adduced to prove that the respondent made any efforts in getting in touch with or



trace the claimant. It is submitted that no disciplinary action was taken against the claimant, and an alleged letter summoning him back to work was not produced in evidence.

26. Citing *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited (Cause 1442 of 2015)* [2020] KEELRC 609 (KLR) (Employment and Labour) (24 July 2020) (Judgment), counsel submitted that the respondent failed to establish that after the claimant allegedly deserted duty, it made efforts to have the claimant resume duty or at the very least issued a notice to the claimant notifying him that it was considering terminating his employment on the ground of desertion.
27. Further, citing *Walter Ogal Anuro -v- Teachers Service Commission (2013) eKLR*, it is submitted that for termination to be deemed fair, there must be both substantive and procedural fairness. An employer has to establish a valid reason to justify termination or dismissal and that the proper procedure was followed.
28. It is submitted that it is not enough for an employer to allege that an employee has deserted duty. There should be evidence of efforts made to reach out to the employee and notice that his/her termination is under consideration for desertion. To buttress this assertion counsel cited *Ronald Nyambu Daudi v Tornado Carriers Limited (Cause 236 of 2019)* [2019] KEELRC 2150 (KLR) (28 February 2019) (Judgment).
29. It is further submitted that the respondent failed to comply with both substantive and procedural fairness. It is submitted that the respondent admitted having dismissed the claimant and delivered the dismissal letter dated 18<sup>th</sup> January, 2016 to the labour office although the said letter was not produced in court. The court is urged to find that the termination was unfair and unlawful.
30. For all the foregoing reasons the court is urged to find in favour of the claimant and award all the reliefs as prayed.
31. On the other hand, counsel for the respondent identified the following issues for determination – Whether the claimant’s employment was terminated or he deserted his employment; Whether the claimant was underpaid; Whether the claimant worked overtime and during public holidays; Whether the claimant is entitled to reliefs sought or he has no claim against the respondent; and, Who should meet the costs of the cause.
32. On the first issue, it is submitted that the claimant violated the provisions of Sections 44(4)(e) of the Act in refusing to obey a lawful and proper command issued by the employer.
33. Citing *Seabolo v Belgrava Hotel (1997)6 BLLR 829(CMMA)*, it is submitted that the claimant deserted duty at Greensteads without an intention of returning, which is distinguishable from absence without leave. It is submitted that the claimant confirmed that he willingly failed to report to his assigned post alleging that he had no means of transport. Further, citing *Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR* it is submitted that based on the claimant’s assertion that the lack of fare led to his abandonment of duty, the respondent had reasonable grounds to genuinely believe that the claimant had deserted.
34. It is submitted that since the claimant deserted duty he was liable for summary dismissal. To buttress this assertion counsel cited *Standard Group Limited V Jenny Leusby (2018) eKLR*. Further, citing *Evans Ochieng Oluoch V Njimia Pharmaceuticals Limited (2016) eKLR*, it is submitted that the respondent duly complied with the law by notifying the claimant of his unauthorised absenteeism through its human resources manager and as such a claim for unfair termination cannot stand.



## V. Issues for Determination

35. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
- a. What was the period and nature of the employment relationship between the claimant and the respondent?
  - b. Was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful?
  - c. If (b) above is in the affirmative, is the claimant entitled to the reliefs sought in the claim?
  - d. Who meets the costs in this cause?

## VI. Employment

36. It is not in dispute that the claimant was an employee of the respondent. The claimant's case is that he was an apprentice in November 2013 when he underwent training by the respondent to acquire skills in security. To him this qualified him as an employee by dint of Section 2 of the Act that defines an employee as a "person employed for wages or a salary and includes an apprentice and indentured learner." The claimant stated that although the respondent alleged that those on training should not be paid, an apprentice is an employee in law. He testified that he was not paid for November 2013 when his employment commenced.
37. The respondent's case is that the claimant underwent training from 28<sup>th</sup> November, 2013 until he was deployed on 5<sup>th</sup> December, 2013 as a night guard. The respondent's position is that its policy provided that those on training were not to be paid.
38. The respondent produced a letter dated 27<sup>th</sup> November, 2013 by the claimant applying for a job. The claimant's national identity card was also produced and on its face it is indicated that he was deployed on 5/12/2013. The claimant did not object to the production of the two documents indicating that he had applied for the job with the respondent on 27<sup>th</sup> November, 2013 and was subjected to training for assessment and subsequently deployed on 5<sup>th</sup> December, 2013.
39. Based on the foregoing and the evidence adduced, the court is inclined to rule in favour of the respondent that as at the time of his training, the claimant was yet to be an employee as he was under assessment of his suitability and his employment commenced upon his deployment on 5<sup>th</sup> December, 2013 at a monthly gross salary of Kshs8,500/= as pleaded in paragraph 10 of the statement of claim.

## VII. Dismissal

40. The facts on the circumstances leading to the dismissal of the claimant and the dismissal itself are in dispute. While the respondent alleges that the claimant deserted duty by failing to avail himself at his designated location at Greensteads Schools, the claimant asserts that he requested to be redeployed to an area near his own home or within Nakuru CBD, only for him on 14<sup>th</sup> January, 2016 to be ordered not to resume work and to return his uniform.
41. It is the claimant's case that he was neither given any warning prior to his termination nor was a show cause letter served upon him. He stated that no hearing was conducted, which is clearly in breach of the provisions of Section 35 of the Act, and neither was a termination notice issued to him. The claimant vehemently takes the position that he was wrongfully, unfairly and unlawfully terminated.



42. The respondent's chronology of events is that the claimant applied for leave on 14<sup>th</sup> December, 2015 which was granted for 21 days with effect from 17<sup>th</sup> December, 2015. On 11<sup>th</sup> January, 2016 the claimant was assigned to work at Greensteads Schools but instead of reporting back to work at the respondent's office and at his assigned place of work, he absconded duty and never reported back despite several warning calls.
43. The respondent's case is that there was no chance to meet the claimant as he refused to come to work despite being summoned by the manager, and that he left with the company uniform which was returnable upon termination of the relationship.
44. The claimant challenges the dismissal on two fronts. He argues that the reason for his dismissal was not established and that the respondent did not follow the lawful procedure before dismissing him.
45. On the other hand, the respondent takes the view that the claimant deserted duty by failing to obey a lawful command, and that he was not terminated or dismissed. The respondent asserts that the claimant's desertion was reasonable grounds for summary dismissal.
46. A plethora of decisions from this court (ELRC) has by now, and to a large extent, settled the law on what constitutes substantive and procedural fairness – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro vs Teachers Service Commission* (2012) eKLR.
47. The bottom-line in due process is that an employer must have a lawful reason and adopt the proper legal procedure before terminating or dismissing an employee.
48. The law in its wisdom recognizes that employment contracts, like all other contracts, are organic and shall come to an end at some point in time. There are a variety of reasons that could terminate a contract of employment and the *Employment Act* (the Act) provides for many such reasons. Employment is personal in nature and hence death of an employee brings the relationship to a natural end. Sections 40 (redundancy), 43, 44, 45, and 46 of the Act provide for reasons and circumstances that may form good reasons or grounds for termination or dismissal. Similarly, Sections 35, 36, 40, and 41 of the Act provide for germane pointers towards what constitutes procedural fairness.
49. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed in determining if the dismissal of the claimant, if at all, by the respondent was substantially and procedurally fair and lawful.
50. There was no show cause letter issued. The claimant is accused of deserting duty and refusing to obey lawful directions from his superiors to report to his designated post. It is important to note that no particulars of the alleged desertion were issued to enable the claimant prepare and mount a defence or a response thereto. Further, no disciplinary hearing was conducted whereby the claimant had a right to appear with a fellow employee, union member, or officer of his choice.
51. While the alleged charges against the claimant were serious to warrant summary dismissal under Section 44 of the Act, the claimant was equally entitled to details and particulars of the charges and to be informed of his rights before, during, and after the disciplinary hearing. This was not done.
52. No letter of dismissal was produced to indicate that the respondent terminated the employment relationship on grounds of desertion.
53. This court has held in the past, and even now, that a disciplinary hearing is not expected to meet the standards of a trial in a law court as the courts are subject to strict rules of law, evidence, and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned



unheard; an employee has a right to all information and particulars of charges before the hearing; and an employee has a right to test the evidence by way of cross-examination. An employer has to establish a prima facie case against an employee for the hearing to meet the minimum threshold for fair hearing as envisaged under Article 47 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.

54. It is in the considered opinion of this court that while the respondent may have had grounds to take disciplinary action against the claimant based on the alleged desertion, such grounds were neither particularized or substantiated nor was any disciplinary hearing conducted where evidence could have been adduced in support of the allegations. The respondent ought to have summoned and invited the claimant for a disciplinary hearing after serving him with a show-cause letter, and if the claimant failed to show up minutes should have been taken to confirm so.
55. During the hearing in court, evidence was called to prove that indeed the claimant was guilty of the alleged misconduct. The claimant conceded in cross-examination that he stopped working because he was not facilitated with transport and that he did not have fare to proceed to the assigned area of work that was over three kilometers from the CBD, Nakuru.
56. He testified that he was not issued with a warning letter or called back to work. RW1, the respondent's human resources manager, testified that the claimant had deserted duty as transport was always availed by the respondent to date and, in any event, it was not the respondent's obligation to provide transport.
57. The evidence on record demonstrates that indeed the claimant deserted duty because he allegedly had no means of transport to get to his assigned post. In the circumstances the respondent had a genuine, reasonable, or probable ground upon which to dismiss the claimant as envisaged under Section 43(2) of the Act. However, the respondent failed to demonstrate that indeed the claimant was informed of the said allegations, accusations, and charges of desertion. This move by the respondent violated Section 41 of the Act.
58. On procedural fairness it is not disputed that no disciplinary hearing was conducted as envisaged under Section 41(2) of the Act.
59. In the circumstances, the court finds and holds that the Claimant was denied procedural fairness and hence, and to that extent, the dismissal was wrongful, unfair, and unlawful.

#### **VIII. Reliefs**

60. Having held that the respondent wrongfully, unfairly, and unlawfully dismissed the claimant by failing to accord him both substantive and procedural fairness the court shall consider each of the reliefs sought as set out in the introductory part of this judgment.
61. Item (a) is for underpayment in Kshs97,170.84. There is no evidence that the claimant had at any time during his employment raised the issue of underpayments of his salary, although he testified that he raised the issue orally. The claimant testified that his pay was below that recommended by the government from time to time for a person working within a municipality. Having found that the claimant's employment commenced in December 2013, the claimant's claim for underpayment shall be reviewed from December 2013 to January 2016.
62. The claimant produced the Minimum Wages Order for the period beginning 2013(Legal Notice 197-The Regulation of Wages (General) (Amendment) Order, 2013) and the Minimum Wages Order for the period beginning May 2015(Legal Notice 116-The Regulation of Wages (General)(Amendment) Order 2015) in support of the allegations that his monthly salary of Kshs8,500 was below the minimum wage for a person working within a municipality.



63. RW1 testified that he could not confirm whether Giddo Plaza where the claimant had previously worked was within the former Nakuru Municipality. The claimant's position is that indeed he did not report to Greensteads Schools. He stated that Bedi Investments and Giddo Plaza where the claimant had worked were within the Nakuru CBD.
64. In the foregoing circumstances, it was proved that the claimant had worked within a municipality for the period from May 2013 to April 2015 and as such he was entitled to a salary of Kshs10,116.15 (exclusive of Housing allowance) and Kshs11,330.10 (exclusive of Housing allowance) from May 2015 to 11<sup>th</sup> January 2016.
65. The respondent did not provide proof that the places the claimant worked were outside the former municipality of Nakuru. The claimant was paid a gross salary of Kshs8,500/-. This was an underpayment.
66. The claimant commenced working in December 2013. The minimum wages for 2013 and 2015 were exclusive of housing allowance and thus the tabulation for underpayment shall consider an additional 15% in housing allowance. From December 2013 to April, 2015, the salary payable was Kshs10,116.15 plus 15 % house allowance of Kshs1,260/- to sum up to Kshs11,376.15. It was not disputed that the claimant was paid a gross monthly salary of Kshs8,500/-. The underpayment was thus Kshs2,876.15 for the period at of 17 months making the underpayment for the said entire period at Kshs48,894.55.
67. From May, 2015 to 11<sup>th</sup> January, 2016 the salary payable was Kshs11,330.10 plus 15 % house allowance of Kshs1,699.52 to sum up to Kshs13,029.62. The period was 8 months and 10 days. The claimant was paid Kshs8,500 for the said period. The underpayment was thus –
- 8 months = Kshs4,529.62.  $8 * Kshs4,529.62 = Kshs36,236.96$
- Ten days =  $10/30 * 4,529.62 = 1,509.90$
- $(Kshs36,236.96 + Kshs1,509.90) = Kshs37,746.86.$
- $(Kshs48,894.55 + Kshs37,746.86) = Kshs86,641.41.$
68. Prayer (b) is for notice pay of Kshs13,029.62. The claimant was not issued with a notice before dismissal. The claimant was a month to month employee and hence the notice applicable is for one month or payment of one month's gross salary in lieu thereof. The claimant is hence awarded Kshs13,029.62 under this head.
69. Prayer (c) is for overtime pay of Kshs157,326.42. The claimant testified in support of this claim that he worked for 12 hours a day which is the normal time worked by security workers and cited Jackson Kipkoech Togom v Radar Limited, ELRC Appeal no. E003 of 2023. The respondent argued that the claimant worked for 8 hours only but did not avail any evidence in terms of employment records. Sections 9, 10, and 74 of the Act bestow upon the respondent a duty to keep employment records and to produce the same when required to do so. It is only such records that should have dislodged the allegations made by the claimant. In absence of such records the evidence by the claimant stands unchallenged. However, having found that employment commenced in December, 2013, the period of tabulation was to commence in December, 2013 until 11<sup>th</sup> January, 2016. This prayer is hence allowed and granted in the sum of Kshs147,539.75 made u as hereunder –
- The overtime pay for the period December 2013 to 30<sup>th</sup> April, 2015 would thus be for –
- $17 \text{ months } 8 * 72 \text{ hours} = 1224 \text{ hours} * Kshs10,116.15 \times 1.5/195 = Kshs95,247.44$
- From May 2015 to 11<sup>th</sup> January 2016, the period was 8 months and 10 days.



$$= (72 \text{ hours} * 8 \text{ months}) + (10/30 * 72 \text{ hours})$$

$$= 576 \text{ hours} + 24 \text{ hours} = 600 \text{ hours}$$

$$= \text{Kshs}11,330.10 * 1.5 * 600/195 = \text{Kshs}52,292.31$$

$$\text{Kshs}95,247.44 + \text{Kshs}52,292.31 = \text{Kshs}147,539.75$$

70. Prayer (d) is for off duties of Kshs150,603.18. The claimant testified in support of this claim and the respondent did not avail employment records to prove otherwise. Sections 9, 10, and 74 of the Act bestow upon the respondent a duty to keep employment records and to produce the same when required to do so.
71. It is only such records that would have dislodged the case made by the claimant and in absence of such records the evidence by the claimant stands unchallenged. However, employment relationship commenced in December, 2013 and ended on 11<sup>th</sup> January 2016. This prayer is hence allowed and granted in the terms below –
- December 2013 to April 2015 = 17 months
- 4 off days x 17 months = 68 off days
- 68 days x 12 hours = 816 hours
- $11,330.10 * 2 * 816/195 = \text{Kshs}94,824.22$
- May 2015 to 11<sup>th</sup> January 2016 (8 months, 10 days)
- $(4 \text{ off days} * 8 = 32 \text{ days}) + (4 \text{ off days} * 10/30 = 1 \text{ day}) = 33 \text{ days}$
- 33 days x 12 = 396 hours
- $11,330.10 * 1.5 * 396/192 = 35,052.50/=$
- $\text{Kshs}94,824.22 + 35,052.50/= \text{Kshs}129,876.72.$
72. Prayer (e) is for public holidays worked amounting to Kshs30,927.42. The claimant submits that there were 26 holidays from December 2013 to 11<sup>th</sup> January 2016. The respondent did not provide evidence in terms of employment records to demonstrate otherwise. As stated above Sections 9, 10, and 74 of the Act obligate an employer to keep and maintain employment records and to produce the same whenever required to do so. This claim for holidays worked is accepted at Kshs30,927.42.
73. Item (f) is for refund of uniform money of Kshs1,500/=. The claimant pleaded that at termination he was entitled to half of the uniform money he had paid. RW1 testified that they did not counterclaim for the uniform as it was given for free and in any case the claimant did not return his uniform. There is no evidence whatsoever that the claimant paid for the uniform or that he was entitled to the half cost for the uniform. For this reason, this prayer is denied.
74. Item (g) is for a gratuity in the sum of Kshs2,400 and Kshs2,400 for unremitted NSSF dues for six months. No evidence was adduced that the claimant was entitled to gratuity under the employment contract. Gratuity may only be paid if and where the same is agreed upon and or provided for in the contract of service or at the discretion of an employer. For this reason, this prayer is denied.
75. As for unremitted NSSF dues for 6 months, the NSSF statement filed by the claimant with the consent of the respondent reflects a few months with zero remittances or less remittances than the required amount of Kshs400 between December 2013 up to May, 2014. The claimant is free to take up the matter with NSSF who are not parties in this cause as the money was due and payable to it as a statutory body.



76. Item (h) is for compensation under Section 49 of the Act. The claimant has pleaded for the maximum compensation equivalent to 12 month's gross salary of Kshs156,355.44.
77. The claimant worked for the respondent for a period of about three years. He testified that he failed to report to his assigned post at Greensteads Schools as he did not have transport. To this extent he contributed to his dismissal.
78. In the considered view of the court this is not an appropriate case for the award of the maximum 12 months' gross salary in compensation. The court awards to the claimant three months' salary in compensation. The same is calculated at Kshs13, 029.62 \* 3 = Kshs39,088.86.
79. The claimant also prays for leave pay of Kshs1,500.97. During the hearing in court, the claimant testified that he only took leave as evidenced in the application dated 18<sup>th</sup> November 2015. RW1 testified that the claimant took two annual leaves in 2014 and 2015 and produced the application leave forms thereof as exhibits 1 to 4. On a balance of probabilities, there was no proof that the claimant recalled the approved leave application form for 2014 and thus the respondents' evidence stands in that regard. This prayer fails.

#### **IX. Costs**

80. The claimant is awarded costs of this cause.

#### **X. Disposal**

81. The court issues the following orders –
- a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful for lack of procedural fairness.
  - b. The claimant is awarded a total of Kshs447,103.78 made of –
    - i. Underpayment..... Kshs86,641.41
    - ii. One month's gross salary in lieu of notice..... Kshs13,029.62
    - iii. Overtime..... Kshs147,539.75
    - iv. Off duties..... Kshs129,876.72
    - v. Public Holidays pay..... Kshs30,927.42
    - vi. Compensation for wrongful and unlawful dismissal..... Kshs39,088.86

Total.....Kshs447,103.78

This amount is subject to statutory deductions.
  - c. The claimant is awarded costs of this cause together with interest.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024**

.....

**DAVID NDERITU**

**JUDGE**

