



Timafloor Limited v Ndai (Employment and Labour Relations Cause E013 of 2023) [2024] KEELRC 13489 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13489 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E013 OF 2023
ON MAKAU, J
DECEMBER 19, 2024**

BETWEEN

TIMAFLOOR LIMITED CLAIMANT

AND

JUDY NJERI NDAI RESPONDENT

JUDGMENT

Introduction

1. The Claimant employed the Respondent as a Human Resource Officer effective 2nd January 2009 and later promoted her to Human Resource & Administration Manager. She worked until 5th May 2023 when her services were terminated for gross misconduct. Thereafter the claimant brought this suit claiming an outstanding staff loan of Kshs. 8,864,574.29 from the respondent. It alleged that during her employment, the Respondent applied and obtained from it various staff loans which were serviceable through a check off system. However, at the time of her exit, she had not repaid all the loans. Therefore, the claimant prayed for the following reliefs:
 - a. Kshs. 8,864,574.29 with interest at prevailing commercial rates from date of filing of the suit until payment in full.
 - b. Costs of the suit with interest
 - c. Any other or further relief the court may deem fit to grant.
2. The respondent denied liability to pay the said loan and averred that Kshs. 7,000,000 of the same was a bonus paid to her for her good performance on 11th July 2022. She averred that, she never applied for a loan of Kshs.7,000,000 which is a requirement under the company loan policy. Consequently, she prayed for the suit to be dismissed with costs for being frivolous, scandalous, incompetent and for lacking reasonable cause of action.



3. In addition, the respondent filed another suit, Meru ELRC No. E004 of 2024 alleging that the claimant had unfairly and unlawfully terminated her employment contract without justifiable reason and without following a fair procedure. She further averred that the employer subjected her to discrimination and unfair labour practices on racial grounds during her employment. Therefore, she prayed for the following reliefs against the employer:
 - a. A declaration that her termination from employment was wrong, unfair, unlawful and unconstitutional.
 - b. A declaration that the Claimant is guilty of unfair labour practices including racial discrimination.
 - c. That she be awarded general damages for unfair labour practices, discrimination and violations.
 - d. Compensation for unlawful termination equivalent to 12 months' gross salary amounting to Kshs. 8,225,424/=.
 - e. Payment in lieu of notice equivalent to 3 months' gross salary of Kshs. 2,056,356/=.
 - f. Severance pay amounting to Kshs. 5,140,890/=.
 - g. Unpaid leave for 40 days amounting to Kshs. 913,936/=.
 - h. Costs of the claim.
 - i. Interests on all the payment above, as from the date of judgement until payment in full.
 - j. Any other relief that the Court may deem fit to grant in the interest of justice.
4. The claimant filed a Response to the Claim on 26th September 2023 denying the alleged unfair termination of the claimant's employment. On the contrary, it averred that it had a valid reason for the termination and it followed all the laid down procedures before the termination. It denied the alleged violation of the respondent's rights and averred that the same has not been pleaded with precision. It reiterated that the respondent owed it a loan of Kshs.8,864,574.29 which remains unsettled. For the said reasons, it prayed for the respondent's suit to be dismissed with costs.
5. The two suits were consolidated by consent on 5th February 2024 and direction given that the proceedings would be under this file. During the hearing the claimant called four witnesses and the respondent relied on her own evidence. Thereafter, both sides filed written submissions, which I have considered in this judgment.

Claimant's case

6. CW1, Lydia Wachiku Macharia, is the Claimant's Human Resource Manager. She adopted her written statement dated 19th June 2023 in this suit and her statement in the respondent's dated suit dated 9th October 2023 as her evidence in chief. She then produced the lists of documents dated 19th June 2023, 11th October 2023 and 13th January 2024 as exhibits in support of the Claimant's case.
7. In brief, she stated that she worked for the claimant from 2006 to 2013 as the HR Manager and rejoined it in same capacity in June 2023. She confirmed that the respondent was employed on 2nd January 2009 as HR officer and later became the HR & Administration Manager.
8. She further stated that the claimant gives financial accommodation and loans to its employees on request and it has put in place a loan policy. Under the policy:



- a. An eligible employee obtains a loan application form, fills it and returns to the HR Management Office.
 - b. Loan document, including application and approval is done through the HR Management Office.
 - c. The HR Management Office submits the loan application to the senior management for approval.
 - d. Upon approval, the HR Management Office draws a loan contract between the manager and the company, noting the interest of the company in the property being financed where that is the case. The property should not be used as security for any other loan.
 - e. The loan contract will stipulate the loan repayment terms. The repayment will be in equal installments, and will be deducted from the employee's salary through monthly payroll deductions.
 - f. Deductions are effected by the Farm Account's Office.
 - g. Loan repayment is for a period of 6 years, but employees are encouraged to clear the loan at the shortest period.
 - h. In the event a manager leaves employment before the loan is repaid in full, the manager will clear the loan balance, or the manager's terminal dues will be used to offset the loan balance.
9. In cross examination she admitted that a loan had to be applied for, as per the policy. She further admitted that there was no application for the Loan of Kshs 7,000,000 by the respondent and further there was no approval of the same by the Managing Director. She clarified that loan applications by senior manager are approved by the Managing Director Mr. Simon Van der Burg but small amounts were approved by the General Manager.
 10. She stated that the Respondent failed to ensure implementation of the staff loan to the extent that there were some missing documents. She confirmed that the company pays bonus upon approval by the managing Director. She was not in the company when the alleged loans were advanced to the respondent but contended that the same can be traced from the payroll. However, she confirmed that there was a remittance advice with a narration that the said money was as bonus pay.
 11. As such, disciplinary process against the respondent for failure to ensure documentation of the loans, CW1 confirmed that the respondent's employment was terminated before the matter was concluded.
 12. In re-exam, she stated that the responsibility of maintaining the loan records was on the HR manager. She confirmed that there was no documentation for the Kshs. 7,000,000 but there was a corresponding entry of the same in the payroll. She stated that the disciplinary process was initiated by a show cause and suspension but no hearing was conducted.
 13. CW2, Eunice Mumbi is the claimant's Assistant Farm Accountant. She adopted her witness statement dated 19/6/2023 as her evidence in chief. In brief, she stated that the claimant has a loan policy for its staff which requires that when an employee applies for a loan, all the documentation and approvals are completed by the HR Office, and handed over to the Accounts Department for implementation. The Accounts Department then vets the documents for completeness and accuracy and proceeds to implement the loan approval by opening a loan account; computing and effecting the monthly deductions; maintaining employee loan statements in the computer system; generating monthly



payslips indicating deductions; generating loan schedules indicating loan balances; and updating loan balances during annual audits.

14. She stated that, during the respondent's tour of duty, she made applications and requests for financial accommodations and loans which were granted as follows:
 - a. 21st August 2012 Kshs. 500,000
 - b. 19th October 2012 Kshs. 500,000
 - c. 22nd July 2014 Kshs. 500,000
 - d. 22nd July 2014 Kshs. 224,498.74
 - e. 1st April 2015 Kshs. 1,000,000
 - f. 6th May 2015 Kshs. 1,000,000
 - g. 19th July 2015 Kshs. 1,000,000
 - h. 18th November 2015 Kshs. 30,360
 - i. 10th March 2016 Kshs. 274,000
 - j. 4th May 2016 Kshs. 47,000
 - k. 2nd August 2016 Kshs. 1,000,000
 - l. 19th October 2016 Kshs. 30,000
 - m. 20th July 2020 Kshs. 5,000,000
 - n. 14th December 2021 Kshs. 22,000
 - o. 8th July 2022 Kshs. 7,000,000
15. She stated that the said money was disbursed from the claimant's bank account number 6442000018 domiciled at the NCBA Bank Kenya PLC Nanyuki branch to the respondent's bank account number 100313288200 domiciled at Standard Chartered Bank Kenya, Nanyuki Branch. The loans were serviceable through payroll check-off system and as at the time of her exit, the respondent had an outstanding loan balance of Kshs. 8,864,574.29. She relied on the loan schedules of staff, Exhibit 6(a) and (b) prepared by the Farm Accountant, to prove that the respondent was included thereon as one of the employees with loans from the company.
16. On cross examination, she stated that the Quick Report at page 44 of the claimant's Bundle No. 1, was prepared by the Accountant who also did the posting. She contended that the source of the information for posting was loan request letters, invoices, bank statements and remittance advices from the bank. She contended that page 44 of the claimant's bundle indicated company loan, and therefore the information was from bank statement.
17. However, on being referred to the Claimant's bank statement at page 86 and 87 of bundle 3, RW2 confirmed that the narration given for the transfer of Kshs 7,000,000 in favour of the respondent was a bonus. She confirmed that she was not the one who initiated that payment and was also unaware of the source of that information. However, she contended that the respondent's payslip reflected the said payment as a loan. She admitted that the policy required that an application be made in writing but in this case, she never saw any loan application for the said amount.



18. She admitted that page 44 of bundle 1, indicated that the Kshs. 1,000,000 disbursed on 29th January 2021 and 28th September 2021 were bonuses to the Respondent but indicated as labour wages. She further admitted that the amount of Kshs. 2,500,000 of 31st July 2022 was a bonus but used to reduce company loan and that was just a few days after receipt of the Kshs. 7,000,000. She confirmed that she did not have the loan schedule for the month of July 2022 and denied being aware that there was disbursement of Kshs. 7,000,000 to all senior managers.
19. However, on being referred to page 87 of bundle 3, she confirmed that the bank statement showed disbursement of bonuses to 4 managers namely: Kithiru Kshs. 500,000, Judy Kshs. 7,000,000, Gitau Kshs. 5,000,000, Thairu Kshs. 500,000. She stated that they all qualified for the bonus and further confirmed that Thairu and Kithiru were still working for the Claimant.
20. In re-exam she stated that labour wages in the Account Quick Report referred to an account where wages and loans were charged. She confirmed that the amounts disbursed on 29th January 2021, 29th September 2021 and 31st July 2022 were bonuses to repay the company loan. However, she reiterated that the entry for Kshs. 7,000,000 was company loan. She reiterated further that the narration in page 87 Exhibit 26 were initiated by the accountant and not herself. She maintained that the entry of Kshs.2,500,000 on 31st July 2022 was to reduce loan balance.
21. CW3, Thomas Frauser, is the claimant's General Manager. He adopted his written statement dated 9/10/2023 as his evidence in chief subject to amendments. He sought leave to amend paragraph 3 to read "approval right" instead of "initiation right," and the last paragraph to read "approve any amount" instead of "initiate any amount." He also deleted the whole paragraph 15 from the statement.
22. In brief, he stated that the respondent was the third senior most manager of the claimant and her benefits were highly competitive and reflected her senior position in the company. She worked for 15 years in a multi-racial management team in the company and there was no single case of discrimination ever reported in the company. He denied the alleged discrimination against the respondent and averred that she was equally treated with all other managers and even better in some instances like medical insurance and education benefits.
23. He further stated that the respondent was in charge of generating Muster Roll while the Farm Accountant was responsible for generating Payroll and it was hard to monitor because the two managers guarded the said documents jealously. They also misapplied the company loan policy to their advantage and those close to them, which led to some loans being increased without approval.
24. He contended that the respondent occupied a position of trust in the company but she abused it. She had approval rights to the company bank accounts at the NCBA Bank Kenya PLC and she could approve any amounts. In March 2023, she proposed pay rise to her favoured staff beyond the Managing Director's proposal of 7% which led to her suspension on 13th March 2023. Another reason for the suspension was failure to effect appropriate monthly deductions of staff loan.
25. He stated that she was instructed to handover her duties to Mary Maina before proceeding on the suspension, but instead, she held a meeting with Joseph Gitau (Farm Accountant), cleared her desk and left. She also carried away unknown documents and items including the proposed special pay rise without declaring and clearing them with the company. As a result of the foregoing matters, the company engaged Mr Ben Mwarania as a Consultant on management and administration to assist the company to manage the crisis which led to the suspension of the respondent and he reported to the Farm on 22nd March 2023.



26. He further stated that the respondent reported back to work on 23rd March 2023 but she was suspended and directed to record statement on the following:
 - a. Failure to effect deductions for fuel from eligible staff.
 - b. Failure to handover duties to Mary as instructed.
 - c. Any other matter/s she would like to bring to the attention of management.
27. He stated that, vide a letter dated 21st April 2023, the respondent was invited to a disciplinary hearing on 24th April 2023 to answer to the following charges:
 - a. Failure, refusal and/or neglect to effect proper and efficient systems for the administration of company staff loans, in accordance with the company Staff Loan policy dated 1st September 2020.
 - b. Failure, refusal and/or neglect to document loans extended to her as per the company Staff Loan policy dated 1st September 2020.
28. He stated that the respondent reported to the Farm on 24th April 2023 but declined to attend the hearing and on the following day she wrote an undated letter and forwarded by email. Another hearing was scheduled for 27th April 2023 to answer the said charges plus a fresh charge of absence from work without leave for 8 days from 14th March 2023 to 22nd March 2023. Again, she reported to the farm but refused to attend the hearing and a decision to summarily dismiss her from employment was made but the same was reduced to a termination.
29. He averred that the termination was grounded on a valid reason and fair procedure was followed. He maintained that the respondent was not discriminated and the termination was fair.
30. On cross examination he stated that initiation for bank transactions are commenced in the accounts department then to him for his approval, thereafter to the human resource department for approval. In his absence the managing director approves.
31. He stated that the Managing director verbally suspended the Respondent on 13th March 2023 and she was thereafter invited for hearing on 27th April 2023. He stated that the charges against the Respondent were failure or refusal to effect proper system for staff loans, and failure to document the loans extended to her. He confirmed that the charges were not determined because the Respondent frustrated the hearing.
32. He reiterated that on 23rd March 2023, the Respondent was sent on leave pending investigations and the same ended upon termination as she was never recalled from leave. He confirmed that the respondent's employment was terminated for absence from work from the date of the hearing on 27/4/2023.
33. He stated that the panel before which the Respondent appeared consisted of himself, the managing director, Mr. Mwarania a consultant but she refused to sign attendance sheet. He testified that the managing director informed her that if she failed to sign the attendance sheet there would be no hearing and that is what happened. Thereafter CW3 signed a dismissal letter for absence from work from the date she refused to sign the attendance sheet. She was, however, not given a hearing before the dismissal for absence for the five days.
34. He confirmed that the Respondent could not approve any payment without his or the managing director's approval. He further confirmed that there were bonuses paid in July 2022. He also confirmed that in June the respondent and Gitau were paid Kshs. 2,500,000, while the others were paid Kshs.



- 1,000,000. He stated that bonuses were paid in the end of June and December 2022, but he could not remember what was paid.
35. In re-exam, he stated that page 43 of bundle 2, was the attendance form that the Respondent refused to sign when the hearing failed to take place. He stated that there were online banking transactions that went on without his or the managing director's approval. He clarified that either the Respondent or the Managing Director had final approving authority.
36. CW1, Bernard Gikundi Mwarania is a business man and also a Consultant and Expert in Management since 2005. On 22nd March 2023, he was asked to advise the claimant and offer support on the following areas:
- a. Implementation of the company's vision and mission.
 - b. Review organizational structure and filling of arising vacancies.
 - c. General administration.
 - d. Human resource management including staff welfare.
 - e. Compliance standards.
 - f. Company corporate social responsibility.
 - g. Training and development.
 - h. Performance management.
 - i. Policies and procedures.
 - j. Monitoring and evaluation.
37. He stated that he was in the panel constituted to hear the respondent's disciplinary case on 24th April 2023, but it never took place because the respondent reported to the farm but declined to take part in the hearing. On the following day, she wrote an undated letter and forwarded the same by email.
38. Another hearing was rescheduled to 27th April 2023 and the respondent reported to the farm but again declined to participate in the hearing and walked away. As a result, the company terminated her employment on 5th May 2024.
39. On cross examination, he confirmed that he was part of the disciplinary panel and also the investigation team which declared the charges. He further confirmed that the respondent refused to participate in the first hearing until certain documents were provided. However, he could not remember the documents that she was demanding but he contended that the same were prepared and availed to her during the second hearing on 27/4/2023. Again, she declined to go through the hearing and also refused to sign the attendance sheet.
40. He stated that when the respondent refused to sign the attendance sheet, everyone became emotional and she left. After one week the decision to dismiss her was made on 5/5/2023 for her absence from work. He confirmed that the Respondent was never called for a hearing before termination for absenting herself from work from 27/4/2023.

Respondent's case

41. RW1 Judy Njeri is a Human Resource Practitioner formerly employed by the claimant as the HR and Administration manager. She adopted her written statements dated 11th July 2023, 21st November



- 2023 and 14th November 2023 as her evidence in chief. She made corrections on paragraph 9 of the statement of 21st November 2023 to alter the bonus from Kshs. 2,500,000 to Kshs. 7,000,000. She also produced ten documents in the list dated 11th July 2023 as exhibits.
42. In brief her evidence was that, she joined the claimant on 2nd January 2009 as a HR Officer and then rose to become the HR & Administration Manager earning a monthly salary of Kshs.682,646 plus lunch allowance and transport allowance. Her services were unlawfully terminated by the claimant on 5th May 2023 for no valid reason and without following a fair procedure. During her employment various audits were done on the facility and no documents, policies, manuals or procedures were ever missing. Furthermore, the issue of non-performance was never brought to her attention and she was always rewarded with bonus.
 43. She stated that the claimant's Director introduced a bonus scheme in the year 2021-2022 and he was the one determining the amounts payable. She contended that the bonus payments were as follows:
 - i. September 2021 bonus was Kshs.2,500,000 of which Kshs.1,000,000 went to loan recovery.
 - ii. December 2021 bonus of 2,500,000 of which Kshs.1,000,000 went to loan recovery.
 - iii. July 2022 bonus Kshs.7,000,000 of which Kshs.2,500,000 went to loan recovery.
 44. She denied the alleged loan of Kshs. 8,864,574 and contended that the same was feasible because it included the bonus of Kshs 7,000,000. She also contended that, until the separation, she was servicing her loans as per the loan agreement and company policy and after the termination, her gratuity was used to offset the outstanding loan balance.
 45. She further averred that staff loans granted were discussed and approved during the senior management meetings, and authorized deductions/recovery schedules were strictly adhered to. She contended that a total of Kshs. 44,327,216 was disbursed as loans to senior and junior managers upon discussion and approval by the directors. The loans also included insurance for motor vehicles, servicing of motor vehicles and fuel which were procured jointly by the company and then invoiced to the individual employee as loan account. The loans were to be written off in 2023 and the directors did so.
 46. She denied that she had any initiation rights to the company bank account at NCBA bank Kenya PLC and clarified that she had only authorization rights. Initiation was done by the accounts departments after obtaining approval from the resident director and then exercise authorization rights granted by the owners. She denied any wrong doing and averred that the charges pressed against her vide the letter dated 23rd March 2023 were not true.
 47. As regards the alleged failure to handover her roles after suspension, she contended that she was asked to stay on and assist the company in facilitating payment of salaries on 22nd and 23rd March 2023. She contended that the said charges were generalized and no evidence was tendered against during the scheduled disciplinary hearing on 24th and 27th April 2023.
 48. She contended that she attended the hearing and demanded for a copy of the investigation report but the company confirmed that no investigation was done. Her witnesses were not allowed into the meeting as no hearing was done. Instead, she was coerced to resign and be paid a good exit package or face summary dismissal, but she declined.
 49. She denied the allegation by the Claimant's witnesses that she refused to take part in her disciplinary hearing and stated that being a HR practitioner, there was no way she could decline a hearing. She contended that upon arrival at the meeting, she greeted the panel but they remained silent, signifying that the environment was hostile to her. She stated that Mwarania (CW4) demanded that she should



- sign 5 documents without any chance to read the contents and she refused. She contended that the said documents did not include Attendance Sheet. The managing director then interjected and told her to sign the documents or just leave his premises before he treated her as he wanted.
50. She refused to sign and she was ordered to leave and wait for communication. She waited until 5th May 2023 when she received termination letter citing gross misconduct as the reason for the termination. She maintained that the termination was unfair and unwarranted as it was due to personal vendetta with one of the managers in the company.
 51. She further contended that during her employment, she was subjected to racism, unfair treatment, cruel and/or harsh environment and discrimination but just endured in order to earn a living. Finally, she stated that the termination process was grossly unfair and without justification and it has caused her to suffer emotional and psychological distress.
 52. On cross-examination she admitted that the letter inviting her to the hearing indicated her right to be accompanied by another employee. She argued that she went with her witnesses but they were left outside the board room while the preliminaries were being dealt with. She maintained that the Attendance Sheet in the Claimant's bundle, was not among the five documents that she was given to sign during the disciplinary hearing.
 53. She admitted that she was in charge of the HR and keeping of staff records for the staff loans. She also admitted that she was familiar with the company's policies including the policy on company loans for managers on page 13 of bundle 2 of the Claimant's documents. She admitted that the said loan policy applied to her and she was eligible to a loan of up to Kshs. 10,000,000.
 54. She stated that the loan policy required an officer to pay the outstanding loan upon exiting employment. She confirmed that she generated her pay slip for March 2023 indicating a company loan of Kshs. 8,840,754. She further confirmed that the Accounts Quick Report indicated that the sum Kshs. 7,000,000 was captured as loan and as at 28/2/2023 her total loan was indicated as Kshs. 8,888,360. However, she maintained that Kshs. 7,000,000 of the said loan was a bonus.
 55. She further contended that page 29 of her bundle dated 11/7/2023 were bonus for 2021 and 2022. She also contended that there were schedules of bonus and loans approvals done by the Managing Director and bank statements for the same which she left in the office. Further, stated that the narration for payment was done by the accountant with authority of the general manager. She averred that nothing went into the narration without the general manager's approval.
 56. She clarified that only the managing director approved the bonuses and loans of the managers. She confirmed that she had authorization over the company's bank account at NCBA. She stated that her loan was Kshs. 1.9 million and it was to be written off while the sum of Kshs. 7,000,000 was a bonus. She contended that the if the auditor was called, he could explain the process of bonus payment better. She added that the accountants were better placed to explain the amount of Kshs. 2,500,000 that appear after the Kshs. 7,000,000 at page 28 of the second bundle.
 57. She contended that the reason why her witnesses failed to enter the board room during the disciplinary hearing was due to the hostile environment.
 58. In re-exam she reiterated that only the managing director approved the loans and bonuses for the senior staff and no loans could be disbursed without such approval. She contended that her bonus of Kshs. 7,000,000 was approved by the managing director. She explained that before approval, one had to check the narration, purpose and the amount and if there was any error then the approval would be denied.



59. She clarified that the Kshs. 7,000,000 in her March 2023 pay slip was a bonus and not a loan. She contended that the narration would remain in the pay slip until the end of the financial year treating the bonus as a loan in order to take care of tax purposes. She stated that if the Fringe Benefits Returns were produced it would have shown that the money given as loans was in deed bonuses.
60. Finally, she confirmed that in her original statement she had stated that she was given pre-typed documents to sign but she declined because she was denied a chance to read them.

Submissions

61. It was submitted for the Claimant that it is entitled to recover the sum of Kshs. 8,864,574.29 from the Respondent being loans advanced to her during her employment. It was further submitted that the Claimant maintained a running loan account in respect of every employee enjoying loan facility including the Respondent. In the loan account, all credits advanced were recorded including, items purchased on credit from the company, cost of servicing cars, cost of purchase of spare parts and so on.
62. It was submitted that the Claimant had produced the loan account statement Exhibit 8 dating back to 2012 and exhibit 26 evidencing some of the Respondent's transactions. It was submitted that the loan account statement was clear that the closing balance of the Respondent's loan account as at 31st March 2023 was Kshs. 8,864,574.29.
63. It was argued that the Respondent ought to have called the director who she alleged wrote off the outstanding loans for other employees, including hers. For emphasis, reliance was placed on the case of Ahmed Abdullahi Mohamad & another v Mohamad Abdi Mohamad & 2 others [2018] eKLR at paragraphs 41-44 where the court discussed the doctrine of the missing witness.
64. It was submitted that clause 13 of the Claimant's loan policy dictated that in the event a manager left employment before settling staff loan, he /she was bound to pay the same or use terminal benefits to offset the loan balance. However, under clause 14 a loan balance would be written off in the event of the employee's death. Consequently, it was submitted that the respondent did not qualify for her loan to be written off.
65. On the other hand, it was submitted that the Respondent only contested the amount of Kshs. 7,000,000 on ground that the same was a bonus, leaving the sum Kshs. 1,864,574.29 which was uncontested thus due to the Claimant.
66. Despite the foregoing, it was submitted that the said Kshs. 7,000,000 reflected as a loan according to the documentary evidence adduced including pay slip and the debtor's schedule was prepared by the Farm Accountant and verified by the consultant internal auditor Mr. John Trundell. For emphasis, the Court was therefore urged to adopt the approach of the UK High Court of Justice in National Union of Mineworkers v IEMO [2019] EWHC 1359 (Comm) at paragraphs 28-31.
67. It was further argued that the Respondent did not produce evidence in support of her contention that the same was a bonus but indicated as a loan for accounting purposes. It was contended that the Respondent never at any point contested the entries and it was evident that she was servicing the same without any protest. The doctrine of estoppel was therefore invoked to urge that the Respondent having treated the Kshs. 7,000,000 as a loan during her employment was estopped from alleging it to be a bonus. For emphasis, reliance was placed on Doge vs Kenya Cannery Ltd [1989] KLR 127 and Muti vs Kenya Finance Corporation & Another [2004] 2EA 182.
68. It was submitted that had the Respondent been awarded bonus of Kshs. 7,000,000 as she alleged, then the same would have been subjected to income tax and thereby reduced to a net of Kshs. 4,600,000.



- For these reasons, it was submitted that the bonuses were not posted to the loan accounts, except the portion of which went towards the loan reduction. To support the foregoing arguments, reliance was placed on the case of Philip Omukule v Trapoz Contrators Ltd [2021] eKLR and James Orwaru Nyaundi v Kilgoris Klassic Sacco Limited [2022] eKLR.
69. It was further submitted that the respondent served a notice to produce, but when the Claimant sought for clarification from her on the documents it was required to produce, she failed to furnish the details despite adjournment being given to her on 16th October 2023 for that purpose. Consequently, it was urged that the Claimant's failure to furnish the documents should not be blamed on her.
 70. Finally, on the claim for loan, it was submitted that the claimant is entitled to interest on the Kshs. 8,864,574.29. For emphasis, reliance was placed on the case of B.O.G Tambach Teachers Training College v Mary Kipchumba [2018] eKLR.
 71. As regards the respondent's claim for unfair termination, it was submitted that there was substantial and procedural fairness as was pronounced in the case of Walter Ogal Anuro vs Teachers Service Commission [2013] eKLR. It was submitted that the respondent was required to respond to certain allegations related to irregularities in the payroll administration and she was also sent on compulsory leave pending investigations. Thereafter, she was invited to a hearing on 24th and 27th April 2023 but the hearing did not take place because the respondent refused to sign an Attendance Sheet. Consequently, she was asked to go away and on 5th May 2023 her employment was terminated for her failure to participate in disciplinary hearing and absenting herself from duty without official leave from 27th April 2023
 72. It was further submitted that the said reasons for the termination were valid as the respondent, indeed declined to participate in the disciplinary hearing and absented herself from duty without official leave.
 73. It was also submitted that after the refusal to sign the attendance form, the meeting ended at the preliminary stage and therefore it did not reach the extent of the Claimant inquiring whether she was accompanied by witnesses. It was submitted that the respondent never disclosed the names of her alleged witnesses to this court. Consequently, it was argued that the respondent frustrated the hearing and went away. For emphasis, reliance was placed on the case of Wanyagah v Market Development Trust t/a Kenya Markers Trust (Civil Appeal 356 of 20170 [2023] KECA 998 (KLR) (28 July 2023) (Judgement).
 74. As regards the reliefs sought, it was submitted that there was nothing unconstitutional about the impugned termination and the Court was urged to find that the allegation falls short of the threshold of constitutional pleading enunciated in Anarita Karimi Njeru v Republic [1979] eKLR and affirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKL. It was submitted that the Respondent did not plead with precision how the Claimant engaged in unfair labour practices and racial discrimination; and no evidence was led to prove the same. She even never mentioned the alleged discrimination in her witness statement dated 14th December 2023
 75. In view of its submissions above that the termination was fair, it was contended that the respondent was not entitled to compensation for unlawful termination. However, it was submitted that, in the event the Court was of a contrary view, an award of two months compensation would be sufficient considering that the Respondent contributed to her termination and further that she secured another job as HR Manager at the Cottage Hospital Nanyuki. For emphasis, reliance was placed on the case of Anunda v Tiger Force Security Services Limited (Cause 73A of 2018) KEELRC 3273 (KLR) (13 December 2023) (Judgement), and Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR among other authorities.



76. As regards the claim for salary in lieu of notice, it was submitted that the Respondent's contract provided for pay of not less than 30 days, therefore she was only entitled to thirty days pay and not three months pay. It was argued that her monthly pay was made up of a basic salary of Kshs 513,388 and house allowance of Kshs. 77,008 equaling to Kshs. 590,396.
77. About the claim for severance pay, it was submitted that the same must fail because under section 40(1)(g) of the *Employment Act*, such benefit is only meant for an employee who is declared redundant. For emphasis reliance was placed on the case of Ephantus Ndirangu Murage v Memusi Trading Limited [2015] eKLR.
78. As regards the claim for Kshs. 913,936 for the accrued leave of 40 days, it was submitted that the Respondent is entitled to only Kshs. 776,376.
79. Finally, the court was urged to order each party to bear own costs guided by the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.
80. On the other hand, it was submitted for the Respondent that the termination of her employment was unfair, unjust, unlawful and contrary to the *employment Act*. It was acknowledged that, allegations were made against the respondent on 14th March 2023 that she failed to make fuel deductions from eligible staff, but it was submitted that her request for the identity of the alleged eligible staff to enable her give her response and clear herself from the allegations, was ignored. Instead, she was sent on compulsory leave and thereafter invited for a disciplinary hearing on 24th April 2023.
81. It was further submitted that the hearing did not take place as she was informed that nothing wrong was unearthed during the investigations and as such she was only summoned to a social meeting. Her services for 15 years were described as exemplary and then she was asked to resign in order to receive a good exit package but she declined.
82. She was thereafter invited to another meeting on 27th April 2023 and she attended but again no hearing took place as the claimant tried to coerce her to sign a blank document but she declined. She then demanded to be supplied with the investigations report and also be allowed to call her witnesses but she was sent away. It was submitted that CW1 admitted in her testimony that the disciplinary hearing never took place on 27th April 2023 but a termination letter was issued on 5th May 2023. The reasons for the termination was the respondent's failure to participate in the disciplinary hearing and absenting herself without official leave from 27th April 2023.
83. It was submitted that, CW4 confirmed in his testimony, that the termination on the said reason was done without according the Respondent a disciplinary hearing which was rendered the termination unfair by dint of sections 45(2) and 41(2) of the *Employment Act*. For emphasis, reliance was placed on the case of Kenfright [EA] Ltd v Benson K Nguti [2016] eKLR, *Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers vs Mombasa Sports Club Cause No. 440 of 2013* and Oyombe vs Eco Bank Limited [2022] KECA 540 (KLR).
84. As regards the claim for loan of Kshs. 8,864,574.29, it was submitted that the Claimant had not produced any evidence to prove the same. It was argued that the claimant did not adduce any evidence to prove that the Respondent applied for a loan of Kshs. 7,000,000/= as required under its loan policy. It was observed that CW2 admitted in her testimony that there was no application for the Kshs. 7,000,000 by the Respondent. Consequently, it was submitted that there is no way the management could approve a loan without a formal application.



85. Reliance was made on sections 107 and 109 of the *Evidence Act* together with the principle of law that he who alleges must prove, in support of the argument. The Court was further urged to follow the holding in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR.
86. It was argued that the amount of Kshs. 8,864,574.29 was not feasible as the Kshs. 7,000,000 was a bonus and the rest was being serviced by the Respondent as per agreement between herself and the Claimant. It was submitted that the Respondent issued the Claimant with a notice to produce the Fringe Benefits Tax Return for December 2022, June and July 2023, which would have showed that the Kshs. 7,000,000 was a bonus, but it failed to comply with the notice. As such, reliance was placed on section 112 of the *Evidence Act*, the cases of Kenya Akiba Microfinancing Limited vs Ezekiel Chebii & 14 others [2012] eKLR and Kimotho vs Kenya Commercial Bank [2003] 1EA to urge the court to make an adverse inference against the claimant that, if the Fringe Benefit Tax Returns were produced as required, they would have proved that the sum of Kshs.7,000,000 was a bonus and not a loan. Consequently, it was urged that the claimant is not entitled to recover the said sum from the respondent.
87. Lastly, it was submitted that the Respondent is entitled to the reliefs sought in her claim since she had proved that her employment was unfairly terminated by the claimant.

Determination

88. Having considered the respective claims, the responses, the evidence tendered, authorities cited and the law, the main issues falling for determination are:
- a. Whether the court has jurisdiction over the claimant's loan claim.
 - b. whether the respondent owes the Claimant a loan of the Kshs. 8,864,574.29;
 - c. whether the termination of the Respondent's employment was unfair and unlawful;
 - d. whether the claimant violated respondent's right to fair labour practices, right to fair administrative action and freedom from discrimination.
 - e. whether the parties are entitled to the reliefs sought in their respective Claims.

Jurisdiction over the Claimant's loan claim

89. The Respondent challenged the Claimant's claim on the ground that the same was based on a commercial cause of action but the Claimant maintained that the Court has jurisdiction as the loan was between an employer and an employee. The said objection was obviously abandoned after the claimant's suit was consolidated with the respondent's suit and she thereafter failed to raise the issue again during the hearing and submissions.
90. Suffice it to say that this Court derives its jurisdiction from Article 162(2) of *the Constitution* and the Employment and Labour Relations Court's Act under section 12 which states as follows:

" 12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-



- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements."

91. Besides, the issue whether this court has jurisdiction over staff loans was ably answered by Rika J in *Banking Insurance & Finance Union (Kenya) v Consolidated Bank of Kenya Limited* (Industrial Court Cause No 900 of 2012) as follows:

"The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum.....to determine the final issues that may arise out of this dispute."

92. Again, in *Abraham Nyambane Atsiago v Barclays Bank of Kenya* [2013] eKLR, the Court held as follows:

"The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship?

By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators."

93. I agree with the foregoing decisions and proceed to hold that the court is clothed with the jurisdiction to determine matters of staff loans between employers and their employees since they flow from the



employment relationship. In the instant case, the jurisdiction is made more solid by the respondent's invitation of this court to determine whether the sum of Kshs. 7,000,000 was a bonus or a loan.

Claimant's Loan of Kshs. 8,864,574.29

94. The Claimant contended that as at the time of separation, the Respondent owed it Kshs. 8,864,574.29 in loan but the Respondent maintained that the Kshs. 7,000,000 out of the said amount was a bonus and not a loan as claimed. She contended that the same was indicated as loan for tax purposes and it was to be written off at the close of the financial year. She further argued that the Fringe Benefits Returns, which the Claimant failed to produce, would have proved that position. The Claimant denied the alleged failure to produce the said documents and averred that it was not issued with a proper notice to produce.
95. It is not in dispute that the Claimant issued its staff with loans governed by its loan policy and made deductions from their monthly pay and bonuses. What is in dispute is whether the Kshs. 7,000,000 was a loan or a bonus.
96. The claimant maintained that the sum of Kshs. 7,000,000 was a loan and not a bonus and produced a payslip prepared by the respondent indicating the said sum as a loan. It also produced Account Quick Report and loan schedules that indicated that the said sum was loan and not bonus.
97. The respondent poked holes on the foregoing explanation by contending that the claimant did not produce any written loan application (form) duly approved by the managing Director or General Manager as required by the Loan Policy. She further relied on the claimant's bank account statement for 1st – 31st July 2022 (page 86-87 of its further List of documents) that indicated that on 11th July 2022 she was paid a bonus of Kshs. 7,000,000. She also relied on Account Quick Report which indicated the sum of Kshs. 2,500,000 as loan deductions from labour wages, a few days after the respondent had received the bonus of Kshs.7,000,000.
98. I have considered the foregoing contentions and also the fact that the CW2 admitted that the bank statement (page 87), indicated that four managers including the respondent were paid bonus. The respondent was paid a bonus of Kshs.7,000,000 out of which Kshs.2,500,000 was applied to repay her loans. CW1 further confirmed that there was a remittance advice with a narration that the payment was a bonus. CW3 confirmed that the respondent was paid bonuses in July 2022. Consequently, I agree with the respondent that the sum of Kshs.8,884,075.33 indicated in her Pay slip for March 2023 was inclusive of the bonus of Kshs.7,000,000 paid to her on 8th July 2022.
99. Putting the evidence of both sides on a weighing scale, the respondent's evidence carries more weight. I am satisfied that the Kshs 7,000,000 paid to her in July 2022 was a bonus and not a loan. The claimant did not produce any written evidence to prove that the respondent applied for the loan as required by its own loan Policy. It also failed to produce any evidence to prove that the management considered and approved the loan of kshs 7,000,000 in favour of the respondent. Besides, the claimant has never made any accusation that the respondent had stolen or defrauded the said money.
100. It also failed to rebut the evidence by the respondent that it had a practice of extending bonuses to staff and treating the same as loan until the end of financial year for tax purposes. I also agree with the respondent that the failure to produce a Fringe Benefit Tax Returns by the claimant, denied the Court crucial evidence about the bonus payment to its staff. Consequently, I make an adverse finding that the failure to produce the said evidence was because it would be against its case and in favour of the respondent. I gather support from Kenya Akiba Microfinancing Limited vs Ezekiel Chebii & 14 others [2012] eKLR and Kimotho vs Kenya Commercial Bank [2003] 1EA where it was held that a



court is entitled to make an adverse inference against a party, who having the custody or control of a document fails or refuses to produce it as evidence.

101. Having considered the foregoing matters, I am satisfied that the claimant has failed to prove that the said Kshs. 7,000,000 was a loan and not a bonus. It follows that the only claim which the claimant has established is Kshs,1,864,574.29 since the respondent did not make any serious effort to rebut. She just stated that she was repaying as per her agreement and the loan policy, and by her gratuity, but no evidence was adduced to prove that she settled the same.

Unfair termination of employment

102. For a termination to pass muster, it must be justified by a valid and fair reason and fair procedure must be followed. Section 45 (1) & (2) 41 of the *Employment Act* provides as follows:

“45. Unfair termination

- (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 a fair reason—
 - 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.”

103. Section 41 of the *Employment Act* provides that:

“41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



104. Further section 43 of the *Employment Act* provides that:

“ 43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

105. Section 41 as read with section 43 requires that before terminating the services of an employee the employer must explain to the employee in a language they understand the reasons for the intended termination and then accord him/her a fair opportunity to defend himself/herself. These basic tenets have been upheld in a legion of Court decisions in this country including *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where the court held that:

“ Four elements must thus be discernible for the procedure to pass muster: -

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

106. Again, in *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR it held that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”



107. The Respondent argued that the termination of her employment was unfair for want of a valid reason and due process. The Claimant on the other hand argued that the termination was procedurally and substantively fair as there was a valid reason and the Respondent frustrated the hearing process. The termination letter stated as follows:

“Dear Madam

Termination Of Employment

You were required to appear for a disciplinary hearing on 27th April 2023. You reported to the Farm but declined to participate in the disciplinary hearing, and left the Farm. You therefore absented yourself from duty from 27th April 2023, and are still so absent.

Absence from duty without official leave is gross misconduct, and calls for summary dismissal. However, the farm exercises its discretion to reduce the summary dismissal to reduce the summary dismissal to termination of employment from 27th April 2023.

You are entitled to the following:

1. Days worked.
2. Annual leave due.
3. 45 days’ pay in lieu of notice.
4. Travelling allowance (one way).
5. Certificate of service.
6. SACCO savings.

...”

108. The question that arises is whether the reasons cited above were valid. The first is whether the respondent absented herself from duty without official leave from 27th April 2023. She denied the said offence and averred that on the said day, she attended disciplinary hearing and when she declined to sign some papers without first reading them, the managing director ordered her to leave his premises. CW3 confirmed that the respondent was on leave from 23rd March 2023 until the day she was dismissed. It follows that the alleged absence from duty was not factual.

109. As regards the alleged refusal to participate in disciplinary hearing, the claimant’s case was that she attended the hearing on 24th April 2023 but the hearing was adjourned after she requested to be provided with the investigation report. In response, she was told that the investigation did not unearth anything wrong against and as such, she was only summoned for a social meeting. She was then asked to tender a resignation so as to get a good terminal package, but she declined.

110. Subsequently, she attended the hearing on 27th April 2023 and again she was not provided with the information she had earlier requested for. The environment was hostile from the beginning because, when she entered the venue and greeted the panellists no one responded. Thereafter she was given some documents to sign without reading but she declined. She was treated harshly and ordered to go away.

111. The managing director who ordered the respondent to sign the said documents or else go away did not testify in this case. CW3 who was a panellist stated in his written statement that the respondent reported to the Farm but refused to attend the disciplinary hearing. The termination letter stated that she reported to the farm but refused to participate in the hearing. The letter and the said written



statement did not state that she refused to sign Attendance Sheet. The said allegation was therefore an afterthought.

112. Having considered the evidence before the court it is clear that the respondent attended her disciplinary hearing on two occasions, but the hearing failed to take off. It is clear that she had engagement with the panellists on the two occasion but as admitted by the Cw3 and 4, the same did not amount to a hearing. I am not satisfied that the respondent was to blame for frustrating the disciplinary hearing. The the legal obligation is upon the employer to ensure that a fair hearing is conducted by providing a fair opportunity to the employee to defend himself/herself and also by eliminating of all forms of hostility against the employee. In this case the claimant has failed to prove on a balance of probability that it provided the respondent with a fair opportunity to defend herself and she willingly walked away.
113. As regards the procedure followed after the alleged offence of refusal to participate in the disciplinary hearing and absence from duty, it is evident that the Claimant terminated the Respondent's services without following a fair procedure. There is evidence, that the alleged refusal to be heard is contested just as the alleged absence from duty. It follows that terminating the respondent's services for the said reasons without affording her a hearing was procedurally unfair. Even the offer to pay her salary in lieu of notice did not render the termination fair.
114. I gather support from *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, where the Court of Appeal held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

115. It is must be clear by now that the termination of the respondent's employment vide the letter dated 5th May 2023 was unfair and unlawful for want of a valid reason and for being done without following a fair procedure.

Constitutional violations

116. The respondent pleaded that her constitutional rights to fair labour practices, right to fair administrative action and right not to be discriminated contrary to Article 41, 47 and 27 of *the Constitution* respectively. The respondent never submitted on the alleged violations and therefore, I treat the same as abandoned.

Reliefs sought

117. In view of my finding that the claimant has proved the loan balance of Kshs. 1,864,574.29, I award the same to it.



118. On the other hand, I find that the respondent having proved a case of unfair termination, she is entitled to remedy under section 49 of the Employment Act being compensation for unfair termination plus salary in lieu of notice. The contract Provided for a notice period of 45 days after serving more than 5 years and the claimant acknowledged in the termination letter, that she was entitled to 45-days' pay in lieu of notice. According to her pay slip for March 2023, her gross salary was Kshs. 685,452 but except for the item of basic salary of 513,388 and house allowance of Kshs.77,008, the rest were not fixed payments and they depended on the actual performance by the employee. Consequently, I hold that the respondent's correct monthly gross salary was Kshs. 590,396.
119. I gather support from the case of Postal Corporation of Kenya v Andrew K.Tanui (2019) eKLR, supra, where the Court of Appeal held that:-
- “Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deductions of taxes and other deductions.”
120. Again, in the case of Richard Erskine Leakey & 2 others vSamson Kipkoech Chemai [2019] eKLR, the court of Appeal held that :
- “55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”
121. As regards compensation, I have considered that the respondent served for 15 years and the termination was not grounded on a valid reason. Besides the employer did not terminate her employment in accordance with equity and justice. Consequently, I award her ten months gross salary as compensation for the unfair termination.
122. The claim for severance pay, is not warranted in the circumstances of this case because it is a benefit only meant for employees whose services are terminated on account of redundancy. The appropriate remedy would have been service pay under section 35 (5) of the Employment Act which provides:
- “(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”
123. However, even if the respondent had prayed for service pay, the same would still fail because her pay slip for March 2023 showed that she was a member of a pension scheme and NSSF, and therefore she was disqualified from the said benefit by dint of section 35(6) of the Employment Act
124. On unpaid 40 days' leave, the same is not disputed and the termination letter acknowledged that accrued leave would be compensated. The appellant even submitted that the respondent was entitled to Kshs.776,376 for the accrued leave. Therefore, I award the 40, leave days as prayed.
125. Since both parties have succeeded in the respective suits, I direct that each side shall bear own costs of the suit.



Conclusion and disposition

126. I have found that the claimant’s case of unpaid loan is partially successful to the extent of Kshs1,864,574.29. I have further found that the respondent has proved her claim of unfair termination and unpaid terminal dues. Consequently, I enter judgment in the following terms:

- a. The respondent to pay the claimant Kshs.1,864,574.29 being the balance of her staff loan.
- b. The claimant to pay the respondent the following:
 - i. Salary in lieu of notice.....Kshs. 885,594.00
 - ii. Compensation.....Kshs. 5,903,960.00
 - iii. Leave.....Kshs. 787,194.66

Total Kshs 7,576,748.66

127. In the end, I decree that the claimant shall pay the respondent Kshs.7,576,748.66 less kshs.1,864,574.29 leaving a net of Kshs. 5,712,174.37. The sum will attract interest at court rates from the date of filing her suit until payment in full.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

