



**Kulati v Music Copyright Society Ltd (Cause E113 of 2022)  
[2024] KEELRC 13440 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13440 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E113 OF 2022  
BOM MANANI, J  
DECEMBER 16, 2024**

**BETWEEN**

**MILCAH KHAKAYI KULATI ..... CLAIMANT**

**AND**

**MUSIC COPYRIGHT SOCIETY LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The dispute between the parties revolves around the lawfulness of the Respondent's decision to terminate the Claimant's contract of employment. Whilst the Claimant contends that the decision was unlawful, the Respondent expresses a contra view.

**Claimant's Case**

2. The Claimant avers that she was employed by the Respondent in the position of Management Accountant with effect from 1<sup>st</sup> September 2012. She contends that she rose through the ranks, serving in different capacities until she was appointed as the Respondent's Chief Executive Officer from 1<sup>st</sup> August 2019.
3. The Claimant contends that throughout her nine (9) years of service, she served the Respondent with zeal and dedication. She avers that as a result of her efforts, the Respondent gained national recognition.
4. The Claimant avers that despite her dedication to service, the Respondent maliciously terminated her contract on 5<sup>th</sup> November 2021. It is her case that the Respondent's decision was unjustified and contravened due process. She contends that the Respondent did not afford her an opportunity to be heard before her services were terminated in violation of the law.



5. The Claimant contends that before her services were terminated, the Respondent served her with a notice to show cause letter accusing her of several infractions. She contends that she responded to the show cause and addressed all the issues which had been raised.
6. The Claimant avers that in addition to the notice to show cause, the Respondent issued her a letter suspending her from duty allegedly to facilitate investigations into the matter. She contends that the Respondent further informed her that it will set up an ad-hock committee to which she will be invited to offer her defense.
7. The Claimant avers that on 24<sup>th</sup> September 2021, she received an invite to appear before the ad-hock committee on 1<sup>st</sup> October 2021. She says that the invite informed her that she was required to clarify some of the issues she had addressed in her response to the notice to show cause.
8. The Claimant avers that when she appeared before the committee on 1<sup>st</sup> October 2021, members of the committee forced her to sign a cheque for Ksh. 523,493.00 instead of dealing with what had been communicated in the Respondent's letter of 24<sup>th</sup> September 2021. She avers that the committee thereafter gave her a list of issues it required her to explain and directed her to prepare and share her written response.
9. She contends that in view of this development, the committee adjourned the session. As such, she denies that the hearing scheduled for 1<sup>st</sup> October 2021 took place.
10. The Claimant avers that in compliance with the committee's directive, she prepared her write-up on the issues which had been flagged and delivered it to the Respondent on 5<sup>th</sup> October 2021. She contends that she then retreated to await fresh summons for the adjourned hearing.
11. The Claimant avers that as she waited to be invited for the hearing, the Respondent issued her with a letter dated 7<sup>th</sup> October 2021 extending her suspension from duty for a further one month. She avers that the Respondent informed her that the reason for the decision was that it required additional time to undertake further investigations into her case.
12. The Claimant avers that through the letter of 7<sup>th</sup> October 2021, the Respondent introduced a new issue relating to a legal audit. However, she was neither informed about the content of the proposed audit nor asked to make representations on the matter.
13. The Claimant avers that on 5<sup>th</sup> November 2021, whilst she was awaiting the results of the investigations alluded to in the Respondent's letter of 7<sup>th</sup> October 2021 and an invite for hearing, she was astonished to be served with a letter of even date terminating her employment. She avers that the aforesaid letter alluded to a hearing which had allegedly taken place on 1<sup>st</sup> October 2021 when she was allegedly given an opportunity to be heard. However, she maintains that no hearing took place on that date.
14. The Claimant avers that in the letter of 5<sup>th</sup> November 2021, the Respondent demanded from her Ksh. 3,660,874.67 which it contended it had lost on account of her failure to diligently discharge her mandate. However, it (the Respondent) did not explain how the loss had arisen and how she was responsible for it.
15. The Claimant contends that the Respondent's actions were driven by ulterior motive. She contends that the actions were contrived to remove her from office illegally.
16. The Claimant believes that the decision to remove her from office was driven by personal vendetta which the Respondent's Chairperson had against her. She asserts that the said official had been engaged in fraudulent activities at the institution which she was opposed to thus souring their relation.



17. The Claimant contends that during the currency of her employment, the Respondent did not provide her with medical cover in contravention of the terms of the contract between them. As a result, she was forced to pay her own medical bills. Consequently, she seeks reimbursement of the money she expended on this account.
18. The Claimant further contends that during the currency of their contract, the Respondent withheld part of her salary thus resulting in accumulated salary arrears as specified in the Statement of Claim. Thus, she claims this amount.
19. The Claimant also asserts that the Respondent made deductions from her salary towards statutory dues but did not remit the amount collected to the relevant government agencies. She further asserts that the Respondent deducted loan instalments from her pay but did not remit the amount to her bankers.
20. The Claimant contends that from 1<sup>st</sup> August 2019, the Respondent engaged her as its Chief Executive Officer on a fixed term contract. She contends that the contract provided for payment of gratuity at the end of her term. As such, she contends that she was not supposed to suffer deductions towards a separate retirement benefits scheme from the date of the new contract.
21. She contends that despite this reality, the Respondent deducted Ksh. 167,995.00 from her salary for the period between August 2019 and April 2020 purportedly towards a separate retirement benefits scheme. As such, she claims that the Respondent reimburses this amount.
22. In addition, the Claimant seeks several other reliefs as set out in the Statement of Claim. These include: accrued leave pay; salary in lieu of notice to terminate her contract; refund of statutory deductions not remitted to the Kenya Revenue Authority (KRA); unpaid airtime allowance; gratuity as per her contract of service; gross salary for the unexpired term of her contract; compensation for unfair termination of her contract; general damages for breach of her contract; and costs of the case.

### **Respondent's Case**

23. In response, the Respondent avers that it hired the Claimant in the position of Chief Executive Officer on 13<sup>th</sup> May 2020. It contends that the Claimant did not perform her duties as had been expected. As a result, she was subjected to a number of disciplinary processes which led to the loss of her employment.
24. The Respondent denies that the decision to terminate the Claimant's contract was motivated by ill will as asserted by her. On the contrary, it contends that the Claimant lost her job because of her failure to deliver in her docket.
25. The Respondent avers that the Claimant was issued with a notice to show cause letter dated 11<sup>th</sup> August 2021 which set out the infractions she was accused of. It contends that the show cause provided the Claimant with sufficient time to offer her rebuttal to the accusations.
26. The Respondent avers that it considered the Claimant's response to the show cause and found it unsatisfactory. As a result, it subjected her to a disciplinary hearing before it terminated her services.
27. The Respondent contends that it conducted the disciplinary proceedings against the Claimant in a fair and just manner. As such, it contends that their separation was processed in accordance with the law.
28. The Respondent denies that the Claimant was forced to sign a cheque as she claims. It contends that the Claimant was a signatory to its accounts. As such, she signed the cheque in question in the ordinary discharge of her duties. It denies that signing of the cheque had anything to do with the disciplinary case the Claimant was facing.



29. The Respondent avers that its investigations revealed that it had lost a sum of Ksh. 3,660,874.67 as a result of the Claimant's inaction and connivance. Consequently, it became necessary to take measures to recover this amount from her. Hence the demand for the amount.
30. The Respondent contends that the failure to renew its license impacted negatively on its ability to fulfil most of its contractual and statutory obligations as and when they fell due. It avers that this explains why it was not able to renew the Claimant's medical cover, pay some of her salary and remit some of her statutory and contractual dues to the relevant agencies.

### **Issues for Determination**

31. After analyzing the pleadings, the evidence and submissions by the parties, I am of the view that the following are the issues for determination in the action:-
  - a. Whether the contract of service between the parties was legitimately terminated.
  - b. Whether the parties are entitled to the reliefs which they seek through these proceedings.

### **Analysis**

32. In order to determine whether the decision to terminate the Claimant's contract was fair, the court has to address two sub-issues, namely:-
  - a. Whether the Respondent had a substantive justification for its decision.
  - b. Whether the Respondent observed fair procedure in the process that resulted in the termination of the Claimant's employment.
33. The record shows that the Respondent accused the Claimant of a myriad infractions. Details of these infractions are provided in the notice to show cause letter which was served on the Claimant on 11<sup>th</sup> August 2021. The infractions included the following:-
  - a. Delayed and double payment of royalties.
  - b. Failure to generate correct data about the Respondent's members.
  - c. Failure to pre-empt attachment of the Respondent's assets by auctioneers.
  - d. Failure to provide the Respondent's members with correct information about royalty distribution.
  - e. Laxity in implementing the Respondent's Board decisions.
  - f. Inept handling of court cases against the Respondent.
34. The Claimant was required to respond to the notice to show cause within seven days. By a separate letter dated 10<sup>th</sup> September 2021, she was suspended from duty to facilitate investigations into the matter.
35. The record shows that the Claimant responded to the notice to show cause on 23<sup>rd</sup> August 2021. She blamed the Respondent's Board for the challenges which afflicted the processing of royalties to its (the Respondent's) members. She averred that the Board's decision to pay royalties to only those members who had furnished the Respondent with their full particulars had the consequence of leaving out majority of the members from the payment process resulting in widespread disgruntlement amongst the Respondent's members.



36. The Claimant further stated that she was not directly involved in the payment of the royalties. She said that her role in the process was purely supervisory. She contended that because of her involvement in the cases which had been instituted against her and the Chairman of the Respondent in 2021, she left the processing of royalties to the Finance Manager and only guided the process whenever it was necessary.
37. Regarding accusation about members' data, the Claimant stated that when the issue arose, she asked the heads of the relevant departments to account for the anomaly. However, the Chairman and some directors of the Respondent instructed her to let the Board handle the matter. As such, she lost control of the issue.
38. The Claimant blamed some of the challenges which the Respondent was experiencing on the actions by its Board of Directors. She insinuated that the Board sometimes involved itself directly in the day to day operations of the Respondent to her exclusion. For instance, she contended that the Board often handled finance matters directly with staff in the finance department without involving her. She suggested that this interfered with the functioning of her office resulting in disjointed action on certain matters.
39. Regarding accusations of failure to preempt execution of court decrees against the Respondent's assets, the Claimant stated that the Board had been requested to approve payment plans for the decrees in question. However, it declined to do so because it was unwilling to enter into firm financial commitments with third parties in the face of the financial challenges which the Respondent was experiencing.
40. She contended that because of the awkward scenario which was presented by the Respondent's failure to honour promises to settle the decree in question, she had asked some members of the Board to intervene in the matter by reaching out to the decree holders directly in order to agree with them on a payment plan. As such, she could not be blamed for the Board's inaction on the matter.
41. Regarding failure to supply members of the Respondent with proper information on royalty payments, the Claimant stated that the decision on payment of royalties was made by some of the Respondent's directors and the royalty distribution team in her absence. She said that she had written to the finance manager seeking information on what had been agreed but to no avail. As such, she was not enabled to provide the Respondent's members with information on the subject.
42. On the question of failure to implement Board resolutions, the Claimant stated that some resolutions were not implemented because of the financial constraints which the Respondent was experiencing. She contended that whenever this happened, the Respondent was notified.
43. On the issue of failure to handle a court case which resulted in an alleged default judgment, the Claimant stated that the case in question was instituted when she was serving as the Respondent's Human Resource Manager. She contended that at the time, she was not responsible for managing litigation against the Respondent.
44. The foresaid notwithstanding, the Claimant stated that the Respondent instructed its lawyers to handle the case in question. She said that despite the advocates doing their best to defend the matter, the Respondent lost the case. She therefore wondered why the Respondent would seek to blame her for an unfavourable court decision merely because it (the decision) was adverse to it (the Respondent).
45. The record shows that the Respondent was not satisfied with the Claimant's response to the show cause. As such, it wrote to her on 10<sup>th</sup> September 2021 suspending her from duty in order to undertake



further investigations into the matter. Meanwhile, it notified the Claimant that it had set up an ad-hock committee which was to invite her for a hearing.

46. The evidence on record shows that the ad-hock committee wrote to the Claimant on 24<sup>th</sup> September 2021 inviting her for a hearing on 1<sup>st</sup> October 2021 at 1.00 pm. The committee informed the Claimant that after studying her response to the notice to show cause, it had formed the opinion that she needed to provide further clarification on some of the matters under consideration.
47. Although the parties agree that the meeting of 1<sup>st</sup> October 2021 was convened as scheduled, they do not agree on what transpired during the session. The Claimant contends that the disciplinary hearing was adjourned prematurely after members of the ad-hock committee raised new matters and directed her to react to them (the issues) in writing. On the other hand, the Respondent contends that the disciplinary hearing proceeded and the Claimant was found guilty of the various infractions which she had been accused of.
48. It is noteworthy that the Respondent did not tender in evidence the minutes of the session of 1<sup>st</sup> October 2021. As such, it is difficult for the court to determine what transpired during the said session.
49. Minutes of the ad-hock committee for the aforesaid session are the property of the Respondent. As such, they are ordinarily expected to be in the control and custody of the Respondent. Consequently and in terms of section 112 of the *Evidence Act*, if there is disagreement regarding what transpired during the session, the burden lies with the Respondent to produce the said minutes to resolve the disagreement.
50. The Respondent did not produce these minutes. At the same time, it did not provide a justification for withholding the said minutes from the court despite knowing that there was a contest regarding what transpired during the session of 1<sup>st</sup> October 2021. As such, the court is entitled to draw an adverse inference that the Respondent knew that if the minutes were produced in evidence, they will support the Claimant's contention that the session was adjourned prematurely in order to allow her time to address the new issues which the ad-hock committee had raised (*Lucy Nyambura Gitonga v Vijaykumar Shamji Patel & another* [2021] eKLR).
51. The Claimant's contention that the disciplinary session ended prematurely is further supported by the Respondent's letter to her dated 7<sup>th</sup> October 2021. In the letter, the Respondent's Chairman extended the Claimant's suspension from duty for a further thirty (30) days pending further investigations into her case. The fact that the Respondent was still investigating the case after the purported disciplinary hearing of 1<sup>st</sup> October 2021 can only be construed to mean that there was no conclusive hearing on that date as there was still need for further investigations into the matter.
52. Ordinarily, a disciplinary session ends with a resolution either clearing or finding an employee culpable of the infractions which he has been accused of. It is apparent that this is not what happened in the session of 1<sup>st</sup> October 2021. If the Respondent's letter of 7<sup>th</sup> October 2021 is anything to go by, the session closed without a resolution either convicting or clearing the Claimant of the charges which she faced since the matter required further investigations.
53. The foregoing reality buttresses the Claimant's contention that the session of 1<sup>st</sup> October 2021 was adjourned prematurely. Therefore and contrary to the Respondent's assertion, the court arrives at the conclusion that the disciplinary hearing that was intended for 1<sup>st</sup> October 2021 did not conclude on that day.
54. The session of 1<sup>st</sup> October 2021 having terminated prematurely, the question which begs an answer is whether there was a session in which the charges against the Claimant were proved. The answer



- to this question is in the negative. There is no evidence to demonstrate that the Respondent's ad-hock committee convened a subsequent session during which the Claimant was accorded a chance to answer to the accusations against her after she had delivered her write-up in response to the issues which the committee raised on 1<sup>st</sup> October 2021 and after the further investigations which the Respondent conducted into the matter after 1<sup>st</sup> October 2021.
55. It was improper for the ad-hock committee to have asserted that it found the Claimant culpable of the accusations against her during its session of 1<sup>st</sup> October 2021 when it is apparent that no such finding was made on that day. It is clear from the Respondent's own letter of 7<sup>th</sup> October 2021 that the matter remained under active investigation after 1<sup>st</sup> October 2021 obliterating the contention that the disciplinary hearing was concluded on that day and firm findings made in respect of the accusations which had been leveled against the Claimant.
56. As stated earlier, the Respondent presented the Claimant with a plethora of accusations through its notice to show cause letter dated 11<sup>th</sup> August 2021. The Claimant gave a detailed response to the notice to show cause on 23<sup>rd</sup> August 2021. Thereafter, the Respondent was expected to hear the Claimant in terms of section 41 of the *Employment Act* and make conclusive findings on the charges under inquiry. There is no evidence that such conclusive findings were made on 1<sup>st</sup> October 2021 as purported by the Respondent.
57. There is no persuasive basis upon which the Respondent rejected the Claimant's defense to the accusations against her. It was not sufficient for the Respondent to have merely asserted that it was not persuaded by the response. It was expected that it (the Respondent) would table evidence before the ad-hock committee which demonstrated that the Claimant's defense was, in all probability, a sham. It did not. As such, the basis upon which the ad-hock committee arrived at its findings in its report of 29<sup>th</sup> October 2021 remains unclear.
58. The court is alive to the fact that under section 43 (2) of the *Employment Act*, an employer is entitled to terminate the services of an employee if he has genuine reason to believe that the employee has committed an infraction at the workplace. However, this belief must be founded on cogent evidence which, on a balance of probabilities, points to the employee's culpability. It cannot be founded on conjecture. This is what I understand the courts to have been saying in *Kenya Revenue Authority v Reuwei Waitaha Gitahi & 2 others* [2019] eKLR and *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
59. In the instant case, the court has not been shown the persuasive material upon which the Respondent entertained the belief that the Claimant was guilty of the accusations which were leveled against her. There was no evidence which was tabled before the ad-hock committee to demonstrate that the Claimant was or may have been responsible for the: delay in disbursing royalties to the Respondent's members; overpayment of royalties to some of the Respondent's members; failure to pre-empt attachment of the Respondent's assets by auctioneers; failure to provide the Respondent's members with information on royalty distribution; failure to implement the resolutions of the Respondent's Board; and the inept co-ordination of court cases.
60. The record does not show that evidence to prove the commission or likely commission of these infractions by the Claimant was presented to the ad-hock committee on 1<sup>st</sup> October 2021 or indeed on any other date. All that the Respondent presented were hollow accusations without a shred of evidence to back the claims. In the face of the foregoing, it is difficult to comprehend the factual basis upon which the ad-hock committee made its observations that the Claimant was guilty of the infraction she had been accused of.



61. In their submissions, counsel for the Respondent have argued that the Claimant was culpable of the infractions in question because as per the terms of her contract of service, she bore the ultimate responsibility for the efficient running of the Respondent. As such, she cannot pass the buck to other members of staff. According to them, the Claimant owned up to the wrongs in her response to the notice to show cause.
62. With respect and having regard to the Claimant's response to the show cause, I do not agree with counsel's contention. It is apparent from the response that the Claimant gave a cogent rebuttal to the accusations against her. In turn, the Respondent was expected to have provided evidence to explain:-
- a. Why it expected the Claimant to shoulder responsibility for the failure by its Board to provide a payment plan for the court awards against it;
  - b. Why it blamed the Claimant for delayed and double payment of royalties despite her explanation which lay blame for the debacle at the doorstep of the Board;
  - c. Why it expected the Claimant to shoulder blame for non-supply of information on royalty payments to the Respondent's members despite her explanation that members of the Respondent's Board and the royalty committee had handled the matter without her involvement and withheld information on the subject from her despite her request for it.
  - d. Why it expected the Claimant to take responsibility for failure to provide accurate data regarding its members despite the Respondent's Board members and Chair directions that she lets the Board handle the matter;
  - e. Why it expected the Claimant to take responsibility for the failure to implement Board resolutions despite her explanation that the failure was due to the financial constraints which the Respondent was experiencing at the time.
63. In the premises, I arrive at the conclusion that the Respondent did not substantiate the charges it leveled against the Claimant. As such, I find that it (the Respondent) has failed to demonstrate that it had substantive grounds to terminate the Claimant's contract.
64. The next question for determination is whether the Respondent's decision to terminate the Claimant's contract was processed in accordance with fair procedure. The answer to the question is in the negative.
65. The evidence on record supports the position that the ad-hock committee adjourned its session of 1<sup>st</sup> October 2021 in order to allow the Claimant to clarify some issues which its members had raised on that day. The record also shows that the Respondent continued with investigations against the Claimant after the session of 1<sup>st</sup> October 2021. This is self-evident from the Respondent's letter to the Claimant dated 7<sup>th</sup> October 2021. Meanwhile and as the record shows, on 5<sup>th</sup> October 2021, the Claimant prepared and shared with the Respondent her response to the issues which the ad-hock committee had raised on 1<sup>st</sup> October 2021.
66. There is no evidence to show that the ad-hock committee convened to deliberate on the results of the investigations which the Respondent conducted after 1<sup>st</sup> October 2021. There is no evidence to show that the committee met to deliberate on the response which the Claimant delivered to the Respondent on 5<sup>th</sup> October 2021 before it rendered its decision. There is no evidence to demonstrate that the Claimant was given an opportunity to appear before the committee to react to the findings of the investigations which the Respondent conducted after 1<sup>st</sup> October 2021 or to be interrogated on the response she submitted on 5<sup>th</sup> October 2021.



67. In effect, the Respondent's ad-hock committee did not accord the Claimant a fair opportunity to respond to the accusations that were leveled against her in the face of the new and additional evidence that was gathered during the Respondent's investigations which were conducted after 1<sup>st</sup> October 2021. As such, the Claimant was deprived of fair procedure in the process that resulted in the termination of her contract.
68. From the record, it is apparent that the Respondent did not adhere to the requirements of substantive and procedural fairness in processing the release of the Claimant from employment. Consequently, I find and declare that the Claimant's contract of employment was improperly terminated.
69. Having found and declared as such, the next question for determination relates to the nature of reliefs which the court ought to grant in the matter. Under section 49 of the *Employment Act*, an employee whose contract is unfairly terminated is entitled to compensation that is capped at an amount which is equivalent to his salary for twelve (12) months. However, the court should order full compensation only in exceptional cases.
70. I note that before the Claimant's contract was terminated, she had been in the Respondent's service for approximately nine (9) years, a considerably long period of time. Having regard to this fact, I award her compensation for unfair termination of her contract which is equivalent to her gross salary for eight (8) months.
71. According to clause nine (9) of the contract of employment between the parties dated 13<sup>th</sup> May 2020, the Claimant's gross monthly salary was agreed at Ksh. 742,500.00. Consequently, compensation which is equivalent to eight (8) months of her salary works out to Ksh. 742,500.00 x 8 = Ksh. 5,940,000.00.
72. Since the Respondent's decision to summarily terminate the Claimant's employment has been vitiated, she is entitled to notice pay under sections 35 and 36 of the *Employment Act* read together with clause 17(b) of the contract between the parties dated 13<sup>th</sup> May 2020. Under the aforesaid clause, a party who wished to terminate the contract prematurely was to give the other notice of three (3) months or pay an amount that is equivalent to the Claimant's salary for three (3) months.
73. As indicated earlier, the Claimant's monthly salary was Ksh. 742,500.00. As such, the Respondent is obligated to pay her Ksh. 742,500.00 x 3 = Ksh. 2,227,500.00 in lieu of notice. Accordingly, I award the Claimant this amount.
74. The Claimant has claimed salary arrears for the period between May 2018 and March 2019 totaling Ksh. 2,659,169.00. She contends that she served the Respondent for this period but was not remunerated.
75. At paragraph 24 of the Statement of Defense, the Respondent made a general denial of this claim. However, at paragraph 20 of the same Statement of Defense and paragraph 17 of the witness statements of RW1 and RW2 which the witnesses adopted on oath during trial, the Respondent does not deny the Claimant's contention that part of her salary was not paid. Instead and whilst tacitly admitting the assertion by the Claimant, the Respondent contends that nonpayment of the Claimant's salary was occasioned by the failure to renew its license, a matter it says adversely affected its capacity to settle salaries and statutory outgoings as and when they fell due.
76. Ordinarily, records of salary payments are expected to be under the custody and control of the employer. Indeed, sections 10(6) and (7) and 74 of the *Employment Act* obligate the employer to maintain these records and produce them in evidence in the event of a dispute on the issue. These



provisions are consistent with section 112 of the Evidence Act which places the burden of proof of a disputed fact on the party who has special knowledge of it.

77. In the Court of Appeal decision of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR, the court expressed itself on a similar matter as follows:-

“On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the Employment Act the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the Employment Act.

Beginning with salary arrears, it is common ground that the respondent’s employment came to an end on 10<sup>th</sup> November, 2013. As per the respondent, she had not been paid for the months of July, August, September and October, 2013 prior to the determination of her employment. In contrast, the appellant denied the existence of such arrears. On our part, taking into account that the appellant did not produce any evidence of payment of the respondent’s salary during this period we are inclined to give the respondent the benefit of doubt.”

78. Having regard to the Respondent’s tacit admission at paragraph 20 of the Statement of Defense and paragraph 17 of the witness statements of RW1 and RW2 that it did not settle part of the Claimant’s salary because of the constraints it was experiencing and considering the aforesaid position of the law on the subject, I hold that the Respondent did not factually controvert the Claimant’s assertion that she worked from May 2018 to March 2019 without pay. The Claimant produced pay slips which were issued to her by the Respondent to demonstrate that she was entitled to certain payments towards her salary for this period. However, she contends that the Respondent did not release the payments to her.

79. The Respondent was ambivalent about this claim given the contradictory positions it took on the matter in its Statement of Defense and the witness statements by RW1 and RW2. The fact that it issued the Claimant with pay slips for the period under inquiry is not evidence that it remitted the salary in question to her. At best, the pay slips are only evidence of the amounts that were due to the Claimant. Evidence of settlement of the sum would be in the form of transfer of the funds to the Claimant, cheques drawn in her favour or payment vouchers executed by her. In the premises and based on the material before me, I find that the Respondent owes the Claimant salary arrears for May 2018 to March 2019. From the pay slips that were produced in evidence, the Claimant was entitled to the sum of Ksh. 2,468,050.00 as net pay for the period. As such, I enter judgment for her for this amount.

80. The Claimant has also claimed a sum of Ksh. 3,170,943.00 allegedly on account of wrongfully withheld salary during the period between October 2019 and August 2021. She contends that despite having been promoted to the position of the Respondent’s Chief Executive Officer with a salary of Ksh. 742,500.00, the Respondent continued to pay her salary based on the position she previously held. As such, she suffered massive underpayments.

81. The Claimant produced a letter by the Respondent dated 29<sup>th</sup> July 2019 by which she was appointed to the position of Chief Executive Officer with effect from 1<sup>st</sup> August 2019. This appointment was reduced into writing through the contract between the parties dated 13<sup>th</sup> May 2020. Under the contract, the Claimant’s gross monthly salary was agreed at Ksh. 742,500.00.



82. The Claimant produced her pay sheets for the years 2019 to 2021. The documents show that in August and September 2019, she was paid Ksh. 742,500.00 per month. However and for unexplained reasons, the Respondent subsequently stepped down her monthly salary to Ksh. 490,750.00 for the months of October, November and December 2019 and January, February, March and April 2020.
83. The record shows that the Respondent included the sum of Ksh. 1,762,250.00 in the Claimant's pay slip for May 2020 as part of her salary arrears. The money was supposed to have been paid to the Claimant that month. However, she contends that it was not released to her.
84. The record shows that in the months of May, June, July, August, September, October, November and December 2020, the Respondent adjusted the Claimant's monthly gross pay to Ksh. 556,875.00 instead of Ksh. 742,500.00 that had been agreed on in the contract between the parties. This trend continued into the year 2021 when the Claimant's gross monthly salary is reflected as Ksh. 556,875.00 instead of Ksh. 742,500.00.
85. It is thus apparent that the Respondent paid the Claimant less than what had been agreed on initially by a margin of Ksh. 254,750.00 per month between October 2019 and April 2020. The Respondent further underpaid the Claimant by a margin of Ksh. 185,625.00 per month between May 2020 and August 2021.
86. As such, the underpayments for the period between October 2019 and April 2020 total Ksh.  $254,750.00 \times 7 =$  Ksh. 1,783,250.00. And the underpayments for the period between May 2020 and August 2021 are Ksh.  $185,625.00 \times 16 =$  Ksh. 2,970,000.00. The total underpayments stand at Ksh. 4,753,250.00.
87. No evidence was tendered to suggest that the parties had agreed to vary the contract between them in terms of section 10(5) of the Employment Act as read with clause twenty one (21) of the contract in order to reduce the Claimant's salary. As such, she was entitled to full pay during the period under review.
88. Although the court has established that the arrears due to the Claimant for the period under review stand at Ksh. 4,753,250.00, she has claimed Ksh. 3,170,943.00 under this head. This is probably because the Respondent settled the difference. It is instructive that RW1 conceded during his oral testimony that the Respondent used to make erratic payments towards the Claimant's salary due to the financial challenges it was experiencing.
89. Lastly, RW1 tacitly admitted during cross examination that the Claimant was owed some salary arrears. Testifying for and on behalf of the Respondent, the witness expressed his no objection to the Claimant's quest to recover this amount. In the premises, I enter judgment for the Claimant for Ksh. 3,170,943.00 to cover salary underpayments for the period between October 2019 and August 2021.
90. The record shows that the Claimant was suspended from duty on 10<sup>th</sup> September 2021 until her contract was terminated on 5<sup>th</sup> November 2021. In the letter of suspension, the Respondent stated that its Staff Code regulations would apply.
91. Under clause 6 of the Respondent's Human Resource Manual, an employee who is undergoing investigations may be suspended from duty on half pay. However, he is entitled to recover the amount withheld on this account once he is cleared of the allegations against him.
92. The Claimant avers that she was put on half pay immediately she was suspended from duty. She contends that this remained the position until her contract was terminated on 5<sup>th</sup> November 2021. As



such, she prays for an order that her salary which was withheld during this period be paid to her. She puts the amount at Ksh. 834,294.83.

93. The court has arrived at the conclusion that termination of the Claimant's contract of service was unjustified. This necessarily means that she ought to have been cleared of the charges that had been leveled against her with the consequence that her suspension from duty ought to have been lifted and her withheld salary paid.
94. As such, she is entitled to the withheld half salary for the period in the sum of Ksh. 222,454.00 for September 2021, Ksh. 371,250.00 for October 2021 and Ksh. 61,875.00 for November 2021 totaling Ksh. 655,579.00. Accordingly, I enter judgment for her for the aforesaid amount.
95. The Claimant has also claimed for a refund of the sum of Ksh. 1,525,614.76 allegedly deducted from her salary to settle instalment payments towards a loan she had taken from Family Bank Ltd but which was not remitted to the bank. She gave evidence that the Respondent deducted a total of Ksh. 4,262,144.00 from her salary for purposes of paying her loan instalments. However, it only remitted Ksh. 2,736,530.00 to the bank. As such, it (the Respondent) failed to account for Ksh. 1,525,614.76 being the difference. She produced a bank statement showing the amounts which the Respondent had remitted to the bank.
96. Although the Respondent halfheartedly disputed this claim in its Statement of Defense, both RW1 and RW2 expressed a contrary view in their witness statements which they adopted as the Respondent's evidence under oath. At paragraph 17 of RW1's RW2's statements, the witnesses conceded that the Respondent had been unable to fulfil most of its contractual and statutory obligations to the Claimant due to challenges it attributed to the nonrenewal of its license. I consider the Respondent's denial of the claim as ambivalent because whilst it disputes the claim at paragraph 24 of the Statement of Defense, it tacitly concedes it at paragraph 20 of the said pleading when it reiterates the aforesaid averments by its witnesses.
97. In the face of this tacit admission and absent evidence from the Respondent that it remitted to the bank all the amounts it deducted from the Claimant's salary, the court must find that there is proof of non-remittance of the amounts pleaded by the Claimant. The foregoing is particularly so in view of the fact that the Respondent has custody of the employment records for the Claimant showing the amount it deducted from her salary and remitted to the bank for this purpose. Therefore and in terms of section 112 of the *Evidence Act*, the duty to explain whether the entire amount deducted from the Claimant's salary found its way to the bank lay with the Respondent. Absent this evidence from the Respondent and in view of the fact that it has exclusive control of the records of the transactions in question, the court is entitled to draw an adverse inference that had the Respondent tendered the evidence in court, it would have been adverse to its case.
98. Further, apart from denying the claim in portions of the Statement of Defense, the Respondent did not tender evidence to controvert it (the claim). Apart from the tacit admissions at paragraph 17 in the witness statements of RW1 and RW2 and paragraph 20 of the Statement of Defense of the Respondent's inability to meet its statutory and contractual obligations in respect of the Claimant's contract, the Respondent did not speak to this claim in any other way both in its written and oral evidence.
99. The position in law is that when a party does not lead evidence to controvert a claim by the other, he is deemed to admit it. This is more so if there is either an express or tacit admission of the claim through such party's pleadings.



100. Having regard to the foregoing, I find that the Respondent did not account for the sum of Ksh. 1,525,614.76 which it deducted from the Claimant's salary for purposes of settling her loan account with Family Bank Ltd. As such, the Respondent is obligated to reimburse this amount to the Claimant. In the premises, I enter judgment for the Claimant for the aforesaid amount.
101. The Claimant has claimed for leave pay for her accrued leave days. From the evidence that was tendered in court, it is apparent that the Claimant had accumulated leave days. For instance, the pay slip for March 2019 which was generated by the Respondent shows that she had 136.50 accrued leave days.
102. The Respondent, as the Claimant's employer, has custody and control of the Claimant's leave records. As such, it (the Respondent) was required to tender these records in evidence to demonstrate that the Claimant had either proceeded on her annual leave or commuted the accrued leave into leave pay (see *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* (supra)). It did not. Instead, it contended that the unutilized leave days had been forfeited.
103. The Respondent's aforesaid contention is founded on clause 10 of the contract between the parties as read with clause 5.5 of its Human Resource Manual. The two instruments imply that an employee who does not utilize his/her leave days within the leave earning year will be deemed to have forfeited the days unless the Respondent's Board sanctions the carrying forward of the benefit. The legitimacy of this suggestion is doubtful.
104. It is imperative to note that annual leave is a statutory right accorded to an employee and guaranteed under section 28 of the *Employment Act*. As affirmed by section 26 of the Act, annual leave is one of the minimum terms and conditions of employment which parties to a contract of service cannot phase out by agreement or otherwise.
105. The law does not contemplate general forfeiture of accrued leave days. The only instance in which forfeiture may arise is in cases where the leave days in a leave earning period have been split into blocks and an employee has utilized portions thereof during the leave earning period whilst leaving the rest unutilized. As such, it is doubtful that the employer can take away this benefit, other than as contemplated by statute, through a general forfeiture clause stipulated in his internal work rules or the employment contract.
106. This matter has previously been considered by the court in a series of decisions. In *Shah v Vitafoam Products Limited* (Employment and Labour Relations Cause 342 of 2019) [2024] KEELRC 2278 (KLR) (25 September 2024) (Judgment), the court, quoting with approval the decision in *Rumba Mnyika Nguta v Southern Hills Development Agency Limited t/a Radio Kaya* [2020] eKLR, expressed itself on the subject as follows:-
- “The *Employment Act* does not support the leave forfeiture clause, contained in [the] Claimant's contract. The Court does not agree that leave entitlement was forfeited, when it was not utilized. There is no provision in law, supporting forfeiture. Leave, when not taken, becomes an accrued benefit, which is monetized, and paid out, at the request or demand, of the Employee.”
107. As such, I grant the request for leave pay for the years 2017-2018, 2018-2019 and 2019-2020 at Ksh. 301,108.00, Ksh. 433,608.00 and Ksh. 742,500.00 respectively. This totals Ksh. 1,477,216.00. The amount to cover annual leave entitlement is premised on the following evidence on record:-
- a. The pay slip for May 2018 showing that the Claimant's monthly salary up to that time was Ksh. 301,108.00.



- b. The pay slip for June 2018 showing that the Claimant's salary was adjusted to Ksh. 433,608.00 from that month.
  - c. The contract between the parties dated 13<sup>th</sup> May 2020 showing that the Claimant salary was adjusted to Ksh. 742,500.00 from 1<sup>st</sup> August 2019.
108. Under section 28 of the *Employment Act*, an employee is entitled to minimum of twenty one (21) working days as annual leave every year. Under clause ten (10) of the Claimant's contract dated 13<sup>th</sup> May 2020, she was entitled to annual leave of twenty five (25) working days every year. As such, inclusive of weekends, the leave period per year is approximately one (1) month. Hence the above award.
109. Clause 9 of the contract between the parties entitled the Claimant to medical cover. At paragraph 17 of the witness statements by RW1 and RW2, the witnesses confirm that the Respondent was unable to provide the Claimant with this benefit due to challenges which were occasioned by nonrenewal of its license.
110. In his oral evidence in court, RW1 stated that the Claimant was entitled to medical cover. As such, he conceded that she would be entitled to recover medical expenses she may have incurred as a result of the Respondent's inability to provide the cover.
111. The Claimant has claimed Ksh. 150,000.00 on account of medical expenses she allegedly incurred directly as a result of the Respondent's failure to activate her medical cover. She tendered hospital records to demonstrate that she had received medical attention during the period that she was in the Respondent's service.
112. From the records, the court was able to discern payments of up to Ksh. 109,390.00 incurred by the Claimant towards medication after she took up the position of Chief Executive Officer. As such, I enter judgment for her for this amount.
113. In their final submissions, the Respondent's lawyers contend that the Claimant is not entitled to claim for reimbursement of her medical expenses since she was covered under the National Health Insurance Fund (NHIF). However, this was not the Respondent's case either in its Statement of Defense or testimony in court. At best, it is an attempt by counsel to introduce a new defense at the stage of submissions which is not desirable.
114. Importantly, even assuming that the Respondent would be entitled to pursue this line of argument, it is apparent that the NHIF cover was not sufficient to offset all the medical expenses which the Claimant incurred. As such, she was forced to supplement the shortfall because the Respondent's failure to activate her medical cover as per the contract between the parties. As such, she is entitled to reimbursement of what she spent in this respect.
115. The Claimant has also claimed a refund of Ksh. 1,136,250.00 on account of money deducted from her salary towards her pension but which was not remitted to the pension fund administrator. This claim covers the period between February 2017 and July 2019.
116. The Claimant produced sample pay slips covering the period between May 2018 and March 2019 which show that the Respondent had been debiting her salary with a constant amount which was to be remitted to the pension fund. She also produced her pension statements dating back to 2013 which showed that although the Respondent had been remitting a constant amount to her pension fund on monthly basis, it stopped doing so after January 2017.
117. The statement produced by the Claimant shows that the fund was being managed by UAP Life Assurance Limited on behalf of the Respondent. It further shows that as at 31<sup>st</sup> December 2016,



the employer's (Respondent's) monthly contribution to the scheme was Ksh. 23,125.00 whilst the employee's (Claimant's) contribution was Ksh. 13,875.00 totaling Ksh. 37,000.00 per month. This figure had remained constant from January 2016. Thus, based on this evidence and absent evidence to the contrary, the court finds that the Claimant's monthly pension contribution both from self and the Respondent was Ksh. 37,000.00.

118. The Claimant contends that the Respondent stopped remitting this amount after the last payment in January 2017. This remained the case until end of July 2019 when her contract switched from indefinite to fixed term after she was hired as the Respondent's Chief Executive Officer.
119. The Respondent did not provide specific evidence to controvert this claim. On the contrary, both RW1 and RW2 stated at paragraph 17 of their witness statements that the Respondent was unable to fulfil most of its statutory and contractual obligations to the Claimant because of challenges which arose from the nonrenewal of its license.
120. The Respondent was responsible for and had custody and control of the records evidencing application of the funds it deducted from the Claimant's salary. Therefore and in terms of section 112 of the *Evidence Act*, the burden lay with it to produce evidence regarding how it had applied the money it deducted from the Claimant's salary towards her pension. It did not.
121. In the premises and based on the statement of accounts from UPA Life Assurance Limited, I find that the Respondent stopped remitting the monthly pension contributions of Ksh. 37,000.00 on behalf of the Claimant as from January 2017. As such, it is obligated to make good this claim.
122. Between 2017, February and 2019, July is a period of twenty eight (28) months. At the rate of Ksh. 37,000.00 per month, the Respondent is holding Ksh. 37,000.00 x 28 = Ksh. 1,036,000.00 on this account. Accordingly, I enter judgment for the Claimant for the amount.
123. The Claimant has also claimed from the Respondent the sum of Ksh. 7,519,610.83 on account of pay as you earn (PAYE) tax which the latter allegedly deducted from her salary but did not remit to the KRA. However, I do not agree that she is entitled to recover this amount from the Respondent or demand that the Respondent settles the account with KRA. The responsibility to pursue the amount lies with KRA.
124. In this judgment, it is sufficient to state that the Respondent was under obligation to pay to KRA all taxes it collected from the Claimant through deductions from her salary. As such, if the taxes so collected were not paid to KRA, that amount is due and owing from the Respondent to KRA. As such, should KRA seek to recover the money from the Claimant, she will be entitled to seek indemnity from the Respondent.
125. The Claimant has also claimed airtime allowance as per the Respondent's Human Resource Manual. Again, apart from the general denial of the claim at paragraph 24 of the Statement of Defense, the Respondent did not specifically controvert it. For example, there is no plea that the amount in question is not due to the Claimant because it was remitted to her as per the Respondent's Human Resource Manual as read with her contract of service. Importantly, the Respondent's witnesses did not controvert or speak to the claim either in their written witness statements or their oral testimony in court.
126. The evidence tendered by the Claimant shows that the Respondent used to factor her other allowances in her pay slips. These include: house allowance; extraneous allowance; acting allowance; entertainment allowance; and fuel allowance. However, it did not do so for airtime allowance. As such, there is no evidence that this allowance was factored into her monthly pay and remitted to her.



127. In any event and as indicated earlier, evidence of payment of the allowance will ordinarily be in the possession of the Respondent, being the custodian of the employment records. As such, if there is a dispute regarding whether the allowance was paid, the burden rests with the Respondent to prove or disprove the contention in terms of section 112 of the Evidence Act as read with sections 10(6) and (7) and 74 of the Employment Act.
128. Clause 5 of the Respondent's Human Resource Manual entitles its employees in management positions to airtime allowance of Ksh. 6,000.00 per month. As such, the Claimant was entitled to this allowance at the aforesaid rate from January 2018 up to end of July 2019 when she switched positions from Human Resources Manager to Chief Executive Officer. After she became the Respondent's Chief Executive Officer, she became entitled to airtime allowance at the rate of Ksh. 15,000.00 as per clause nine (9) of her contract.
129. Between January 2018 and July 2019 is a period of eighteen (18) months. At the rate of Ksh. 6,000.00 per month, the Claimant ought to have been paid airtime allowance worth Ksh. 6,000.00 x 18 = Ksh. 108,000.00 for this period.
130. Between August 2019 and December 2020 when the Claimant was serving as the Respondent's Chief Executive Officer, she was entitled to Ksh. 15,000.00 in airtime allowance. For this duration, she ought to have drawn Ksh. 15,000.00 x 14 = Ksh. 210,000.00 towards this allowance.
131. Thus, the total amount due to the Claimant on account of unpaid airtime allowance is Ksh. 318,000. Accordingly, I enter judgment for her for this amount.
132. The Claimant has prayed for payment of gratuity in terms of clause nine (9) of her contract of service dated 13<sup>th</sup> May 2020. However the contract contemplates payment of this benefit at the end of the contract period. It does not provide for prorata payment of the benefit.
133. According to the evidence on record, the Claimant's contract was to have run for four (4) years from 1<sup>st</sup> August 2019. However, it was terminated on 5<sup>th</sup> November 2021, before the four (4) years had lapsed. It is therefore apparent that the Claimant was not entitled to claim gratuity at the time that the contract collapsed. As such, this request is declined.
134. The Claimant has also claimed for a refund of Ksh. 167,995.00 which she contends was wrongfully deducted from her salary between August 2019 and April 2020 on account of her retirement benefits. She contends that since she was entitled to gratuity under the new contract between the parties, it was irregular for the Respondent to have continued to deduct money from her salary towards a separate pension fund.
135. The evidence on record shows that the Respondent continued to make deductions from the Claimant's salary towards her pension fund even after she had been promoted to the position of Chief Executive Officer and was serving on a fixed term contract which provided for gratuity. A sum of Ksh. 67,500.00 was deducted from the Claimant's salary between August 2019 and September 2019 for this purpose. Thereafter, a sum of Ksh.13,873.00 was deducted from her salary on monthly basis commencing October 2019 until April 2020 when the deductions were stopped.
136. The Claimant contends that because she was eligible for gratuity at the close of her fixed term contract, she was not required to contribute separately to another pension scheme. This position was tacitly acknowledged by the Respondent when it stopped the deductions from April 2020.
137. The fact that the Claimant is entitled to a refund of this amount is bolstered by the fact that there is no evidence that the Respondent, in any event, forwarded the money to the pension fund. As such, it



- will be unjust to allow it (the Respondent) to hold the cash. Consequently, I order the Respondent to reimburse the Claimant the aforesaid amount of Ksh. 167,995.00.
138. The Claimant has prayed for salary for the balance of her contractual term. She contends that at the time her contract was terminated, she had a balance of thirty four (34) months to work under it (the contract). As such, she ought to be paid salary for this period.
  139. The prayer for salary for the unexpired term of the contract presupposes that the Claimant would have served the Respondent for the entire of the contractual term were it not for the impugned summary dismissal. This is quite hypothetical. A contract of service can legitimately terminate prematurely for various other reasons such as death of a party to the contract or frustration of the contract. As such, there is no guarantee that the contract will run its full term.
  140. Further, most contracts of service usually have an exit clause which allows either party to the contract to terminate it by issuing the other with the requisite notice to terminate. This fact underscores the reality that there is no guarantee that the contracts will run their full term.
  141. Besides, it is contrary to good conscience and public policy to order remuneration for a person who has not rendered services. Such payment can only be permissible if parties to a contract had agreed on it.
  142. The foregoing being the case, the Claimant's request for payment for the unexpired term of her contract is not only unjust but also in contravention of public policy as it creates an avenue for unjust enrichment. As such, it is declined (see *Anytime Limited v Fredrick Mutobera Omuraya* [2022] eKLR, *Erastus Chege Mwangi v Kenya Railways Corporation* [2022] eKLR, *Peter Wesonga Opaka v Hilltop Preparatory School & another* [2019] eKLR, *Ambogo v Sameer [Agriculture and Livestock \(Kenya\) Limited \(Employment and Labour Relations Cause 199 of 2022\)](#)* [2023] KEELRC 2257 (KLR) (29 September 2023) (Judgment)).
  143. The Claimant has also prayed for general damages for breach of her contract. However, this relief cannot be countenanced for two reasons. First, it is not contemplated under section 49 of the *Employment Act*. Second, the general rule is that the remedy of general damages is normally not available to redress breaches of contract (*Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR). As such, I decline the prayer.
  144. As I draw to the conclusion of the decision, I will now address a matter which the Respondent raised its final submissions and also alluded to during cross examination of the Claimant. It relates to limitation of time.
  145. The defense lawyers sought, during cross examination of the Claimant and in their final submissions, to suggest that portions of the claim are time barred. However, this defense is not pleaded in the Statement of Defense.
  146. The general position in law is that a party ought to found his case on his pleadings. As such, one is not entitled to pursue a claim or defense which has not been pleaded. It is generally not permissible to invite the court to determine a matter that has not been pleaded.
  147. The justification for this cannot be gainsaid. It is meant to ensure fairness in the dispute resolution process by limiting the opportunity for trial by ambush.
  148. Having said thus, the Court of Appeal appears to be of the view that back claims arising from a contract of service fall in the category of continuing injury claims under section 89 (formerly section 90) of the *Employment Act*. As such, an employee is entitled to pursue them in court as long as this is done within twelve (12) months of cessation of the injury or termination of the contract of service (see *The German*



School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment)).

149. A perusal of the court record shows that the claims which the Respondent contests on account of limitation of actions comprise of back claims which were not settled during the currency of the contract between the parties. The record also shows that this action was commenced in February 2022 approximately four (4) months after the Claimant's contract was terminated. As such, it is not time barred.
150. Finally, I order that the amounts awarded herein shall be subject to the applicable taxes.
151. Further, the amounts shall attract interest at court rates from the date of this decision.
152. The Claimant is awarded costs of the case.

### **Summary of the findings and award**

153. After evaluating the pleadings, the evidence, the law and submissions by the parties, the court renders the following findings and award:-
  - a. The court finds and declares that the Claimant's contract of employment was improperly terminated.
  - b. The court awards the Claimant compensation for unfair termination of her contract of service which is equivalent to her gross salary for eight (8) months, that is to say, Ksh. 5,940,000.00.
  - c. The court awards the Claimant Ksh. 2,227,500.00 in lieu of notice to terminate her contract.
  - d. The court finds that the Respondent owes the Claimant salary arrears for May 2018 to March 2019 totaling Ksh. Ksh. 2,468,050.00. Accordingly, the court enters judgment for the Claimant for this amount.
  - e. The court enters judgment for the Claimant for Ksh. 3,170,943.00 to cover salary underpayments for the period between October 2019 and August 2021.
  - f. The court enters judgment for the Claimant for Ksh. 655,579.00 being the half salary that was withheld by the Respondent for the period between 10<sup>th</sup> September 2021 and 5<sup>th</sup> November 2021 when she was under suspension in terms of the Respondent's Human Resource Manual.
  - g. The court enters judgment for the Claimant for the sum of Ksh. 1,525,614.76 which the Respondent deducted from her salary for purposes of settling her loan account with Family Bank Ltd but which the Respondent did not account for.
  - h. The court enters judgment for the Claimant for accrued leave pay for the years 2017-2018, 2018-2019 and 2019-2020 totaling Ksh. 1,477,216.00.
  - i. The court enters judgment for the Claimant for Ksh. 109,390.00 being reimbursement of the medical expenses she incurred directly as a result of the Respondent's failure to activate her medical cover in contravention of the contract between the parties.
  - j. The court enters judgment for the Claimant for Ksh. 1,036,000.00 against the Respondent on account of pension deductions it effected against the Claimant's salary but failed to remit to the pension fund administrator.
  - k. The court declines to order the Respondent to reimburse the Claimant the money it allegedly debited from her salary account for purposes of paying taxes to the Kenya Revenue Authority.



- l. The court enters judgment for the Claimant for Ksh. 318,000 to cover unpaid airtime allowance.
- m. The court declines to grant the Claimant the prayer for gratuity.
- n. The court orders the Respondent to reimburse the Claimant the amount of Ksh. 167,995.00 which was deducted from her salary towards her pension when she was already serving under a fixed term contract of service which had provision for gratuity pay.
- o. The amounts awarded in the judgment shall be subject to the applicable taxes and statutory deductions.
- p. Further, the amounts shall attract interest at court rates from the date of this decision.
- q. The Claimant is awarded costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 16<sup>TH</sup> DAY OF DECEMBER, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

**B. O. M MANANI**

