



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waweru v Barclays Bank of Kenya (Cause 748 of 2017)  
[2023] KEELRC 133 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 133 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 748 OF 2017  
K OCHARO, J  
JANUARY 20, 2023**

**BETWEEN**

**PHYLIS WAITHIRA WAWERU ..... CLAIMANT**

**AND**

**BARCLAYS BANK OF KENYA ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times, the Claimant was an employee of the Respondent, having been employed by the latter of the 3<sup>rd</sup> November 2008 as a cashier. She remained in the said employment till 13<sup>th</sup> October, 2015, when the same was terminated by the Respondent. Maintaining that the termination was unlawful, arbitrary, illegal and unprocedural, she sued the Respondent for the following reliefs:
  - a. A declaration that the Respondent's decision to terminate the Claimant is wrongful, callous, unlawful, arbitrary, illegal, unprocedural, and unconscionable.
  - b. Reinstatement and accrued salaries.
  - c. Payment to the Claimant:
    - i. Damages for wrongful dismissal at 12 months' wages, Kshs 1,024.092.
    - ii. Leave allowance for 2016 and 2017, Kshs 7,558.
    - iii. Salary not paid up to retirement at 60 years, Ksh.19,457.748.
    - iv. Gratuity pay, Kshs 418,170.9.



2. Upon being served with summons to enter appearance, the Respondent did file a memorandum of appearance dated 23<sup>rd</sup> October 2017, and subsequently filed a memorandum of response dated 10<sup>th</sup> April 2018.
3. The Claimant's case was heard on the 25<sup>th</sup> October 2021, while the Respondent's was on the 22<sup>nd</sup> February 2022.

### **The Claimant's Case**

4. At the hearing, the Claimant adopted the contents of her witness statement dated 19<sup>th</sup> April 2017 as part of her evidence in chief, and tendered in evidence the documents that she had filed under the list of documents dated 18<sup>th</sup> April 2017.
5. The Claimant stated that he was employed by the Respondent Bank on the 3<sup>rd</sup> November, 2008 on permanent and pensionable terms. Her salary was Kshs 441,096.00.
6. She testified that at the material time she was a 2<sup>nd</sup> custodian of the Respondent, while one Ms Judy Kinoti was the 1<sup>st</sup>. Her role included bulk cashiering, being in charge of all the cash in the safe; and moving money from the branch to the central collection point of the Bank.
7. The Claimant further testified that at any particular time there were two people in charge of the safe.
8. She stated that she had the authority to pay up to Kshs 500,000, if the relevant transaction was bulk, and up to Kshs 150,000 if the account was savings.
9. The Claimant testified that on the 27<sup>th</sup> July 2015, she was at the counter when a customer walked in and gave her his identity card number xxxx in the name of Simon Kabira Maburi, together with a duly signed account balance requisition form. The form was already filled with his names and the Account number, xxxx, it had the balance amount indicated thereon as Kshs 3,186,062.08 written on it in red.
10. The customer requested to withdraw an amount of Kshs 950,000, an amount which she paid out after satisfying herself from the system that the details were correct, and after the payment had been authorized by her immediate supervisor, Ms. Judy Kinoti.
11. Later in the course of that day, the Operations manager approached her and requested the banking slip in respect of the transaction asserting that the transaction had become disputed.
12. The Claimant contended that at the time of serving the customer, there was no memo [red flag] on the account, and all the documents were in order.
13. On the 30<sup>th</sup> July 2015, while at the cash office, one of her colleagues, called her to move to identify the fraudster, he had come back to the bank. The action by the colleague was prompted by the fact that after the incident a memo had been circulated in the bank highlighting the account. She was able to identify him.
14. The Claimant further contended that prior to the 27<sup>th</sup> July, 2015 she had not met the customer, and in serving him on that material day, she carried out her duty dutifully and diligently, including searching for, and getting authorization from her immediate supervisor.
15. The Claimant contended that in the circumstances of the matter, the Respondent's decision to terminate her employment was callous, arbitrary, unlawful, illegal and unprocedural. The Respondent wrongfully failed to pay her, her terminal dues.



16. Cross examined by Mr Masese, counsel for the Respondent, the Claimant testified that throughout the seven years and seven months she was in employment, she served as a cashier, and in the course, she underwent trainings.
17. She testified that the reason for the separation was the alleged fraudulent withdrawal of money from a customer's account. Not all transactions in the account had been done from Meru branch. She testified further that she had no idea whether or not the owner of the account was an old man.
18. The Claimant accepted that she had transaction limits and for an account like the one the subject matter herein, her limit was Kshs 150,000. It was a savings account.
19. She exercised due diligence before she paid out the money, she looked at the history of the account, the documents presented, and asked questions which were all answered correctly.
20. It was her further testimony that if there was a memo against an account, the information will pop up once one keys in the account. As regards the account and transaction in issue, this did not happen. There was no memo.
21. She alleged that at the time the investigation team was accessing the account, she was not present.
22. The Claimant testified that she was invited to appear before the disciplinary committee. She appeared on 8<sup>th</sup> October 2015, she had a chance to explain to them on the happenings of the material date.
23. It was further stated that a memo in an account acts as a red flag. It alerts one to seek for more information and be careful while transacting.
24. She did not tell the panellists that the account had a memo and referrals. She did not in any way perceive the identity card to be fake.
25. The reason for her dismissal was that she failed to refer the transaction to the bank's fraud management, yet the account demanded so. She stated that contrary to the reason, she referred the transaction to immediate supervisor.
26. At the dismissal, she was informed of her right of appeal, however, she did not appeal.
27. In her evidence in re-examination, she testified that a customer may directly go to the cashier [counter], or first pass through the inquiries desk before approaching the cashier.
28. Investigations into the incident were done almost three months after the incident.
29. The Claimant was not aware of any previous attempts to defraud the account. No memo popped up when she keyed in the account number.
30. Concerning why she did not appeal against the dismissal, the Claimant stated that the committee had been abusive and insulting to her, prompting her to conclude that she would best get justice before a court of law.

### **The Respondent's Case**

31. Vascas Odhiambo testified for the Respondent Bank. He testified that he is currently the Head of Employment Relations of ABSA formerly Barclays Bank. He joined the employment of the Respondent in November 2016.
32. The witness urged the Court to adopt his witness statement dated 17<sup>th</sup> December 2018, as his evidence in chief and the Respondent's documents filed herein as the Respondent's documentary evidence.



33. The witness stated that the Claimant was employed by the Respondent on 20<sup>th</sup> June 2008, as a clerk and by a contract dated 3<sup>rd</sup> November, 2008, she was given a job offer as a cashier at the Respondent's Ruaraka Branch and in February 2014, she was transferred to the Thika Road Mall [TRM] Branch.
34. The witness further stated that on or about the 27<sup>th</sup> July 2015, there was a disputed counter withdrawal amounting to Kshs 950,00 in regard to Account No xxxx in the name of Simon Aburi Kaberia, that was domiciled at Meru Branch. The matter was raised by the customer Simon Aburi Kaberia, through the Meru Branch.
35. Through his complaint letter, the customer disowned the transaction, alleging that it was fraudulent. He requested for investigations and reversal of the funds. With this, the Respondent engaged its Forensic Investigations Department to carry out investigations on the counter withdrawals and prepare a report on its findings.
36. The witness testified that the investigations revealed that the same sum was withdrawn on the 27<sup>th</sup> July, 2015 through the Claimant's teller and further that there was a memo at the time of the transaction, the Claimant and another did not verify the transactions with the Fraud Operations team, before processing the withdrawal.
37. The Claimant was interviewed by the investigators. On the 2<sup>nd</sup> October, 2015, the Respondent invited her for a disciplinary hearing scheduled on 8<sup>th</sup> October, 2015. The invitation letter informed her of her right to be accompanied by a colleague or union representative.
38. On the 8<sup>th</sup> October 2015, the Claimant attended the disciplinary hearing regarding the disputed counter withdrawals. She did not have a representative, indicated that she did not need one.
39. Following the disciplinary hearing the Respondent decided to terminate the Claimant's employment for negligence in the manner in which she performed her duties and for failure to adhere to the Bank's laid down regulations and cash procedures to refer the withdrawal to the fraud management unit for verification as per the Respondent's policy on account with memos.
40. The witness stated that as at the termination date, the Claimant was indebted to the Respondent. She had outstanding loans of Kshs 3,902,569.40 and unguaranteed loan of Kshs 781,550.70. The Respondent duly informed her of her outstanding liabilities and that money due to her would be used to offset her liabilities. She was also informed of her right to access her pension benefits.
41. Though she was notified of her right of appeal, the Claimant did not appeal. Therefore, she accepted the Respondent's decision.
42. Though the Claimant was liable to a summary dismissal, the Respondent was lenient to her, it instead terminated her employment and paid her one month's salary in lieu of notice.
43. The Respondent's witness stated further that the Claimant is still indebted to the Respondent on the facilities that were advanced to her.
44. The witness contended that the Respondent had reasonable and lawful grounds to terminate the Claimant's employment. The Claimant was subjected to a fair procedure before the termination.
45. Cross examined by counsel for the Claimant, the witness stated that the Claimant was in the employment of the Respondent Bank for 6 [six] years; and that during all that time she did not at all have any disciplinary issue.



46. The witness testified that though the letter dated 2<sup>nd</sup> October 2015 was captioned “notification for interview arrangements”, the caption notwithstanding, the letter in its body was clear that the Claimant was being invited for a disciplinary hearing.
47. The letter purported that under it, the material that was going to be used during the disciplinary hearing was being forwarded, however it appears none was forwarded. Too the letter was not specific as regards the material.
48. From the disciplinary hearing minutes, there is no indication that the Claimant was given the material that was being relied on in support of the accusations against her.
49. The witness testified that the Claimant responded to the charge comprehensively, giving an impression that she was aware of the investigation report.
50. The invitation letter was not specific as concerns the misconduct that was being levelled against her. It did not mention about negligence. It only mentioned of a disputed transaction.
51. During the investigations, the Claimant gave a statement to the investigators. At the disciplinary hearing the Claimant stated that it eventually dawned on her that she had paid a wrong person.
52. The witness stated that the basis for the disciplinary hearing was the investigation report. During the hearing she was asked questions on referrals. However, she was not asked questions on specific portions of the report.
53. He testified that apparently, she was not given an opportunity to comment on the report i.e. whether or not she was disputing the contents of the report.
54. The invitation letter gave the Claimant only six days to appear for the disciplinary hearing.
55. The Claimant was a BA 1 teller. As such she was the 1<sup>st</sup> person in contact. She has to seek authorization from the authorizer immediately she sees an account memo. The investigation report [page 3] shows that she stated that she was asked by Philis to authorize the counter withdrawal. According to the report, she is the one who authorized the withdrawal.
56. Cross examined further, the witness stated that being a BA 1 teller she would not authorise the payment. Her limit to dispense money was Kshs 150,000. This was the amount she would pay without another person’s authority.
57. He testified further that she requested authority from Judy Kinoti. The latter had the authority to dispense the amount. The authorizer was given the details of the customer, including the identity card. She verified the details. After interrogating the account, she gave the authority. Judith was her senior.
58. The memo presented in the investigation report [page 11] is a screen shot. The date when it was generated cannot be discerned. The witness would not tell from which computer the screen shot was.
59. The witness was not in a position to tell whether or not, the memo did pop up on the computer when the Claimant was undertaking the transaction.
60. In his evidence under re-examination, the witness testified that there was authorization from Judith.
61. In the banking industry negligence is a thing that is never condoned.



## The Claimant's Submissions

62. It was submitted that the evidence on record clearly reveal that the termination of the Claimant's employment was unfair, unlawful and or unprocedural.
63. The evidence by the Respondent's witness should not be given any weight as it is only imaginative and not actual. The happenings, the subject matter of the instant claim, happened when the witness was not in the employment of the Respondent. His evidence is only limited to the documents tendered by the Respondent.
64. Section 43 of the *Employment Act* placed an obligation upon the Respondent to prove the reason[s] for the termination of the Claimant's employment. The Respondent did not discharge this burden. The Respondent totally failed to demonstrate that the Claimant acted negligently and in violation of its regulations.
65. The evidence of the Claimant and that of the Respondent considered totally exonerates the former from any guilt concerning the accusation[s] that led to the termination of her employment. It was further submitted that the investigations report that was tendered before the Court did not in any way implicate the Claimant. In fact, largely the contents thereof exonerated the Claimant.
66. It is not clear from the evidence by the Respondent's witness or the investigations report whether at the time the Claimant attended to the subject transaction, the fraud management memo was in place and or whether it popped up.
67. The Claimant submitted that in the disciplinary proceedings the panel, as can be discerned from the minutes thereof, advised the Claimant:

“Just be extra careful in undertaking transactions because in this case the memo could have triggered further inquiry. This should not be a show-stopper but take it as a learning point and be extra vigilant.”

According to the Claimant this statement clearly indicates that at the time, the Respondent did not hold any reasonable belief that the Claimant was negligent and in violation of its cash procedures, policy and regulations.

68. It was further submitted that the termination of the Claimant's employment lacked procedural fairness, contrary to the stipulations of Section 41 of the *Employment Act*. The procedure leading to the termination of her employment was in breach of her right to the fair administrative action, enshrined in Article 47 of the *Constitution*.
69. Claimant submitted that the notice to attend the disciplinary meeting was too short. The letter dated 2<sup>nd</sup> October 2015 [Rex.3] was captioned “Interview Arrangements.” It was not clear from the letter therefore that the Claimant was being invited for a disciplinary action. The Court should find that the notice was insufficient for all intents and purposes. To support this submission, reliance was placed on two decisions, namely:  
  
*Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR and Petition No 100 of 2017 – *Mwangi Stephen Muriithi v National Land Commission & 3 others* [2018] eKLR.
70. The letter did not disclose the specific charges that were being levelled against the Claimant, charges which she was required to explain herself on.



71. Consequently, the Court should find that the termination was unfair by dint of the provisions of Section 45 of the *Employment Act*.

### **The Respondent's Submissions**

72. The Respondent submitted that the law bestows upon the employer to, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he or she understands, the reason for which the employer is considering termination of his or her employment. Thereafter the employee should be given an opportunity to make a representation on the grounds, in the presence of a colleague or a shop union representative.

73. Following the incident of 27<sup>th</sup> July 2015, investigations were commenced by the Respondent. The Claimant was involved in the investigations and that much she admitted. She was subsequently invited for a disciplinary hearing in accordance with the Collective Bargaining Agreement and Section 41 of the *Employment Act*.

74. Using the lens provided in the decision of *National Bank of Kenya v Samuel Mutonya* C.A. 118 of 2017 [2019] eKLR, this court should conclude that the termination was procedurally and substantively fair.

75. The Claimant was invited for a disciplinary hearing. She attended the same and made representations. The Claimant cannot be heard to assert that there was non-compliance with the provisions of Section 41 of the *Employment Act*.

76. Citing the decision in the case of *Kenya Plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* [2016] eKLR, the Respondent submitted that it was incumbent upon the Claimant to prove her case. She did not discharge the burden.

77. It was further submitted that the Respondent through the Claimant owed a duty of care to the customer as to the safety of his cash deposited with the bank. The evidence on record demonstrates that the subject transaction was irregular, the Claimant was negligent in the way she performed her duties. The fiduciary duty the Claimant owed the customer was brought to question. She breached her obligations arising under the contract. Consequently, the termination was with a valid reason.

78. On the reliefs sought, the Respondent submitted that, the Claimant was a beneficiary of a pension scheme and, it further contributed to the pension scheme and to NSSF. By dint of the provisions of Section 35 [5] of the *Employment Act*, the relief for gratuity cannot be availed to her.

### **Analysis and Determination**

79. From the pleadings, evidence by the parties and the number of points that have been raised and wide field that has been covered in arguments by counsel for the parties, the following broad issues, commend themselves as the issues for determination, thus:

- i. Whether the dismissal / termination of the Claimant's employment was procedurally fair.
- ii. Whether the dismissal was substantively fair.
- iii. What reliefs if any are available to the Claimant?
- iv. Who should bear the costs of this suit?



### Whether the dismissal was procedurally fair.

80. Section 45 of the *Employment Act* dictates that no employer shall terminate the employment of an employee unfairly. Section 45 [2] [c] provides reason why the procedure must be fair, absent of procedural fairness will certainly lead to the termination being considered unfair.

81. Section 41 of the *Employment Act*, 2007 supplies the structure for procedural fairness in the Kenyan situation. There is now firm jurisprudence that the procedure provided for in the provision is mandatory and non-adherence to the same by an employer has the effect of rendering the termination of an employee's employment or summary dismissal of an employee unfair. As regards the mandatory nature of the provision, the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, stated:

“ 13. There can be no doubt that the Act which was enacted in 2007, places a heavy legal obligation on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reason for terminating [Section 43]; prove that the reasons are valid and fair [Section 45]; prove that the grounds are justified [Section 45 [5] among other provisions. A mandatory elaborate process is then set up under Section 41 requiring notification and hearing before termination .....”

82. It is imperative to state that the enactment of the *Employment Act*, 2007 imported applicability of the tenets of natural justice into the employment contract. A discussion of the import of Section 41 in a matter cannot be done in isolation from other provisions of the Act, the provisions of the *Fair Administrative Actions Act*, relevant International Labour Standards, and the provisions of the *Constitution* and more specifically those that relate to fair hearing.

83. It shall be with this in mind that I shall determine presence of procedural fairness or otherwise in the termination, the subject matter herein.

84. The Claimant's counsel argued that the Claimant was not accorded a fair hearing by the Respondent. Fair hearing requires that the employee be given sufficient opportunity to prepare for his or her defence against the accusations. The Claimant was given only six days to the appointed date for the proceedings that led to her termination.

85. It was alleged that the six days were insufficient and contrary to the Collective Bargaining Agreement. In the case of *Kori Erick Ng'ang'a v The University of Nairobi* [2019] eKLR, the Court held and I agree,

“In instances where the outcome has the likelihood of resulting prejudice or injuries to an individual, it is incumbent or prudent, or reasonable to give the party adequate, sufficient and reasonable opportunity to defend or give his side of the story. Here is a case where the appellant was called to a disciplinary hearing without being given adequate and sufficient notice of what he intends to meet or expect at the hearing. It is clear that the appellant was never informed of the purpose and reasons as to why he was required to appear before the disciplinary committee. It may be argued that the appellant knew the reason but in order to show that the Respondent complied with the principles of fair hearing as enshrined in Articles 47 and 50 of the *Constitution*, it was reasonably expected to be served with a proper notice containing the charges and informing him of the consequences of his non-attendance or even the eventual outcome of the process. In the High Court case of



*Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR, it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of the allegation against it. Elementary justice and the law demands that a person be given full information on the case against him and given a reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case in court or before a tribunal, but when taking administrative action as well ..... In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice exactly what the focus of any forthcoming inquiry or action will be.”

However, it is important to state that the Claimant did not in her pleadings plead insufficiency of notice as in time wise. None of the parties placed before this Court the CBA alluded to in the Claimant’s submissions. The Claimant did not lead evidence to establish the insufficiency. I decline to make the conclusion that the six days’ notice was insufficient as invited to, by the Claimant.

86. Section 41 of the *Employment Act* expressly and in a mandatory manner, requires of an employer intending to terminate an employee’s employment to issue to such an employee, a notice which in a precise way puts forth the ground[s] on which the employer contemplates the termination. It is not difficult to conclude that the provisions of Section 4 of the Fair Administrative Actions Act & Article 47 and 50 of the *Constitution* are of the same spirit.

87. Having said this, I now turn to the letter dated 2<sup>nd</sup> October 2015. The letter read in part:

“Notification of interview arrangements –

Following completion of investigations into the disputed counter withdrawal of Kshs 950,000 paid by yourself on 27<sup>th</sup> July 2015, I write to advise that a disciplinary hearing has been arranged for 0930 a.m. on Thursday, 08 October 2015 and which you are required to attend without fail. It will be held at West end Kora meeting Room.

You are entitled to be accompanied at the meeting by a colleague or a union representative.

The meeting will be chaired by Joan Odhiambo, Eva Mangeci and Peter Maweu who will assess the material provided and your explanation, and will make a decision.

..... Depending on the outcome of the meeting, you may be subject to disciplinary action and you should therefore attend the meeting fully prepared to state your case.”

88. It is clear from the letter that contrary to the provisions of Section 41 of the *Employment Act*, and without consideration that notice is a matter of procedural fairness and an important component of natural justice, the Respondent did not put forth any charges or accusations against the Claimant precisely or in any manner that would enable her know what she was to meet and respond to on the appointed date.

89. I have carefully considered the alleged disciplinary proceedings, I have no doubt that the committee did not explain any charges to the Claimant and require her to make an explanation on the same. I fear, the flow of the proceedings does not give an impression that indeed they were disciplinary proceedings.



Inspired by the Court of Appeal decision in *Kori Erick Ng'ang'a v University of Nairobi* [2019] eKLR, I hold that the termination of the Claimant from employment was procedurally unfair.

**Whether the termination was substantively fair.**

90. Section 47 [5] of the *Employment Act* among other provisions speak to substantive fairness. The provision requires the employer to demonstrate to court, that the termination was justified. In my view, where a termination is stated to be upon premise of a certain charge, or accusation, which was not precisely put before the employee for an explanation on it, as was in case in this matter, it cannot be difficult for one to conclude that the termination was not justified, and that equity was absent.
91. The termination as can be discerned from the termination letter dated 13<sup>th</sup> October 2015, was on account that the Claimant was negligent in the performance of her duties and that she failed to adhere to the laid down regulations and cash payment procedures and terms and conditions of her employment. I hesitate not to state that the material placed before me by the Respondent does not at all reveal that those charges were brought to the attention of, and explained to the Claimant, to require her make a representation.
92. Section 43, and 45 of the *Employment Act* placed a burden on the Respondent to prove the reason[s] for the termination. Section 45 further burdened it to prove that the reason[s] were fair and valid.
93. As indicated hereinabove, the termination letter gives failure to adhere to the Bank's laid down regulations and cash payment procedures as the reason for its action against the Claimant. One would reasonably expect the Respondent to point out the specific regulations and procedures to court, to enable it weigh them against the material placed before it, interrogate and determine whether they were breached. As admitted by the Respondent's witness, this the Respondent did not do. In fact even the termination letter is silent on what specific regulation or procedure. By reason of this premise, I am unable to see validity and fairness in this reason.
94. All through, the Claimant maintained that the alleged memo did not pop up. That she did seek the necessary authorization from her superior before undertaking and completing the transaction. The fact that authorization was sought is not disputed. Judy Kinoti who had the authority to dispense the amount made the authorization. According to the Respondent's witness, in his evidence under cross examination, she did the authorization after she verified the customer's details. I find great difficulty in absence of any convincing material, to understand in the circumstances, how the Claimant would be made to bear responsibility and not Judy. The reason of negligence, as was advanced by the Respondent in my estimation was not fair.
95. The Respondent did not in any sufficient manner demonstrate to court that from their systems, the memo popped up at the time the Claimant was carrying out the transaction. With due respect, the evidence on the memo was too sketchy. The Respondent's witness had a challenge in explaining the contents of the investigation report on matters the memo. He admitted that he was not able to tell whether the memo popped up or not.
96. By reason of the premises, I come to a conclusion that the Respondent failed to discharge its legal burden under Section 43 and 45 of the Act. It failed to prove that the reason[s] for termination were valid and fair. The termination was substantively unfair.



**Whether the Claimant is entitled to the reliefs sought or any of them.**

97. The Claimant sought inter alia an order of reinstatement. The law is, and there is a galaxy of decisions on it, that after three years of the date of termination, this Court lacks the authority to grant the relief of reinstatement. It is by this reason that I decline to.

98. Section 49 [1] of the *Employment Act* empowers this Court to make a compensatory award to a maximum extent of twelve months' gross salary in a matter where it has found termination of an employee's employment unfair. However, it should be noted that the award is discretionary, the extent of the award too, depending on the circumstances of each case.

I have considered the circumstances under which the Claimant's employment was terminated, that the Respondent without reason deviated from substantive and procedural fairness that was required of it, the fact that reinstatement in this matter is not possible by operation of the law, the industry in which the Claimant was working and conclude that she is entitled to a compensatory relief under the Section and to an extent of 8 months' gross salary, Kshs 682,728.

99. The Claimant further sought for salary not paid up to retirement at 60 years. I see no basis for this claim. It cannot be assumed that the Claimant would have worked until the age of 60 years. The claim is declined.

100. This Court has before held that gratuity has to be contractual. Where it is not provided for in the contract of employment it cannot be granted. There was no evidence placed before this Court to demonstrate basis for the claim. The same is refused.

101. The Claimant's employment was terminated on the 13<sup>th</sup> October 2015. There cannot be any justification for grant of the relief sought for leave allowance for the year 2016 and 2017.

102. By reason of the premises, Judgment is hereby entered in favour of the Claimant for:

- a. A declaration that the termination of her employment was both procedurally and substantively unfair.
- b. Compensation pursuant to the provisions of Section 49 [1] [c] of the *employment Act*, again [8] months' gross salary, Kshs 682,728.
- c. Interest on [b] above at Court rates from the date of this Judgment till full payment.
- d. Costs of the suit.

**READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In presence of:

Mr Olieti for the Claimant

No appearance for the Respondent.

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

