



Mwende v Interstrat Limited t/a Big Square (Employment and Labour Relations Cause 616 of 2018) [2023] KEELRC 1153 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 1153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 616 OF 2018
K OCHARO, J
FEBRUARY 23, 2023**

BETWEEN

KIMANTHI NAOMI MWENDE CLAIMANT

AND

INTERSTRAT LIMITED T/A BIG SQUARE RESPONDENT

JUDGMENT

Introduction.

1. Through a statement of Claim dated the April 26, 2018, the Claimant instituted a claim against the Respondent seeking the following reliefs:
 - (a) A declaration that the Respondent has employed unfair Labour practices in the employment relationship with the Claimant by denying her paid maternity and annual leave and denying the Claimant the prescribed minimum wage.
 - (b) An order for payment by the Respondent to the claimant of Kshs 74,158.50 in unpaid maternity leave payment and Kshs 24,719.50 being one month annual payment accrued in January 2016.
 - (c) An order for payment by the Respondent to the Claimant of Kshs 11,667.60 withheld salary for December 2017.
 - (d) An order for payment to the Claimant Ksh 350,028 being 12 months' salary for the unlawful and unfair termination.
 - (e) An order for payment by the Respondent to the Claimant of Kshs 29,169 being one month salary in lieu of notice for the termination of the employment.



- (f) An order for payment by the Respondent to the Claimant of Kshs 4,375.35 being one month's house allowance in lieu of notice.
 - (g) An order for payment by Respondent to the claimant of Kshs 399,849.09 being salary underpayments owed to the claimant by the Respondent between April 23, 2014 and the December 11, 2017.
 - (h) An order that the Respondent pay to the Claimant a sum of Kshs 120,485.42 being withheld house allowances owed to the claimant by the Respondent between the April 23, 2014 and the December 11, 2017.
 - (i) An order that the Respondent issues the claimant a certificate of service for the period of employment.
 - (j) Punitive and aggravated damages.
 - (k) Cost of the suit and interest.
 - (l) Any other relief this honourable court may deem fit to grant.
2. The statement of the claim was filed contemporaneously with the Claimant's witness statement and the list of documents dated the April 26, 2018, list under which the documents that she intended to place reliance on as her documentary evidence, were filed.
 3. The Respondent entered appearance on the May 10, 2018 and filed a response to the statement of the claim on July 2, 2019 together with the Respondent's witness statement and list of documents. Imperative to state that despite entering appearance and filing the response, the Respondent didn't present any witness to testify in support of its defence.

The Claimant's case.

4. At the hearing, the Claimant sought that her witness statement dated April 26, 2018, be adopted as part of her evidence in chief and the documents be admitted as her documentary evidence. There was no opposition by the Respondent, the adoption and admission were allowed.
5. It was the Claimant's case that she was first employed by the Respondent on the April 23, 2014, in the position of Customer care Assistant at its Big Square Fast restaurant, entrusted with duties of a cashier. Her employment contract was in nature a one-year fixed term contract, however it was renewed on a number of occasions until she was unlawfully terminated from the employment on the December 11, 2017.
6. It was her evidence that at the time she joined the Respondent's work force, her starting salary was Kshs 15,000. The amount was maintained until 2017, when her salary was reviewed upwards to Kshs 16,500, an amount that was maintained until the date of termination. Throughout her tenure, she never earned house allowance.
7. The Claimant stated that about two weeks to the termination, a customer had made an order for a food item but subsequently rescinded the order. She was constrained to refund the money that he had paid to him. Since the item was as per the system sold but not delivered, she offered the item to the next customer who was buying two food items and endorsed the sale on the old receipt. She issued the customer with a new receipt for the second item. However, the customer refused to take the two receipts, insisting that the two items purchased should be reflected on one receipt. She obliged, issued the receipt and remained with the one with the endorsement.



8. She kept the rescinded sale receipt for reconciliation since a sale had been made, rescinded and money refunded, with no stock movement. There was a purchase entry without a corresponding stock movement.
9. It was the Claimant's further evidence that in the year 2015, she got due for maternity leave. She asked the Respondent for paid leave, however the latter insisted that it had to be an unpaid leave. Left with no option, she proceeded for a three months maternity leave, October 2015- January 2016. Further, an annual leave of 21 days. The Respondent failed to pay her the salary for the months she was on leave.
10. On the December 10, 2017, she was called by a representative of the Respondent and asked to report to the Respondent's Karen Branch for a training. She reported on the pretext that she was going for a training brief. On the December 11, 2017, she reported for the training as instructed. She met other colleagues there who equally had been instructed to report.
11. There was no training as it had been indicated to them. After some waiting, the management team addressed them, indicating that the Respondent no longer had confidence in them, on account that they had planned to defraud it.
12. The Claimant stated that each of them was briefed of the accusations that were against him or her. On her part, she was informed that she had made a manual entry on a receipt with an intention to defraud the Respondent. She was not given any opportunity to explain the circumstances of the entry. Her request that the purchases inventory be checked against the stock inventory, did not bear any fruits.
13. She was asked to name employees whom she suspected to be in the scheme of defrauding the Respondent, a thing that declined to. Upon this, the Respondent's Human Resource Manager, called the police who arrested the Claimant along with her colleagues. They were detained at the Karen Police Station until the December 12, 2017 when they were released upon recording statements and the OCS being convinced that there was no case against the Claimant and her colleagues.
14. After the release, she reported to the Respondent's Headquarters as had been instructed. The Assistant Human Resource Manager, one Sandra, instructed her to return her uniform. She obliged. Sandra disclosed to her and the other colleagues that as the Respondent didn't have confidence in them, it had decided to terminate their employment. They were given discharge vouchers to sign, which they did, and informed that their salary was to be paid in January 2018.
15. The Claimant contended that on the February 3, 2018, she was called and asked to report to the Respondent's Lavington office, to sign for her final cheque. When she arrived there, she met Dorcas and Sandra from the Human Resource Department, who directed her to write a letter indicating that she had voluntarily resigned from employment with the Respondent. The letter was a precondition to her receiving the final cheque. She declined to write the letter.
16. The Claimant contended that she was neither granted a hearing nor issued with a termination letter and to date she has neither been paid her final dues. The Respondent never issued her with a certificate of service as required under law.
17. The Claimant contends that her employment as a cashier with the Respondent was a subject to the Minimum Wage Regulations under the *Labour Relations Act* and in particular the Regulation of Wages (General) Order. The Respondent underpaid her salary throughout.
18. Cross examined by counsel for the Respondent, the Claimant testified that she was first employed by the Respondent on the April 23, 2014. The contract of employment indicated that she was being employed as a customer service attendant. The contract did not specify her duties and responsibilities.



19. She further testified that after training she was deployed to serve as a cashier. As a cashier, she would receive cash and orders.
20. The contract of January 20, 2017, was a fixed term contract for one year. The contract was extendable at the discretion of the Respondent.
21. The Claimant reiterated that she proceeded for maternity leave in October 2015, and resumed work in February 2016. During this period, she was not paid salary. She demanded for the payment, though not in writing.
22. When they were arrested, they were taken to Karen police station. However, while thereat, they were not given any to enable one prove that they were held at the police station.
23. According to paragraph 2 of the contract of employment, her salary was to be inclusive of house allowance.

The Claimant's submissions.

24. The Claimant filed her submissions on the October 11, 2022 and ventilated four issues for determination thus;
 - a) Whether the claimant was unfairly terminated.
 - b) Whether the claimant was denied payment of Maternity leave and annual leave as claimed.
 - c) Whether the Claimant's remuneration was a subject of the Minimum Wages Regulation.
25. On the first issue the Counsel for the Claimant submitted that the Claimant's termination was both procedurally and substantively unfair. The claimant relied on the case of David Gichana Omuya vs Mombasa Maize Millers Ltd (2014) eKLR where it was held that the burden or responsibility of to demonstrate that there was due compliance with procedural fairness, lies on the employer.
26. The Counsel further submitted that the Respondent did not tender evidence to demonstrate that a notice to show cause was issued to the Claimant at any time and that there was any disciplinary hearing at which she was given an opportunity to explain herself on any accusations against her. Additionally, the Respondent didn't show how her representations were considered. The Respondent didn't not discharge its burden under section 41 of the [Employment Act](#).
27. It was submitted that the Respondent did not have any genuine reasons to terminate the Claimant's employment. It was its duty to prove the reason[s] for the termination and that the reason[s] was valid and fair. The burden as placed on the employer by dint of the provisions section 43[1] and 45[2] of the [Employment Act](#). In its pleadings the Respondent made mere denials. The Court was urged to take into consideration the holding in case of David Gichana Omuya vs Mombasa Maize Millers Ltd 2014 eKLR (Supra) where it was held at paragraph 28;

' The practice of mere denials and putting Claimant's to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination. 29. In *Mombasa Cause No. 159 of 2013, Reuben Mwamboga v Bahnhof Bar & Restaurant*, this Court reasoned thus

17. Section 45(2) of the [Employment Act](#) expects an employer to prove that the reasons for termination are valid and fair reasons. The Respondent's pleading/



Response did not attempt to justify or prove the validity or fairness of the reasons for dismissing the Claimant.

18. In fact the type of Response filed by the Respondent cannot and does not meet the threshold expected of a pleading in the Industrial Court.
 19. The *Employment Act* has explicitly set out the legal burden an employer should discharge. In this regard the content and form of a Response must adhere to what the Act expects an employer to discharge. Bare denials and putting Claimants' to strict proof will not just do.³⁰ Rule 13 of the Industrial Court (Procedure) Rules, 2010 is clear on what a Respondent should set out in a Response. The Respondent did not clearly set out the facts and grounds it sought to rely on to prove the reasons for the termination.'
28. It was further submitted that the Claimant did manage to discharge her burden of proof under section 47[5] of the *Employment Act*. She was able to demonstrate prima facie that the termination of her employment was unlawful. As regards the burden of proof under the provision, and how it should be discharged, reliance was placed on the decision in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR* where the court expressed itself;
- ' Section 47[5] of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination. The interpretation given to the section by courts is that all the employee needs to do to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that the termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. Indeed, overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between sections 43 and 47[5] of the *Employment Act*, the Court of Appeal in *Muthaiga Country Club v Kudheih Workers*[2017]eKLR said the following: The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under section 47[5] of the Act by laying basis for their claim that an unfair termination of employment had occurred. This brought into play sections 43[1] and 47[5] of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment and justify the grounds for the termination of the employment.'
29. On the third issue Counsel submitted that paragraph 3 of the Memorandum of claim, the claimant expressly stated that she was employed as A customer care attendant discharging the functions of a cashier. The Respondent admitted the averment in the said paragraph, through paragraph 4 of the Regulation of Wages [General] Orders under row 11, contemplates cashiers to be among those persons subject to the Regulations.
 30. On the last issue the counsel submitted that the Claimant had proved her case and therefore her entitlement to the reliefs she has sought in her statement of claim.



The Respondent's submissions.

31. The Respondent filed its submissions on the September 22, 2022 distilling three issues for determination thus;
- a) Whether the reason for termination was fair and valid.
 - b) Whether the Respondent employed unfair Labour practices in the employment relationship with the Claimant.
 - c) Whether the Claimant is entitled to the reliefs sought.

32. On the first issue, the Respondent's counsel submitted that it behoved the Claimant to prove the unfair termination. SHe relied on the case of *Kennedy Maina Mirera vs Barclays Bank of Kenya Limited 2018 eKLR* where Justice Mathews N.Nduma state;

' 16. However, section 47(5) puts a spin on this as f Follows-

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

17. The two sections may appear contradictory in terms, but this is not so taking into account the provisions of section 107 of the *Evidence Act*, which provides-

'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?'

18. It is the courts considered view that section 43(1) and 47(5) of the *Employment Act*, must be construed so as not to nullify the conventional and accepted law on the burden of proof.

19. Therefore the plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to the effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on the balance of probabilities'.

33. Counsel further submitted that the Claimant by her conduct breached the fundamental trust between her and the employer, the Respondent by not following the laid down procedure for issuing the receipts to customers. That she testified during the hearing that she had issued a handwritten receipt to



the customers as opposed to the system generated receipt. In Counsel's view that amounted to breach of her contract.

34. It was argued that the Claimant was accorded a chance to explain her insubordination, however, the explanation she rendered was found by the Respondent not to be satisfactory. The summary dismissal which was pursuant to the provisions of clause 5 of the employment contract, was properly attracted as the conduct of the Claimant amounted to gross misconduct.
35. On the second issue, it was submitted that there existed an employment contract, executed between the Respondent and the Claimant. The Contract at Clause 7(a) provided that annual leave was applicable to the Claimant after working for a consecutive 12 months. The Claimant was accorded her annual leave when it fell due. The Claimant failed to prove to the court she had at any time requested for the annual leave and was denied by the Respondent.
36. It was further submitted that the contract of employment provided under Clause 7(c) for 3 months paid maternity leave after the date of delivery and after a written confirmation of eligibility for leave. That the Respondent having clearly provided for the same in the contract it cannot not be said that it practiced unfair practices.
37. The Respondent submitted that they entered into a contract that provided for a prescribed a monthly salary for the Claimant. The claimant at all times never raised an issue with the Respondent on the issue of salary. The Respondent at all times abided by the terms of contract and it could not at this point be faulted by the Claimant. The Respondent relied on the case of [*Joseph Maina Theuri vs Gitonga Kabugi & 3 others 2017\)eKLR*](#) where the court stated;

' The fulcrum of the employment relationship in this country is fair labour practices as envisaged under Article 41 of the [*Constitution*](#). What is fair straddles and goes beyond what is lawful or legal'

And the case of [*Kenya County Government Workers' Union vs County Government of Nyeri & Another \(2015\)eKLR*](#) where the court held;

' It is the opinion of the court that the right to 'fair labour practices' encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These includes provisions for basic fair treatment.'

To buttress the submission that the Respondent didn't engage any unfair practice as suggested by the Claimant.

38. On the last issue, the counsel for the Respondent submitted that the Claimant was not unfairly terminated. She was found to have committed a gross misconduct, the termination was justified therefore. She is not entitled to the reliefs sought in the circumstances.
39. The contract of employment under clause 7[c] provided for a paid maternity leave. However, it was subject to a written confirmation of employment and eligibility for the leave. Notice of maternity leave had to be in writing and backed up with medical records. The Claimant didn't fulfil the condition[s] under this clause as she did not write a letter to the Respondent demanding for the payment. That the Claimant could not be allowed to awaken from her slumber of 2 years to claim the benefits she never sought from the Respondent herein.
40. The Respondent submitted that the Claimant was not entitled to the accrued annual leave in January 2016 as the Respondent consistently and religiously tabulated the Claimant's unpaid leave for each



month and paid the same to the Claimant. Further the Claimant failed to prove that the Respondent owed her the one month annual leave.

41. It was counsel's position and submission that the Respondent had paid the Claimant all her dues. Further on the compensation sought for the 12 months' gross salary, the Respondent submitted that in view of its position that the dismissal was validly attracted under the provisions of sections 44 (1) (3)(4) of the Act, the claim should fail.
42. On the issue of the one month salary in lieu of notice, it was argued that the employment contract gave the Respondent the right to terminate the employment contract without notice and or payment in lieu of notice where the Claimant had committed a material breach at her obligation under the contract. This was provided under Clause 5 of the contract of the employment. The Respondent relied on the case of Attorney General of Belize et al vs Belize Telecom Ltd & Another (2009) 1 WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd vs North West Metropolitan Regional Hospital Board 1973 1 WLR 601* at page 609, where it was held as follows;

' The court does not make a contract for the parties. The court will not even improve the contract the parties have made for themselves. If the express terms of the contract are perfectly clear and from ambiguity. There is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.'

43. Lastly on the relief for the aggravated damages the Respondent's counsel submitted that the circumstances where the same could be awarded were laid down in the case of *Rookes vs Bernard* and the circumstances as listed by Lord Devlin are;
- a) Oppressive, arbitrary or unconstitutional actions by the servants of the Government.
 - b) Where the defendant's conduct was 'calculated' to make profit for himself.
 - c) Where a statute expressly authorises the same.
44. Similarly in the case of *Bank of Baroda (Kenya) vs Timwood Products Ltd Civil Appeal No 132 of 2001(Unreported)* where the court held that;

'Punitive or exemplary damages are awardable only under two circumstances, namely:

- i. Where there is oppressive, arbitrary or unconstitutional action by the servants of the Government and
- ii. Where the defendant's action was calculated to procure him some benefits not necessarily financial, at the expense of the Plaintiff.'

Analysis and Determination.

45. From the facts of this cause, evidence, submissions and the authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent. Only four issues crystallise for determination thus;
- (a) What is the import of the Respondent's failure to bring forth a witness to testify?
 - (b) Whether the termination of the Claimant from employment was both procedurally and substantively fair.
 - (c) Whether the Claimant is entitled to the reliefs sought.



(d) Who should pay the cost of the suit?

What is the import of the Respondent's failure to bring forth a witness to testify.

46. As herein before stated, when this matter came up for hearing, the Respondent didn't present any witness to testify on its defence against. Claimant's case. It opted to close its case without any testimony on its behalf being tendered. That being so, this Court asks itself this question, 'what is the import of the failure on its case and the claim herein in general?' This Court has in a number of matters before, held and it reiterates here, that where a Respondent who has entered appearance and filed a response to a Claimant's case, but fails to present evidence on the response/defence, as is the case here, his or her statement of response remains just such a statement without any evidential value to its case.
47. However, it should be stated that the fact the Respondent has not testified doesn't in any manner lessen the Claimant's burden of proofing its case, or oblivate his or her duty to discharge any legal burden imposed on her by the law in the circumstances of his or her case.
48. No doubt Employment law in the Kenyan situation is structured in a manner that in regard to disputes emanating out of a termination of employees' contract[s] of employment, the employer bears some specific legal burdens to discharge. Legal burdens are dischargeable by adduction of evidence, not unless there is an admission on that which the party charged with the responsibility to prove a certain fact or matter in discharge of the burden, by the adversary or the court takes judicial notice of the fact or matter. Hereinafter shortly, this Court shall demonstrate that the Respondent by its failure to adduce evidence, failed to discharge particular legal burdens imposed on it by the *Employment Act*, with a consequence that the summary dismissal of the Claimant from employment is deemed unfair by operation of the law. The Court has in mind the legal burden[s] under section 43 and 45[2] of the Act.
49. The Respondent's Counsel has made well researched and detailed submissions on the Respondent's case. With great respect, largely, the submissions sound evidence in favour of its case. Submissions will never be a substitute for evidence as the Court of Appeal stated in the case of *Joseph Nkubi and County Council of Meru v Regina Thiridi [1998] eKLR*, thus;

' We are concerned that the learned Judge embarked on the exercise of assessing damages in vacuo and in the absence of any evidence as none was led. Submissions are not evidence and cannot take the place of evidence. We are told this practice is rampant at Meru but that is no excuse for a practice which is clearly illegal and contrary to law.'

Whether the termination was both procedurally and substantively fair.

50. In a dispute relating to fairness and validity of termination of an employee's employment, section 47[5] of the *Employment Act* has placed specific legal burden on the employer and the employee, the combatants in the dispute. True, for a long time there has been confusion, and it has been challenging to many, as to what is actually contemplated under the provision, and how the employer and the employee are supposed to discharge their respective legal burdens thereunder and at what time. I think jurisprudence is now firm on this. In my view, and flowing from decisions on this aspect, the employee is enjoined to prove that the termination was unfair or wrongful, before the employer's burden set out therein, sets in. In discharging the duty, the employee has to place before court prima facie evidence demonstrating that the employer didn't have any fair or valid reason as basis for the action of terminating his or her employment, and or that the procedure leading to the termination was not fair.
51. It is upon the employee placing forth the evidence in the nature hereinabove stated, that the burden shifts to the employer, requiring him or her to demonstrate on a balance of probabilities that he



- or she had a valid and fair reason to terminate the employee's employment, and that fair procedure in consonance, with the precepts of statute, tenets of natural justice, and the provisions of the Constitution more specifically on fair hearing where adhered to.
52. On the provisions of the section, and how they should be approached, I find the decision in the cases of Kennedy Mirera v Barclays Bank of Kenya [2018] eKLR, and Galgalo Jarso Jillo [supra], cited by counsel for the Respondent and the Claimant respectively, helpful.
53. I have carefully considered the by the Claimant as regards the process leading to her dismissal, I find no difficulty, on account of her uncontroverted evidence that she was not given an adequate chance to defend herself against the accusations that were levelled against, and that no right of accompaniment as contemplated under the provisions of section 41 of the Employment Act, that Prima facie, there was want of fair procedure in her dismissal.
54. Further, I have considered the reason that stirred the dismissal, that is the alleged receipt that Claimant endorsed by hand, the circumstances leading to the same as explained by her in evidence, and find the explanation reasonable, that required to be controverted by the Respondent but was never. Her evidence establishes prima facie that reasonably, the Respondent would not summarily dismiss her from employment on the ground.
55. In the upshot, I hold that the Claimant has discharged the legal burden imposed on her by the provisions of the section hereinabove stated.
56. This court has severally stated that whenever a question of fairness in termination of an employee's employment or summary dismissal is placed before court for determination, consideration shall be on two aspects, procedural and substantive fairness. Procedural fairness has to do with the process leading to the termination or dismissal while substantive fairness has to do with the decision to terminate.
57. Section 41 of the Act provides for the procedure that an employer contemplating to terminate an employer should follow. It is now trite that the procedure is mandatory and any deviation from it shall render the termination unfair even if there were any substantive justification.
58. Section 41 of the Employment Act provides;
- ' (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of any employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance and any person, if any, chosen by the employee within subsection (1) make'
59. The ingredients or the essentials of procedural fairness as encapsulated under section 41 of the Employment Act are that ; an employee contemplating terminating the employee's employment must notify the employee, the grounds attracting the intention, [notification/information component], accord him or her an adequate opportunity to make representations on the grounds and extend to him or her, the right of accompaniment,[hearing component], and lastly, the employer must consider



- the representations made by the employee and or the person accompanying him, [the consideration component].
60. The duty to prove procedural fairness always lies on the employer. Having failed to present any evidence regarding the procedure leading to the termination, and having said that the Claimant has prima facie demonstrated that there was absent procedural fairness, I come to an inevitable conclusion that the summary dismissal was procedurally unfair.
 61. On the substantive justification, section 43 of the Act requires an employer in a dispute like the instant one to prove the reasons for the termination, otherwise the termination/dismissal shall be deemed unfair by dint of the provisions of section 45. It is imperative to state however, that it is not enough for the employer to prove the reasons, he/she must go a further mile to demonstrate that the reasons were valid and fair, as required by the provisions of section 45(2) of the Act. A valid is that which is well-grounded and logically correct.
 62. At this point it becomes imperative for the court to state that under section 43(2), the reasons for the termination of a contract are matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
 63. Without any evidence on the part of the Respondent to demonstrate the reason for the summary dismissal of the Claimant, and that the reason was fair and valid, coupled with my finding hereinabove that prima facie the Claimant had demonstrated that the Respondent in the circumstances of the matter didn't have a valid and fair reason to dismiss her, I conclude that the dismissal was substantively unfair. I am not persuaded by the Respondent's counsel's submissions that the dismissal was justified under the provisions of Section 44 of the Act. The submissions flow from no identified evidence.
 64. I conclude that the termination of the Claimant by the Respondent was both procedurally and substantively unfair.

b) Whether the Claimant is entitled to the reliefs sought.

65. Having found as I have hereinabove, that the termination of the claimant's employment was both procedurally and substantively unfair, I now turn to consider the reliefs sought. The Claimant prayed for Kshs 74,158.50, asserting that she in the month of October 2015, proceeded for her maternity leave, but she was never paid any salary by the Respondent during this period. Counsel for the Respondent submitted that the Claimant was not paid the sum because she didn't comply with some specific conditions that were set in her employment contract. I have carefully considered the memorandum of response by the Respondent, in it the Respondent expressly admits that the Claimant had the maternity leave, but asserts that contrary to her contention, she was remunerated.
66. In my view, Counsel's submissions cannot be allowed to contradict an express admission by in pleadings by a party on whose behalf those submissions are said to be made. Having said as I have hereinabove, it is my view that it behoved the Respondent to prove that indeed it remunerated the Claimant as it asserted. Nothing could have been easier for it to place before court evidence in form of a pay roll, a payment cheque or any document to demonstrate the payment. I award the amount sought under the heading Kshs 74,158.
67. Section 28 (1) of the Act entitles an employee to proceed for 21 days annual leave with full pay. It was the claimant's position that she was added further 21 days as annual leave by the Respondent immediately after the maternal leave, but the Respondent declined to pay her. By dint of section 29 (7), the fact that a female employee has taken a maternity leave, doesn't disentitle her, her right for an



annual leave. The Claimant is hereby awarded Kshs 16,500 the period that she took her annual leave, 2016, but for which period she was not paid for.

68. The Claimant sought damages for the unlawful termination at 12 months' wages Kshs 350,028. The authority of the court to make the award flows from the provisions of section 49(1) (c) of the *Employment Act*. The authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof. Taking into consideration the manner in which the Claimant's summary dismissal occurred, through a procedure that was in breach of the statutory requirements, the Constitutional right to fair hearing, and the tenets of natural justice, that there is no evidence that a reasonable employer would have summarily dismissed an employee in the circumstances of this matter, the manner in which the Respondent didn't comply with the provisions of the law, and more specifically that relating to payment of an employee who is on maternity leave and annual leave, and the length of time she was in the employment of the Respondent, and conclude that she is entitled to the compensatory relief and to the extent of 6 months' gross salary, Kshs 99,000.
69. The Claimant further sought for one month's salary in lieu of notice Kshs 29,169. Having found as I have that the summary dismissal of the Claimant's employment was unfair, the Claimant is entitled to one month's salary in lieu of notice pursuant to the provisions of section 35 as read together with section 36 of the *Employment Act*. He is awarded Kshs 16,500 salary in lieu of notice.
70. The Claimant urged this court to award her Kshs 4375.35 being one-month house allowance in lieu of notice and further Kshs 120,485.42 being the withheld house allowance to the Claimant by the Respondent. I have had a casual look at Clause 2 of the Employment contract and it succinctly stipulated that the Claimant was entitled to a monthly gross/Consolidated salary of Kshs 15,600 and the same was inclusive of house allowance. In view of this I consequently decline to grant the sums under this head or any sum at all.
71. The material before this court is clear that the Claimant worked for the Respondent up to December 11, 2017. In essence therefore, in the month of December 2017, she worked for 10 days. She has claimed that she was not paid for this period. In its pleadings, the Respondent alleged that the Claimant was paid all her dues, however, it didn't place any proof before Court to demonstrate this. I compute the amount awardable under this head as Kshs 5323.00, not 11,667.00 as sought by the Claimant. Thus, $16,500 \times 10/31 = \text{Kshs } 5323.00$ and the same is hereby awarded her.
72. The Claimant asserted that all through her employment with the Respondent, she was not paid pursuant to the obtaining at the material times. In her view, the Respondent was bound by the Wage Orders relevant to the material times during, the currency of her employment. Therefore, cumulatively, she was under paid by a sum Kshs 399,849.09, An amount she Claims. I have no doubt that the Claimant's claim here, is anchored on the provisions of section 48 of the *Labour Institutions Act*, which provides;

' 48

[1] Notwithstanding anything contained in this Act or any other written law-

- (a) The minimum rates of remuneration or conditions of employment established in the wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement.



(b). If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms'

[5]. The powers given by this section for recovery of the sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings.'

73. The Respondent's counsel submitted that the salary that the Claimant earned all through was borne out of an employment agreement duly executed by the parties, and therefore this court will have no business to find that the Claimant ought to have earned more than what the contract availed, for to so do, would amount to re-writing a contract for the parties. With due respect, this submission ignores the provisions of section 48 above stated, and the whole essence of the post 2007, Labour relations legal regime- to act as a countervailing force to counteract the inequality of the bargaining power which is inherent and must be inherent in the employment relationship. Too to guarantee the weaker party [employees] in the labour market protection and basic rights in order to be in a fair position when negotiating salary and working conditions.

74. The general principle, the way I understand it, is that the court's duty is to enforce the terms of a contract between the parties thereto. However, where it appears to the court that the contractual terms are not in consonance with an obtaining law, the applicability of general principle gets constrained, the court can only apply the law and not the terms in a dispute between them. Looking at the texture of the section 48, and the Regulation of Wages [General] Order in general, one encounters an appreciation of this legal limitation. Further, it is clear that the minimum wages prescribed by the law cannot be out contracted.

75. In the case of *Ronald Ongori Gwako v Styroplast Limited [2022] eKLR*, this Court expressed itself;

' The function of our courts is to give effect to the intention of the parties as expressed. In the English Court of Appeal case above-Globe Motors Inc & Others v TRW Electric Steering Ltd & Others [supra], Lord Justice Beatson stated as follows;

'Absent statutory or common law restrictions, the general principle of English law of contract is that parties to a contract are free to determine for themselves what obligations they will accept. The parties have the freedom to agree whatever terms they choose to undertake, and can do so a document, by word of mouth or by conduct'.

The law can temper with the parties' freedom to determine the terms and conditions of their contract in some respects, and that is what exactly the provisions of section 48 of the *Labour Institutions Act* and the Regulations thereto can do.



76. Consequently, the Court finds that the Claimant's claim under the *Labour institutions Act* for underpaid salaries is well anchored. I have considered the relevant Wage Orders for the period June 2015 to December 2017, found that at all their various times, the Claimant was not paid in accord with their prescripts, she was underpaid, computed the underpayments, [being the difference of what she ought to have earned under the law and what she actually earned] and find that the cumulative underpaid sum is Kshs 301, 782, a figure which I award in her favour pursuant to the provisions of section 48 of the Labour Institution Act.
77. The Respondent is hereby ordered to issue a certificate of service to the Claimant as provided under section 51 of the *Employment Act* 2007.
78. The Claimant lastly claimed for punitive or exemplary damages. The circumstances where the same can be awarded were set in the case of Bank of Baroda (Kenya) Limited vs Timwood Products Limited 2001 [supra] I have considered the circumstances of the Claimant's case and the evidence by the Claimant, and conclude that She has not demonstrated on a balance of probabilities that her claim meets the threshold.

(c) Who should shoulder the costs of the suit.

85. It is trite law that costs shall follow the events, the Respondent is hereby condemned to pay the costs of this suit.
86. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;
- (a) A declaration that the Claimant's termination was both procedurally and substantively unlawful and unfair.
 - (b) Annual leave payment - Kshs 16,500
 - (c) Compensation at 6 months' gross salary - Kshs 99, 000.
 - (d) One month salary in lieu of notice - Kshs 16,500
 - (e) Payment for 10 days worked in December 2017 - Kshs 5,323.
 - (f) Compensation for the unpaid maternity leave - Kshs 74, 158
 - (g) Leave pay for the annual leave for 2016 - Kshs 16,500.
 - (h) Interest on the sums awarded above at court rates from the date of this judgement till full payment.
 - (i) Underpaid salary - Kshs 301,782/-
 - (j) Cost of the suit.
 - (k) The Respondent to issue Certificate of service to the Claimant within 30 days of today.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

.....

Ocharo Kebira

Judge

In the presence of



.....For the Claimant

.....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 15th March 2020 and subsequent directions of 21st 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.

.....

Ocharo Kebira

Judge

