



**Mabil v Direct Channel Simbatech [K] Limited (Cause 764 of 2015)
[2023] KEELRC 823 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 823 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 764 OF 2015
MA ONYANGO, J
FEBRUARY 10, 2023**

BETWEEN

PETER NGETICH MABIL CLAIMANT

AND

DIRECT CHANNEL SIMBATECH [K] LIMITED RESPONDENT

JUDGMENT

1. The Claim herein was instituted by way of Claimant's Memorandum of Claim dated 7th May 2015 as amended on 30th April, 2018, in which the Claimant seeks the following reliefs: -
 - i. THAT the court do examine the reasons and merits of termination of the grievant's termination and find that the termination was unlawful.
 - ii. THAT the court do find that the Respondent's action of continued withholding, failing, refusal and or neglecting to pay the Claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.
 - iii. THAT the Respondent has been in breach of the *Employment Act* Chapter 226 Laws of Kenya and other relevant labour laws.
 - iv. THAT the Respondent do pay General damages, Aggravated and other relief to the Claimant for causing him emotional suffering, embarrassment and torture for terminating his services with no valid reason,
 - v. THAT the Respondent is under obligation to pay the grievant his unpaid overtime dues earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for.



- vi. THAT the Respondent pay the Applicant his salaries earned but not paid, leave, travelling allowance, unpaid off days but not paid, and leave days earned but not given and/or paid for.
- vii. THAT the court finds the Respondent created a hostile working environment, acted in bad faith and reprehensible manner and even further infringed on its own (Attached is a copy of the policy)
- viii. THAT the Claimant be adequately compensated with other relief as prayed for on "top of the compensatory damages.

2. The claimant further prays that as a result, the Court do order that the Respondent to pay the all his terminal benefits and other unpaid dues computed as hereunder:

A. General damages for: Discrimination at work place Breach/change of terms of employment unprocedurally in breach of Section 10(2) and (5) Demotion and other unilateral decisions

B. Special Damages.

i. Service pay (6 x 65,000) Kshs.390,000.00

ii. House allowance (10% x 65,000) x 72 months Kshs.468,000.00

iii. 3 months' pay in lieu of notice (6 x 65,000) Kshs.195,000.00

100 x 65,000

iv. Leave days not taken 26 Kshs.250,000.00

v. Salary for 17 days worked in March Kshs.65,000.00

vi. Damages for unlawful termination Kshs.780,000.00 Total Kshs.2,173,000.00

C. Aggravated damages for humiliation, embarrassment and emotional suffering.

D. Retaliatory, malice, reprehensible and outrageous behavior before, during and after Punitive termination. Withholding, refusal to pay terminal dues and falsifying documents. Breaching its Damages own policy

E. For Costs of this claim

F. Interest on a, and b, c and d above at court rates

G. Any other relief as this honourable court may deem just and fit to give.

3. The Claimant avers that he was employed by the Respondent herein, a limited liability company registered in Kenya, on or about September 2008 in the position of Customer Service Executive. He avers that he performed his duties diligently and to the Respondent's satisfaction as a result of which he was promoted to the position of Operations Manager effective from 1st January, 2015, a position he held until his unlawful and unfair termination on 17th March, 2015.

4. The Claimant avers that between the years 2010 to 2015, he was treated unfairly and was a victim of open discrimination contrary to the terms of his employment. As an example he cites the withdrawal of his medical cover without any formal communication and his continuous exclusion from the companies' benefits and bonus scheme.



5. The Claimant avers that the Respondent, with a view of settling personal score with him proceeded to unceremoniously eject him from the Company house allocated to him in full glare of other company members of staff with an aim of embarrassing him.
6. The Claimant avers that the Respondent's actions have caused him emotional suffering and embarrassment as the termination of his employment was without valid reason and due procedure was not followed.
7. He contends that the Respondent's conduct was irregular, unlawful and un-procedural. He urged this Court to find his Claim with merit and allow it in terms of the reliefs sought therein.
8. In response to the Amended Claim the Respondent filed its Amended Memorandum of Defence on 29th November, 2018 in which it admits that it engaged the Claimant in the position of a Customer Service Agent effective 1st September, 2009. It states that the Claimant was earning a consolidated salary of Kshs.15,360/- as per the employment contract executed on 14th June, 2010.
9. The Respondent however denies that the service of the Claimant was exemplary as alleged by the Claimant. It contends that the Claimant's service was tainted with absenteeism without authorization or approval, failure to follow direct instructions, disobedience, general failure by the Claimant to carry out duties of updating attendance reports and submitting his work late, failure to communicate promptly in accordance with practice, rules and regulations.
10. The Respondent further contends that the Claimant was issued with several verbal warnings on his absenteeism and tardiness including a warning letter dated 3rd March, 2015 but there was no improvement.
11. The Respondent denies the allegation by the Claimant that he was a victim of discrimination and contends that the Claimant was treated fairly and/accorded all benefits as contained in his terms of engagement as enumerated in his contract of employment.
12. The Respondent avers that the Claimant was, in line with the provisions of Section 41 of the [Employment Act](#), 2007, invited to a disciplinary hearing wherein he was reminded of the complaints against him and as a result was issued with a warning letter and a performance appraisal recommended to be conducted.
13. That the Claimant was subsequently issued with a letter dated 13th March, 2015 requiring him to show cause for his late reporting, absenteeism, failure to follow instructions and other performance related complaints.
14. The Respondent contends that the response to the Notice to show cause it received from the Claimant on 17th March, 2015 was not satisfactory and it resorted to terminating the Claimant's employment.
15. That at the time of separation the Claimant was duly paid one month's salary in lieu of notice in line with the provisions of Section 36 of the [Employment Act](#), 2007 and his terminal dues totaling Kshs.112,105.40 was paid vide the Respondent's cheque Number 3900.
16. The Respondent maintains that the Claimant has no claim against it. It urged this Court to find the Amended Memorandum of Claim without merit and to accordingly dismiss it with costs to the Respondent.



Evidence

17. The claim was heard on 28th October, 2019, 22nd January, 2020, 25th February 2020 and 2nd November, 2021 with the Claimant testifying on his own behalf as CW1 and the Respondent calling one witness.

Claimant's Case

18. In his evidence the Claimant reiterated the averments made in his Amended Memorandum of Claim. On cross examination he stated that he was paid a consolidated salary. Reference was made to Appendix 1 at page 2 of the Respondent's List and Bundle of Documents-the employment contract. The Claimant further stated that his employment contract provided for one month's termination notice or payment in lieu thereof.
19. The Claimant stated that he was not aware that a cheque of his terminal benefits had been drawn by the Respondent. That he only became aware of the cheque after the Respondent had filed it as part of its exhibits in this matter.
20. On the Claim for overtime, the Claimant stated that he did not have any schedules for the period worked to prove his case under this head.
21. In a rejoinder after the cross examination the Claimant explained that the Respondent had notified him that he was not eligible for bonus pay because he was already on the highest scale and secondly that he did not meet his Key Performance Indicators (KPIs). He further stated that he sought to be included in the medical cover but there was no response from the Respondent on the issue even though the same was provided for in his employment contract.
22. The Claimant maintained that he was a victim of discrimination as he was never paid any bonus. With respect to his claim of demotion the Claimant stated that he did not apply for the position and that no reason was given to him for the demotion.

Respondent's Case

23. RW1, Cheruiyot Benard, the Respondent's Employee Relations Manager adopted his witness statement dated 15th January, 2021 as his evidence in chief. In his statement he reiterated the averments made in the Respondent's Amended Memorandum of Reply.
24. On cross examination RW1 stated that the Claimant's position as stated in his letter of termination and Certificate of Service is Operations Manager. He stated that in the disciplinary hearing minutes the Claimant's position is indicated as Supervisor. RW1 further stated that he could not confirm the letter of alleged promotion issued to the Claimant as he was not in the Respondent's employment at that time.
25. RW1 further testified that although it was recommended that the Claimant undergoes a performance appraisal it was not done due to time constraints.
26. RW1 testified that the Claimant was issued with a Notice to Show Cause on 13th March, 2015 which he promptly responded to by his letter dated 17th March, 2015. RW1 further testified that the Claimant was duly invited for a disciplinary hearing held on 4th March, 2015 as indicated in the minutes of the disciplinary hearing. He stated that there was no indication that the Claimant was invited for another disciplinary hearing after being issued with the Show Cause letter.
27. RW1 further testified that it is not clear from the record whether or not the Claimant was paid his terminal dues at the time of separation even though a cheque was drawn in his favour for the same.



- He stated that the Claimant's terminal dues were to be paid once he had cleared with the Respondent, which clearance RW1 stated that he was not aware if the Claimant did.
28. RW1 further stated that there is no clear record of the days the Claimant is accused of having absented himself from duty. He stated that he relied on documentation including email communication that confirmed that the Claimant was guilty of absenteeism.
 29. On re-examination RW1 stated that the Respondent had several Operations Managers at any given time and they all worked at the same level.
 30. On the issue of leave days RW1 stated that each member of staff was eligible to 21 days leave per year and could only carry forward leave days to the 1st quarter of the subsequent year with the Respondent's consent. He stated that this position was well enumerated in the Company Manual that was produced as an exhibit in this matter.

Submissions by the Parties

31. In his submissions the Claimant maintained that there was no just cause for the Respondent to terminate his employment. He further maintained that he was a victim of double jeopardy as he had already been punished for being absent from lawful duties on 28th February, 2015 when the Respondent deducted 1 day from his leave.
32. On the ground of alleged lateness in reporting as contended by the Respondent, the Claimant submitted that no evidence was availed to support this assertion in terms of exact dates and times when he reported late for duty. The Claimant maintained that this ground is devoid of merit and urged the Court to dismiss it.
33. The Claimant submitted that there was no case of disobedience as alleged by the Respondent. He maintained that the instructions he is alleged to have disobeyed were issued by a fellow Operations Manager and were therefore never issued by a person in authority over him. He further submitted that attending to visitors was not under his scope of duties and therefore the allegation that he failed to follow instructions does not hold in the circumstances.
34. On the allegation that he approved leave the Claimant submitted that no evidence was adduced by the Respondent in Court by way of leave forms or emails showing how he approved the same as alleged by the Respondent.
35. The Claimant urged this Court to take cognizance of the fact that there was no job description given to him clearly aligning his roles and responsibilities as an operations manager and therefore the Respondent cannot allege his failure in that respect.
36. The Claimant submitted that all the reasons and/or grounds advanced for his dismissal lacked merit. He further submitted that the termination of his employment was unlawful and unfair in view of the provisions of Section 45 of the *Employment Act*, 2007. For emphasis he cited and relied on the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* where the Court held that for a termination to pass the fairness test, there must be both substantive justification and procedural fairness. That substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.
37. The Claimant further submitted that the termination was done contrary to the mandatory provisions of Section 41 of the *Employment Act*, 2007 as read with the Respondent's Disciplinary Policy specifically clause 4.2.1 thereof.



38. The Claimant submitted that he was a victim of discrimination throughout his employment with the Respondent as was evidenced by his removal from Medical Cover. He maintained that despite serving the Respondent with a notice to produce the list of staff on medical scheme and payroll dated 24th April, 2019 none was produced to assist the court in making a fair determination. Further, that he was denied bonuses despite the same being paid to his colleagues. He maintained that these acts by the Respondent were contrary to the provisions of Section 5 of the Employment Act, 2007.
39. The Claimant further submitted that during the course of his employment with the Respondent on 6th September, 2013, he was unlawfully and unfairly demoted from the position of Quality Analyst to Supervisor vide email without any prior warning, notice or consent against the Respondent's policy, in particular Clause 5.4 on demotion.
40. The Claimant maintained that his demotion was unfair, humiliating and was done unilaterally by the Respondent without due regard to due process and against fair labour practice. To buttress this argument the Claimant cited and relied on the Court findings in the case of G.M.V v Bank of Africa Limited (2013) eKLR where it was held that once an employee has established a prima facie case, the burden shifts to the employer to show articulate, specific and non-discriminatory reason for disparity.
41. The Claimant submitted that he further experienced multiple instances of embarrassment, violation of right to dignity during the course of his employment with the Respondent, a case in example the termination of his employment that was done unfairly and in the full glare of his juniors in gross violation of his rights.
42. The Claimant submitted that the Respondent is guilty of creating a hostile working environment where racism, intimidation, harassment, use of vulgar language and destruction of personal mobile phones for staff was rife as supported by the minutes of the management meeting held on 20th March, 2015.
43. The Claimant submitted that he had proved his case against the Respondent and was therefore entitled to the reliefs sought in his Amended Memorandum of Claim. He urged this Court to allow his claim as prayed.

Respondent's Submissions

44. The Respondent on the other hand submitted that the termination of the Claimant's employment was based on a valid reason and that due process was followed in line with the mandatory provisions of Sections 41 and 45 of the Employment Act, 2007. Further, that the Claimant has no claim against it, having been paid his terminal dues and issued with a certificate of service dated 17th March, 2015 at the time of separation.
45. The Respondent further submitted that the Claimant had not proved that he was discriminated as alleged in his Memorandum of Claim. The Respondent maintained that the Claimant had failed to discharge the burden of proof by demonstrating the alleged discrimination in line with the provisions of Section 108 of the Evidence Act. For emphasis the Respondent cited the Court of Appeal decision in the case of Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others (2018) eKLR where the Court of Appeal faulted the decision of the trial court in awarding Kshs.500,000/- as damages to a party for discrimination. The Court proceeded to make a finding that there was no basis for the findings that the Respondents were discriminated. The Respondent further cited the case of Louw v Golden Arrow Bus Services (Pty) Ltd (1999) ZALC166 on discrimination where the Court held that the employee had to establish discrimination.



46. The Respondent further submitted that the Claimant had not proved that it infringed on the Claimant's right to dignity under Article 28 of [the Constitution](#) of Kenya, 2010 as contended by the Claimant and maintained that the termination was lawful and did not translate to a claim for infringement of constitutional rights.
47. The Respondent further submitted that the Claim that it had created a hostile working environment for the Claimant should be dismissed for want of proof as no evidence had been availed by the Claimant to support the claim.
48. On the reliefs sought the Respondent submitted that the claims for general damages for discrimination, aggravated damages for humiliation, embarrassment and emotional suffering as well as punitive damages for retaliatory malice and reprehensible and outrageous behaviour before, during and after termination cannot be awarded given that remedies for unfair termination are clearly outlined under Section 49 of the [Employment Act](#), 2007. For emphasis the Respondent cited and relied on the Court findings in the case of *D.K Njagi Marete v Teachers Service Commission* (2020) eKLR where the Court cited the case of *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* (2018) eKLR on exemplary damages.
49. To further fortify the above argument the Respondent cited the Court of Appeal decision in the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others* (2018) eKLR where the Court agreed with the decision of Rika J in the case of *Abraham Gumba v Kenya Medical Supplies Authority* (2014) eKLR wherein the learned Judge held that an employment relationship is not a commercial relationship but a special relationship which must be insulated from the greed associated with profit making motives inherent in commercial contracts.
50. The Respondent maintained that should this court find that the termination was unlawful, which it denied, then the remedies are clearly provided for under Section 49 of the [Employment Act](#), 2007.
51. On the claim for service pay, the Respondent submitted that the Claimant is not entitled to the same by dint of the provisions of section 35 (6) of the [Employment Act](#), 2007.
52. On the claim for house allowance it was submitted that the Claimant's salary was consolidated and therefore inclusive of house allowance. The Respondent urged the Court to dismiss the claim. To buttress this argument the Respondent cited and relied on the Court decision in the case of *Ali Issa Omar v Car & General (Trading) Ltd* (2020) eKLR where the Court held that from the evidence it was clear that the Claimant was paid a gross monthly salary which would ordinarily be inclusive of house allowance.
53. The Respondent submitted that the claim for three months' pay in lieu of notice was also not payable as what was provided for in the employment contract was one month's notice of termination or payment in lieu thereof by either party terminating the employment contract. The Respondent further relied on the provisions of Section 35(1)(c) and 36 of the [Employment Act](#), 2007 on the requisite notice period.
54. The claim for leave days not taken was also denied by the Respondent who submitted that the Claimant's leave days not taken were tabulated and paid vide its cheque dated 31st March, 2015 and the Claimant has no claim against it under this head.
55. The Respondent submitted that the Claimant was also paid salary for the 17 days worked in the month of March, 2015 vide cheque number 003900 dated 31st march, 2015 in the sum of Kshs.36,328.75/-.
56. On the claim for damages for unlawful termination, the Respondent maintained that the same ought to be dismissed as it had demonstrated to this Court that the termination of the Claimant's



employment was lawful and fair, and in strict adherence to the provisions of the statutes. That the issue of unlawful termination would therefore not arise. It urged this Court to dismiss the claim.

57. In conclusion the Respondent urged this Court to find the Claim as filed to be devoid of merit and prayed that the same be dismissed with costs to the Respondent.

Analysis and Determination

58. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto, the issues for determination are:
- a. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
 - b. Whether the Claimant was discriminated by the Respondent;
 - c. Whether the Claimant is entitled to the remedies sought.

Unfair termination

59. Under Section 45(2) of the *Employment Act* termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.
60. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the *Employment Act*. The section provides that –

For any complaint of unfair termination of employment or 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 employment or wrongful dismissal shall rest on the employer.

Reason for Termination

61. The Claimant was issued with a letter of termination dated 17th March, 2015 which reads as follows:

“ 17th March 2015

Mr. Peter Ngetich Mabil

DCST006

Dear Mabil,

RE: TERMINATION OF EMPLOYMENT

We regret to inform you that your employment with Direct Channel Simbatech Kenya Company is hereby terminated immediately.

You may note that verbal and written warnings about your performance have been issued but we've seen no positive change in your performance. Management has reviewed the structures within call center operations and to focus the company to meet emerging business needs and challenges. You could not make the position of an operations Manager with the new envisaged roles and responsibilities.

Your final dues shall be computed and paid as follows:-



Salary for days worked up to 17th March, 2015
Outstanding annual leave as at 17th March, 2015 – 30.75
Salary in lieu of notice – One Month
A Certificate of Service

Please arrange to complete clearance formalities to enable us process and pay your final dues less outstanding company liabilities if any.

We wish you the best in your future employment.

Yours Faithfully,

For & On behalf of Direct Channel Simbitech (K) Ltd

(Signed)

Tecla Adeka Fiona Ramharak

HR OFFICER OPERATIONS MANAGER”

62. Based on the foregoing the reason advanced by the Respondent for the termination of the Claimant’s employment was poor performance. The Respondent further stated that it had reason to believe that the Claimant “could not make the position of an Operations Manager with the new envisaged roles and responsibilities.”
63. In *Jane Samba Mukala v Oltukai Lodge Limited* (2010) LLR 225 the Court observed that–
- “Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”
64. The Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR held:
- “The reason advanced by the Bank for terminating the Respondent’s employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September, 2013) the court observed as follows;
- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
 - c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.



- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”
65. It is clear from the evidence of RW1 that no performance appraisal was conducted by the Respondent to ascertain the Claimant’s performance despite a recommendation to that effect. It is therefore not clear what parameters were used by the Respondent in finding the Claimant’s performance wanting.
66. Even if there had been a performance appraisal the Claimant was entitled to a hearing before termination. The letter of termination does not refer to any hearing. Without a hearing the reasons given for termination could not have been proved.
67. At paragraphs 9, 10 and 11 of the Witness Statement of RW1 which he adopted during the hearing he states: -
9. “THAT as at 13th March 2015 the Respondent was further compelled to issue the Claimant with a Show Cause letter dated 13th March 2015. The Claimant was called upon to show cause for his frequent late reporting, absenteeism, failure to follow instructions and other performance related reasons. Page 18 of the List of Documents.
10. THAT through a letter dated 17th March 2015, the Respondent responded to the Show Cause letter with general denials but failed to specifically respond to the individual issue raised in the letter. He took four days to respond within which he had access information or record to prove his case but failed to do so. Page 19 of the list of Documents.
9. THAT on 17th March 2015, the Respondent was inclined to issue the Claimant with termination letter. According to the pay slip and a copy of Cheque Number 3900 dated 31st March 2015 (Page 31) in my possession, the Claimant was paid his final dues of Kshs 112,105.40. The final dues are broken down as follows: Basic pay Kshs 36,328.75, Leave Pay Kshs.65,712.35, Notice Pay Kshs.65,000.00. Page 30 of the list of Documents.
68. The Claimant’s employment was terminated the very day that he submitted his response to the show cause letter. None of the reasons stated in paragraph 9 of the witness statement which are the reasons given in the show cause letter are mentioned in the letter of termination.
69. The upshot of the forgoing is that the Respondent has not proved that there was valid and fair reason to terminate the Claimant as required under section 45 of the *Employment Act*.

Fair Procedure

70. Section 41 of the *Employment Act*, 2007 provides as follows:
1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

71. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* (2017) eKLR held:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

72. From the evidence before this Court it is clear that a disciplinary hearing was conducted on 4th March, 2015 as evidenced by the minutes of the disciplinary hearing. The purpose of this hearing was to handle alleged complaints against the Claimant herein. The complaints as highlighted in the minutes were as follows:

- i. Absenteeism
- ii. Lateness
- iii. Not following instructions
- iv. Not updating attendance reports and late submissions
- v. Communication problem. Not responding to clients email promptly.

73. None of the issues above touch on the alleged poor performance of the Claimant. RW1 in his evidence testified that he was not aware whether another disciplinary hearing was conducted after the Claimant was issued with the Show Cause letter dated 13th March, 2015. The Claimant responded to the Show Cause letter on 17th March, 2015, the very date that his employment was terminated.

74. No evidence was availed to this Court to prove that the Claimant had been accorded a fair hearing prior to the termination of his employment. In the circumstances, I find that the Respondent has failed to prove that a fair procedure was followed before termination of the Claimant’s employment on account of poor performance contrary to the mandatory provisions of Section 41 of the *Employment Act*, 2007.

75. For these reasons, I find the termination was procedurally flawed and thus the termination of the claimant’s employment was unfair in terms of Section 45(2) of the *Employment Act*, 2007.

Whether the Claimant was discriminated

76. The Claimant in his pleadings and evidence maintained that the Respondent discriminated against him by not giving him bonus despite giving the same to other members of staff at the same rank. The Claimant further maintained that he was denied medical cover despite the same being availed to other members of staff. These averments were not rebutted by the Respondent by way of evidence.



77. The Black's Law Dictionary defines discrimination as follows:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

78. In *Nyarangi & 3 Others v Attorney General* (2008) KLR 688, the Court held that:

“The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows: -

“A particular form of differentiation on illegitimate ground.”...The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification.”

79. Section 5(7) of the *Employment Act* provides that:

In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

80. For an employee to prove discrimination, the employee must demonstrate differential treatment between the employee and other employees to the employee's detriment. The Claimant in this case has proved that there was indeed differential treatment to his detriment and I find accordingly.

Whether the Claimant is entitled to the remedies sought

81. The Claimant prayed for a raft of reliefs. The same are considered below.

i. Unfair Termination

82. This Court has examined the reasons and merits for the termination of the Claimant's employment as outlined above and has determined that the termination was unlawful, unfair and in breach of the *Employment Act*, 2007. A declaration is made to that effect.

ii. General Damages for discrimination

83. The court has already determined that the Claimant has proved that he was discriminated by being removed from the medical scheme which was part of his benefits in the letter of appointment while other employees remained in the scheme. He testified that he was told that he was a single man and did not need a medical cover. He has further proved that he was not paid bonus which was paid to other employees.

84. At the hearing the Claimant narrated in detail how he was subjected to demeaning and embarrassing treatment. He broke down severally while explaining the suffering he endured at the workplace. He testified that he was demoted unilaterally against company policy which provided that a demotion can only be imposed with written consent of the employee. The demotion was from the position of



Operations Manager to supervisor. The demotion entailed changes in working hours and shifts, among other detriments. The demotion included a reduction of salary.

85. In a further demonstration of malice the Claimant testified that the Respondent cancelled the cheque for the payment of his terminal dues after it had been deposited in the Bank.
86. The Claimant testified that the termination of his employment was a conspiracy between the Operations Manager, one Fiona Ramharak, the Call Centre Manager and Head of Training, one Dorothy Lavuna Mwaniga, and the Human Resource Manager Tecla Adeka. He testified that the conspiracy came to light when a skype conversation between the 3 got leaked. A copy of the same was filed by the in his Supplementary List and Bundle of Documents dated 21st October 2015.
87. The treatment that the Claimant had to endure is captured in his email dated 17th March 2015, the date he was dismissed. The same is reproduced below: -

“From: Peter Mabil <mabil@dcsimbatech.com>

Date: Tue, Mar 17, 2015 at 8:35 PM

Subject: Unfair Dismissal and Conspiracy

To: suleiman.sheikh@directchannel.co.za, HennauW@directchannel.co.za,
ajit@simbatech.biz, SulemanS@directchannel.co.za

Cc: Fiona -kenya Mail <fiona@dcsimbatech.com>, Harry Rotich
<harry.rotich@dcsimbatech.com>, Liza
Kinyua<liza.kinyua@dcsimbatech.com>,jacquesp@directchannel.co.za,rishi@dcsimbatech.com,
tecla.adeka@simbatech.biz, . p

nmabil@gmail.com

It is with a heavy heart that I write this email following what transpired today.

The last 2 months has been the hardest in my entire 6 years working with Direct Channel. Albeit the intimidation, daily humiliation and embarrassment in front of my juniors, name calling, racist remarks, insubordination i managed to let it go and focus on my work.

There was a clear plan to have me and some of my colleagues fired through a well orchestrated scheme. I had decided that i will let God's will be done and leave in one peace. Until this evening i was humiliated in front of the staff that were looking up to me and was chased out like a dog by Fiona but not before creating a scene.

Following the unfortunate incident i will have to seek legal redress to regain back my dignity which I have worked so hard to gain and has been tored in a second.

Tecla in your position as the Human Resource you ought to have known better in right procedures and read between the line and not let yourself be used in a witch hunt conspiracy by Dorothy and Fiona, I requested for further investigation but you wouldn't have any of it.

From the attached part of the evidence the evil has prevailed. But I promise it won't happen to anyone else Liza, Harry, TL's in queue.

I must say that direct channel is a great brand and out of the loins of a hard working great gentleman it has come to be what it has. At the rate at which things are going something needs to be done urgently. Nepotism, Corruption, intimidation, mismanagement, favoritism, client mistreatment is taking root. Do not let this happen!



Kindly allow me to share some damning evidence separately and selectively further from the attached.

Thank you Direct Channel and God bless you.”

88. It is for the foregoing reasons that I award the Claimant general damages of Kshs.2,000,000/-.

iii. Service Pay

89. The Claimant is not entitled to service pay by dint of the provisions of Section 35 of the [Employment Act](#), 2007 as he was a member of the National Social Security Fund (NSSF).

iv. House Allowance

90. The Claimant maintained that he did not receive any house allowance during his employment with the Respondent. The Respondent on the other hand contended that the Claimant received a consolidated salary and was therefore not entitled to a separate house allowance.

91. A consolidated salary by definition includes basic pay and housing allowance. Section 31(2) of the [Employment Act](#) refers to consolidated salary in the following terms: -

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
2. This section shall not apply to an employee whose contract of service—
 - a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
 - (b)
 - b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).
3. The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employees shall be dealt with as shall be specified in the notice.

92. The Claimant’s employment contract provided under the heading “Remuneration” as follows:-

“You will be paid a basic consolidated salary of Kshs.15,360/- (Fifteen Thousand Three Hundred and Sixty only) per month. This amount will be inclusive of housing.”

93. The Claim for house allowance is accordingly declined.

v. 3 months’ salary in lieu of notice

94. Having found that the Claimant was unfairly terminated, he is entitled to pay in lieu of notice by dint of Section 36 and 49(1) of the [Employment Act](#), 2007 as read with his employment contract which provided for one month’s notice or pay in lieu thereof. I thus award the Claimant the sum of Kshs.65,000/- as already offered by the Respondent. (Refer to page 30 of Respondents List and Bundle of Documents).



vi. Leave days not taken.

95. The Claimant attached his leave forms. The same forms are also attached to the Respondent's bundle of documents. The forms reflect that for the period the Claimant was in employment he took only 44 days leave. Having been entitled to 21 days leave per year for the period from September 2009 to 17th March 2015 when his employment was terminated, the Claimant is entitled to 113.75 days. He is thus

$$\frac{113.75 \times 65,000}{26}$$

entitled to () Kshs.284,375/- which I award him.

vii. Maximum compensation of 12 months for wrongful dismissal

96. Considering the claimant's length of service and the Respondent's conduct in the termination transaction, it is my view that an award of 8 months' salary as compensation in the sum of Kshs.520,000/- is reasonable under this head. I accordingly award him the same.

viii. Costs and Interest

97. The Claimant is also awarded costs and interest on terminal dues from date of filing suit and on all other claims from the date of Judgment until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2023

MAUREEN ONYANGO

JUDGE

