



**Wambui & 4 others v Kenya Utalii College (Employment and Labour Relations Cause 595, 345 & 266 of 2016 (Consolidated)) [2023] KEELRC 1270 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1270 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS  
CAUSE 595, 345 & 266 OF 2016 (CONSOLIDATED)**

**AN MWAURE, J  
MAY 19, 2023**

**BETWEEN**

**WINNIE WAMBUI & 2 OTHERS ..... CLAIMANT**

**AND**

**KENYA UTALII COLLEGE ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE 345 OF 2016**

**BETWEEN**

**DANIEL KIPCHUMBO TUNGO ..... CLAIMANT**

**AND**

**KENYA UTALII COLLEGE ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE 266 OF 2016**

**BETWEEN**

**RAYMOND ROBERT NGETICH ..... CLAIMANT**

**AND**

**KENYA UTALII COLLEGE ..... RESPONDENT**



## JUDGMENT

1. This claim was consolidated with Causes Numbers 266 of 2016 and 345 of 2016 both filed in year the 2016. The lead file is the current file which now has three claimants after consolidation alleging unlawful and unfair termination by the Respondent.
2. The 1<sup>st</sup> claimant, Winnie Wambui Ndonge says that she worked for the Respondent until February 17, 2016 when the Respondent unlawfully and unfairly terminated her and refused to pay her terminal dues. Her last salary per months was Kshs 23,985.03 as a secretary having risen through the ranks from her first employment position of a messenger.
3. She avers that she was invited to assist in the investigations into the alleged fraud in the institution as a witness and not as an accused. Nevertheless, she was suspended to pave way for investigations. Following the suspension, she was never invited for any hearing to defend herself and that she had done nothing to warrant action being taken against her. The decision was harsh considering she had served the Respondent without blemish for over 5 years.
4. The 2<sup>nd</sup> claimant Daniel Kipchumba Tungo avers in his statement of claim that he was employed by the Respondent as a captain and worked as such continuously with due diligence and to the satisfaction of the Respondent. His last salary was computed at Kshs 43,695 per month as of March 2015. He avers that the Respondent without reasonable cause proceeded to summarily dismiss him on the February 8, 2016 by alleging acts of gross misconduct on the part of the claimant.
5. He says that his dismissal was irregular as he was invited to defend himself in a hearing where the accuser presided over as the judge. He had done nothing to warrant such action against him. The decision to dismiss him was harsh considering he had served the Respondent for over 16 years without blemish and no salary in lieu of notice and severance pay was paid.
6. The 3<sup>rd</sup> claimant Raymond Robert Ngetich avers that he worked for the Respondent from October 26, 2006 until February 11, 2016 when the Respondent unlawfully and unfairly terminated his services and refused to pay him terminal dues. The claimant's last salary was computed at Kshs 63,000/= per month while working as an assistant store keeper having risen through the ranks from his first employment in the position of messenger.
7. He says the Respondent without compliance with the *Employment Act* Cap 226 laws of Kenya, the *Constitution* and principles of natural justice proceeded to unfairly and unlawfully terminate his employment services as he was invited to defend himself in a hearing where the accuser presided over as the judge. He had done nothing wrong to warrant action being taken against him. He had served the Respondent for over nine years without blemish therefore the decision to dismiss him was harsh. No salary in lieu of notice was paid and the required severance pay was not paid.
8. The claimants pray for the following;
  - a. A declaration that the Respondent's action of terminating the claimants was unlawful, unfair and that the claimants are entitled to payment of their terminal benefits and compensatory damages
  - b. An order for the Respondent to pay the claimants terminal benefits and compensatory damages totalling Kshs 579,691 for the 1<sup>st</sup> claimant, Kshs 1,468,250.00 for the 2<sup>nd</sup> claimant and Kshs 1,325,574.00 for the 3<sup>rd</sup> claimant.



- c. Interests on (b) above from the date of filing suit until payment in full.
  - d. Reinstatement of the claimants as an alternative to payment of terminal benefits and compensatory damages.
  - e. Costs of the suit.
  - f. Any other relief the Honourable court may deem fit to grant.
9. The Respondent filed the amended defence and counter claim dated the March 20, 2017 and filed on the March 20, 2017. The Respondent/claimant admits in the defence and counter claim that the Respondent were its employees working in different departments and having varied duties and responsibilities. The claimants' employment was terminated in accordance with the provisions of the Employment Act, Cap 226.
10. The Respondent/claimant in the counter claim says that Daniel Kipchumba Tungo was a senior supply chain officer whose duties and responsibilities included inter alia raising purchasing requisition forms, ensuring that every item is checked from the quality angle, identify requirements of the user and issue materials delivered without any delay. Lucky Litole was at all times the officer in charge of the stationery section in the stores department and his duties and responsibilities included receiving storing and issuing goods as per the stores requisition notes.
11. The respondent/claimant avers that the claimants in collusion with various suppliers, in breach of their duties and the immense trust placed on them by the respondent's official jointly and severally facilitated the loss, plunder and or theft of goods and /or funds from the respondent. The respondent/claimant suffered loss and damage and claims jointly and severally as against the claimants the total sum of Kshs 2,256,722.31. The Respondent suffered loss as the said goods were never delivered to the College yet the same were paid for through invoices drawn and requested for by the claimants on behalf of the Respondent.
12. The Respondent prays for the following;
- a. Kshs 2,256,722.31
  - b. Interests on (A) above at Court rates from date of filing suit until payment in full
  - c. Dismissal of the Plaintiff's suit
  - d. Costs of the suit
  - e. Any other relief that this honourable court may deem fit and just to grant.
13. In the response to the counter claim dated the September 29, 2020, the claimant Daniel Kipchumba Tungo says that he was not aware of the work and responsibility of the 3<sup>rd</sup> claimant and that he is a stranger to the suit. He denies that between August, 2012 and December, 2015 in collusion with various suppliers, he breached his duty and facilitated the loss, plunder and theft of goods and/or funds from the respondent. He denied that neither through the act of omission or commission did he append any signature on any invoices from the suppliers for goods that were never delivered to the claimant.

### **Claimant's Evidence**

14. Raymond Robert Rotich testified as claimant witness no 1. He gave sworn testimony and adopted the filed statement dated the February 22, 2010 as his evidence in chief. He also adopted the documents as contained in the list dated February 22, 2016 as exhibits in the case.



15. In cross examination, he said that he was the one who was in charge of the computer and that anybody who wanted to requisition items in the store department can log in any other computer. He added that he had no authority to requisition any items on behalf of the college. He further says he did not log in and requisition for items.
16. He said that between July 2014 to March 2015 he worked with Winnie Wambui and Daniel Tungo. There was a computer in his office but which was used by three different persons. He had authority to receive goods for store and issue them. The department would order goods but he would raise the purchase requisition and had to rely on other departments for the goods they needed. He said that there were allegations of mismanagement of goods which he got to know at the point of termination and those allegations were not the ones he was terminated for. He says he was given chance to appear for hearing but could not access his office as he was on suspension. The internet protocol numbers and the orders were in the names of Peter Ngugi and he had a right to use the computer. He says he did not see Ngugi use the computer in his store. In re-examination, he said that he was never assigned an IP address.
17. Claimant witness No. 2, Daniel Kipchumba Tungo was affirmed. He adopted the witness statement dated the March 8, 2016 as his evidence in chief. He testified that on the March 13, 2016 a memo was circulated claiming that there was malpractice in his area of work. The memo claimed there were missing goods and he was asked to explain. He wrote to the head of Department and availed documents showing the goods were available.
18. On the May 8, 2016 he got another memo alleging gross misconduct on his part. They were summoned before committee on May 12, 2016 and he tried to express himself but the allegations were different. The members were the same ones alleging loss of goods. On the May 18, 2016 he got another memo suspending him to enable the organisation to carry out further investigations. He says after that he never got a hearing. He also says he was never investigated nor shown any proof of those allegations and he was never charged with any criminal offence.
19. In cross examination he said that he could not place orders for certain items with his credentials and it was his duty to confirm the goods were received in his store. He also said he could not confirm the value of the goods lost and did not see the report dated the June 29, 2021 and filed on the July 31, 2021.
20. Witness No 3 for the claimant one Winnie Wambui testified that she was summarily dismissed from employment by the Respondent College. She testified that she was suspended by the Committee investigating a fraud alleged to have been committed but she was called as a witness. On the May 22, 2016 she was given a memo which was alleging that she had participated by giving a password of the business development manager and fraudulently executed some transactions. The letter said that she had received the password of the Manager and 4 years later she used it.
21. Winnie was issued a suspension letter dated the June 3, 2015. She was served with a show cause letter dated the December 15, 2016 and the letter said she was given a chance to defend herself and she explained about the password of a senior manager. She was told the respondent lost Kshs 5,419,109/=. After writing back her defence she was given a summary dismissal letter and was told if she was dissatisfied, she should appeal the decision to the College Board. She avers that she was unfairly terminated as the employer never said why she was being terminated. The employer did not tell her why she was being suspended and did not give her a chance to defend herself. She adopted the documents in list of documents as exhibits 1-10.



22. In cross examination, she said that Mr Ngugi never authorised her to order for the goods but could only use his password when urgent. She says when she was informed there was a committees investigating her she saw documents which had her name typed but did not have her signature

### **Respondent's Evidence**

23. Respondent witness No 1 Wilson Kamau Mwangi gave sworn testimony. He said he retired from the Respondent's College but had held various positions with the Respondent among them Acting principal of the College. He adopted the witness statement dated the August 12, 2021 as his evidence in chief. He also adopted the documents contained in the list filed on the November 2, 2021 as exhibits in the case.
24. In cross examination he said that he had not indicated in his statement the lost goods as what is given is a summary of his statement. He said one Peter Ngugi did not give Ngetich his password to his knowledge. The computer showed that password of Peter Ngugi was used by Mr Ngetich. He admitted that anyone can log in with password but the computer number will be shown. He mentioned that the accusation of gross misconduct is not specific of the goods lost.
25. The Respondent witness said they lost the money between 2014 to April 2015 and they did not report the matter to the police.
26. Respondent witness No 2 Najai Oseme gave sworn testimony and said that he works for Kenya Utalii College as Human Resource Officer. He adopted the witness statement dated the August 11, 2021 as his evidence in chief. He produced the list of documents dated June 29, 2021 including the personnel policy dated the October 14, 1993 and a letter dated the March 11, 2014 in respect of Mr Ngetich. In regards to Winnie he produced the list of documents dated August 12, 2021 and code of regulations 2006 revised and other exhibits Nos, 2, 3, 4, and 5 in the pleadings.
27. The witness said that Mr Ngetich was accused of participating in the loss of goods and there was a comprehensive report on the issue.
28. He said that after investigations Raymond was found to have been involved in loss of Kshs 2, 678,624/- . The reason is that he was accused of losing Kshs 2,678,624/= for goods purported to be sent to Utalii College yet were never received. They did not report the issue to the police as they handled the matter internally. The show cause letter referred to loss of Kshs for 2,600,000 besides the one for Kshs 60,000. He could not remember when the syndicate occurred. There was according to him a chance that another person could have interfered with the password. He said he was not the head of HR and could not report the claimants to the police.
29. Respondent witness No 3 Peter Kiboi Ngugi gave sworn testimony and said that he is the business development and consultant manager of the respondent. He adopted the witness statement dated August 12, 2021 as his evidence in chief. He produced documents numbers 6 and 7 as exhibits in the case.
30. In cross examination he said he never worked with other claimants but only Winnie. He said that he gave three people his password. A committee was set up to investigate the matter and he was also being investigated. It was decided Winnie was culpable. He said his giving out the password did not lead to the losses to Utalii. He also said that there are control measures where there is initiator and approver of transactions.
31. Respondent witness no 4 Nancy Chepkangor gave sworn testimony and adopted the witness statement filed on the August 12, 2021 as her evidence in chief. She said she is the ICT systems person. She testified



that Mr Ngugi by giving his password went against the employee's policy. On being referred to PG 152 she said that the logins shows that Mr Ngugi's password was used to order for goods. She further said that she had no evidence that the three claimants used their own passwords to access the system.

### Submissions by claimants

32. It was submitted on behalf of the claimant, Raymond Robert Ngetich, Winnie Wambui and Daniel Tungo their rights to fair hearing were not considered and they were to defend themselves on new accusations sprung to them on their feet. Their submissions are dated January 25, 2023. The issue of the loss of Kshs 93,573.19 was never even brought up to the disciplinary tribunal. The witness say no witnesses were ever brought up at the disciplinary tribunal hearing.
33. They relied on the case of [Donald Odeke versus Fidelity Security Ltd, Cause No 1998 of 2011](#) where it was held that:

' An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against him.'
34. They further said that according to the court in the case it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair. That fair procedure was not applied hence the dismissal was unfair and unlawful.
35. They also relied on the Cause No 2525 of 2012 [Abisolom Ajusa Magomere versus Kenya Nut Company Limited 2014 eKLR](#), where the court stated 'that From the evidence on record, the Respondent did not comply with the procedural fairness requirements set out in section 41 of [Employment Act](#) and the Court therefore finds that apart from failing to prove valid reasons for the termination of the claimant's employment, the procedure followed fell below the required threshold set out in law. Overall, I have arrived at the conclusion that the termination of the claimant's employment was unfair for want of substantive justification and procedural fairness.'
36. It is argued that the Respondent therefore failed to discharge the burden of proving that the termination of the claimant's employment was fair and justified as required by sections 41, 43 and 45 of the [Employment Act](#). Having failed to discharge this legal burden, there can only be one conclusion that the termination of the claimant was unfair, unlawful and inhuman.
37. The Respondent in alleging gross negligence and gross misconduct and so had an obligation to prove to the court that the process followed in terminating the claimant's employment was fair and above board and within the requirements of sections 41, 43 and 45 of the [Employment Act](#). None of the above was adhered to and they failed to bring evidence to court to justify their actions.
38. There are no other submissions in the file

### Issues for Determination

- i. Whether the claimants were unfairly dismissed
  - ii. The remedies, if any, the claimants are entitled to
39. The evidence of Peter Ngugi regarding the case before court is that the Respondent herein had established satellite campuses in Mombasa and Kisumu and that it was his responsibility and duty to order goods for the two campuses as and when they were needed. It is his evidence that there was Navision system operating and he was trained on how to use the same and then assigned a password by the IT department. He said that since the job entailed regularly visiting Kisumu and Mombasa and



campuses and also moving around looking for business opportunities for his employer, he shared his password with the claimant, Winnie Wambui.

40. Section 45 of the Act provides in part as follows: -

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove: -
  - (a) That the reason for the termination is valid;
  - (b) That the reason for the termination is a fair reason: - Related to the employees conduct, capacity or compatibility; or -Based on the operational requirements of the employer; and -That the employment was terminated in accordance with fair procedure.'

41. Section 47(5) of the Act provides as follows: -

' 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.'

42. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.

43. In the Court of Appeal case in *Kenya Revenue Authority vs Renwel Waithaka Gitahi & 2 others [2019] eKLR* the court said that:

' The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it 'genuinely believed to exist,' causing it to terminate the employee's services. That is a partly subjective test.'

44. The Court went further and observed that:

' In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.'

45. Lord Denning MR in *Leyland UK Ltd versus Swift 1981 IRLR*; said that the test is

' Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer



might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which an employer might reasonably take one view; and another quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.'

46. The accusation against Raymond Ngetich is that he was involved in all fraudulent transactions as he allegedly used Mr Peter Ngugi's and Mr P Kibai's passwords because these passwords were logged in and used in his computer several times.
47. Mr Ngetich said he was in charge of the computer but the computer was available for three other users. He says he was not in charge of requisitioning goods but the same were requisitioned by one Peter Ngugi who was also the custodian of the password. The claimant says he was in charge of store but computer password was owned by Peter Ngugi who was his senior.
48. He said he never used Peter Ngugi's password and he only learnt of the charges against him at the point of termination. The dismissal letter dated February 8, 2016 provided that the claimant conspired with college suppliers and committed a criminal offence contrary to the Employment Act. The letter further provided that as a result of the college lost Kshs 2,678,624/- and was purported to have received goods that were not delivered to the college.
49. The claimant avers that the goods alleged to have been lost were not lost but were pending collection by the requisitioning entities. The claimant says he made explanation to the respondent but was issued a show cause letter and goods alleged to have been lost were worthy Kshs 93,573/19. He says he was then invited for a disciplinary hearing on May 12, 2015 and was accused of conspiring to defraud the employer which led to loss of goods worthy Kshs 2,678,624/-. He says he was asked to put an explanation and he did but was still dismissed on February 8, 2016.
50. The process and reasons given for the termination of this claimant kept changing. On March 19, 2015 he was asked to explain disappearance of goods and on March 23, 2015 he was informed the goods lost were worth Kshs 60,506/99.
51. The charge for gross misconduct dated March 23, 2015 referred to goods worthy Kshs 93,573/19 and value of goods quoted in the suspension letter was 60,506/99. All these contradictions show the respondents were not clear of the reasons why the claimant one Ngetich should be summarily dismissed.
52. The claimant attended a hearing on May 12, 2015 to discuss malpractice in the college stores. In the letter there was no reference of goods lost but was merely accused of malpractice in the store.
53. Suspension letter was issued on April 1, 2015 and claimant was accused of involvement in fraud that led to loss of goods valued at Kshs 60,506/99.
54. Finally the show cause letter of December 15, 2015 accused him of defrauding college and leading to the loss amounting to Kshs 2,678,624/-. He was asked to put a response. Finally on February 8, 2016 without any further hearing to the enhanced charges the claimant was served with a summary dismissal letter. The minutes of the committee are annexed exhibits and several other employees were faulted including Mr Mungatana, Mr Osiri and Peter Ngugi.



55. If at all goods were lost as claimed the committee should have presented fairly constant figures and not some ranging from 60,000/- to 5 million. The staff members who would have been involved in the malpractice were seven in number and is not clear why the three in these consolidated suits were singled out and summarily dismissed.
56. The court finds the reasons given for termination of Mr Raymond Ngetich is not consistent with the provisions of sections 43 and 45 of the [Employment Act](#) and the procedure followed is a foul to section 41 of the [Employment Act](#).
57. The court noted that claimants were accused of committing criminal acts contrary to [Employment Act](#). There are no criminal acts of course contrary to employment law but should be contrary to the penal code among others.
58. Also for Mr Daniel Tungo his summary dismissal letter dated also February 8, 2016 and he was informed that they defrauded the college of goods worthy Kshs 711,000/- by forming a syndicate that purported to have received goods with the above mentioned amount and yet the goods were not delivered to the college.
59. The charge is the same as the one against Raymond Ngetich and yet it is not detailed the persons who formed the syndicate. The goods purported to have been lost are now valued at Kshs 711,000/0 but for Raymond Ngetich were worthy Kshs 2,678,624/-.
60. The same inconsistencies and discrepancies noted in the evidence against Raymond Ngetich are also observed in these allegations against Daniel Tungo.
61. The court is inclined to observe the discrepancies in the evidence raised against the claimants is glaring and makes it hard to point out clearly the reasons presented to justify their being dismissed from their employment.
62. It is crucial to observe that Mr Peter Ngugi admitted in his evidence in court that he gave out his password to three other people and that act may have led to loss of college money. In the investigation report Mr Ngugi was noted to have been careless in performance of his duties. Three officers apparently had his password including Lilian Mjombah, Bernadette Matelong and Winnie Wambui. No evidence is given why out of the three only Winnie Wambui was singled out for summary dismissal.
63. Again in the investigations report the recommendations were to put seven employees through disciplinary action. Again only three were summarily dismissed after they were given show cause letters even though they were not put through disciplinary hearing in the strict sense.
64. Winnie Wambui like the other two claimants received summary dismissal letter dated February 8, 2016 and was accused of leading the college to loss goods worthy Kshs 711,000/ through a syndicate that worked with her. Once again the syndicate is not named and the goods lost are not listed down.
65. So once again the reasons given for the summary dismissal are opaque and there is no disciplinary hearing as provided in mandatory terms under section 41 of the [Employment Act](#).
66. The court finds there are too many inconsistencies and discrepancies in the pleadings and evidence adduced by the respondent to uphold sound reasons for their summary dismissal of the claimants and so is inclined to find the claimants were unfairly, wrongfully and unlawfully terminated.



67. In the case no 2522 of 2012 Abisalom Ajusa vs Kenya Nut Company Ltd which is just one of the numerous authorities that support this finding said as follows:

' From the evidence on record the respondent did not comply with the procedural fairness test requirement set out in sections 41 of the Employment Act and the court therefore finds that apart from failing to prove valid reason for termination of claimant's employment the procedure followed fell below the required threshold set out in law.'

68. In conclusion the court finds the termination of the three claimant's employment was unfair for want of substantive justification and procedural fairness.

69. The court finds under the circumstance, the respondent is required to compensate the claimants as follows:

70. Raymond Ngetich Case No 266 of 2016

- (a) One month salary in lieu of notice Kshs 63,000/- is unpaid leave allowance
- (b) Unpaid leave allowance no proof and hence is declined.
- (c) Severance pay is not applicable having terminated by dismissal not redundancy so is declined
- (d) Long years of service is not proved in any specific way so is declined
- (e) Unpaid commuter allowance is also not proved and so is declined.
- (f) Compensation is awarded for unlawful termination or 5 months x 63,000/- = 315,000/-.

Total awarded is Kshs 378,000/-

He is also awarded costs and interest at court rates from date of judgment till full payment.

71. Daniel Tungo Case No 345 of 2016

- (a) One month salary in lieu of notice Kshs 43,693/-
- (b) Unpaid leave allowance is not proved and is declined
- (c) Severance pay is declined as claimant was not declared redundant
- (d) Long years' service is not proved and is declined.
- (e) Unpaid increased commuter allowance is also not proved and is declined.
- (f) Unpaid increase house allowance has no support evidence and is declined.
- (g) Compensation is awarded at 5 months' salary which amounts to Kshs 218,475

Total ward is Kshs 262,170/-

h. Costs are awarded to the claimant and interest at court rates from date of judgment till full payment.

72. Winnie Wambui Case No 595 of 2016

- (a) One month salary in lieu of notice Kshs 23,985/03.



- (b) Severance pay is declined as claimant was not terminated through redundancy.
  - (c) Unpaid leave allowance is not awarded as is not proved.
  - (d) Unpaid house allowance is also not proved and so is declined.
  - (e) Unpaid increased commuter allowance is not proved and is declined.
  - (f) Compensation for unfair termination is awarded equivalent to 5 months totalling amounting Kshs 119,925/15.
  - (g) Acting allowance is also not proved and is declined.
- Total award is Kshs 143,910/18
- (h) Claimant is awarded costs and interest at court rates from date of judgment till full payment.

73 **Respondent counterclaim**

There is a counterclaim by the respondent against Daniel Tungo for Kshs 2,256,722.31/-. This counterclaim is by way of liquidated damages and requires specific proof demonstrating how the money claimed by the respondent now claimant was computed and the court finds no such evidence from any documents or adduced evidence. The court therefore finds the counterclaim is not proved and so is not granted. Parties will each bear the costs of the counterclaim.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF MAY, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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.\*\*

**ANNA NGIBUINI MWAURE**

**JUDGE**

