



**Namachi v Tesia Supermarket (Employment and Labour Relations Claim
1 of 2022) [2023] KEELRC 1503 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1503 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 1 OF 2022**

JW KELI, J

JUNE 21, 2023

(FORMERLY NAIROBI ELRC 1982 OF 2016)

BETWEEN

DORINE ANYANGO NAMACHI CLAIMANT

AND

TESIA SUPERMARKET RESPONDENT

JUDGMENT

1. The claimant upon dismissal from employment vide memorandum of claim dated 21st September 2016 and filed in court on the 22nd September 2016 sought the following reliefs against the respondent:-
 - a. Kshs, 432,541.50 (terminal benefits and compensation for unfair termination)
 - b. Costs of the claim plus interest
 - c. Any other relief the Honorable court may deem just.
2. The claimant in addition filed on even date her verifying affidavit to the claim sworn on the 20th September 2016, list of witnesses, her witness statement of even date and the bundle of documents produced as C- exhibits 1-to 3.
3. The claim was opposed by the respondent who entered appearance through the law firm of Bogonko Otanga and company advocates and filed answer to the claim dated 2nd January 2018 together with list of witnesses, respondent's witness statement by John Paul Akure dated 2nd June 2018 and the list of documents of even date and the bundle of documents.
4. The claimant's case delayed as per the record it was initially filed in Nairobi and transferred to Bungoma in 2022. The record also indicates the claimant failed to appear in court to prosecute the case on several occasions.



Hearing

The claimant's case

5. The claimant's case was heard on the 18th January 2023 where she testified on oath(CW), adopted her written witness statement dated 20th September 2016 as her evidence in chief, and produced her documents as exhibits C-1, 2 and 3. The claimant was cross-examined by counsel for the respondent, Simbika.

The respondent's case

6. The Respondent's case was heard on the 18th January 2023 where its witness John Paul Akure (DW) testified on oath as the respondent's witness of fact and adopted his written witness statement dated 2nd January 2018 as defence evidence in chief, and produced defence documents as exhibits D-1-5. DW was cross-examined by counsel for the Claimant Nechesa Maina.

Claimant's case in summary

7. The claimant was a former employee of the respondent(a supermarket) where she was dismissed vide letter dated 24th September 2013 on grounds of having been caught up sneaking some products without permission an act the employer stated to be gross misconduct(C-exhibit 1). The claimant sought for terminal dues for notice pay , unpaid days worked, rest days, leave days, national holidays, uniform reimbursement , overtime, house allowance and underpayment as well as compensation for unfair termination tabulated to a total sum of Kshs 432,541.50/-
8. The claimant during cross-examination told the court she was employed in 2012 by Tesia supermarket and relied on her dismissal letter, that she worked full day without shifts, that she was dismissed from employment for reason that she stole Vaseline oil, that she wrote an apology letter on being forced so as to return to work but had no evidence of being forced, the advocate wrote in paragraph 11 she was found with the oil, she had no evidence in court that she got the Vaseline jelly oil from the alleged sales promotion lady, she did not take leave and did not get overtime, had no evidence on her stated salary of kshs 9600, had no evidence of having purchased the uniform , had no evidence of the working overtime. The witness was silent on the apology she wrote being basis of the police not charging her.
9. On re-examination the Claimant told the court that she worked for the respondent for 1 year and 3 months, she was not paid overtime, she wrote apology letter after she was not allowed in the premises as requested by the general manager, she was not accorded hearing before the dismissal, she was not aware of minimum wages and that the employer had record on leave.

The Respondent's Case

10. DW was John Paul Akure a former human resource officer of the respondent who told the court the claimant was caught with items should could not verify hence summarily dismissed. The dismissal was proper as it was a mistrust issue.
11. During cross-examination DW told the court he had left the employment of the respondent as human resource officer and relied on record as he was not there when the claimant was dismissed from employment, that the respondent considered out of court settlement was the claimant apologised when the matter was reported to the police, the employer could not work with her because of mistrust, the company wanted to settle the case on receipt of demand letter as it did not deem the case was necessary, there was no record of reporting to the police, they had disciplinary proceedings but no



records of disciplinary proceedings before the court, the claimant was caught with the items, no record of warnings before the court.

12. On re-examination DW told the court the matter was reported to the police and on apology of the claimant the matter was not recorded in the OB. That since she apologised the claimant was dismissed for lack of trust, the items she was caught with were sold in the supermarket, that any items sold in the supermarket should be reported and stored to be picked later. That he was updated on the case.

Written submissions

13. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by Nechesa Maina & Associates Advocates and dated 19th April 2023. The respondent's written submissions were drawn by Bogonko, Otanga & Co. Advocates and dated 24th April, 2023.

Determination

Issues for determination.

14. The claimant in their written submissions identified the following issues for determination:-
 - a. Whether the claimant was an employee of the respondent.
 - b. Whether the respondent observed procedural fairness and due process before terminating the services of the claimant
 - c. Whether the claimant was entitled to reliefs sought
15. The Respondent in their written submissions identified and addressed merit of the case, the reasons for the dismissal and its fairness, the employment status and reliefs sought.
16. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion the issues placed before it by the parties for determination of the dispute were follows:-
 - a. Whether the claimant was an employee of the respondent.
 - b. Whether the termination of employment of the claimant by the respondent was lawful and fair
 - c. Whether the claimant was entitled to reliefs sought

Issue 1 Whether the Claimant was an employee of the respondent

17. The respondent submits that the claimant was employed as a casual labourer by the respondent herein on a day to day contract as a shop assistant for a salary of Kshs. 6,377/- per month and the claimant accepted the terms of the letter by signing a letter of appointment. The claimant submits she was an employee having signed agreement as admitted by the respondent in memorandum of response.
18. Neither party produced the said agreement of employment. At the hearing the claimant relied on the dismissal letter as prove of employment (C-exhibit 1). The said dismissal letter at paragraph 1 of the body stated:- 'you have been dismissed from being an employee of Tesia Supermarket as from this date 22/09/2013...'
19. DW in witness statement adopted as defence evidence in chief stated at paragraph 2. 'That the claimant was employed in our shop in Busia Town as shop assistant in or around July 2012 on a day to day



casual contract for a salary of Kshs. 6,377 per month.” In paragraph 3 DW stated the claimant accepted the terms of appointment by signing the letter of appointment. The letter of appointment was not produced.

20. The court finds that it was not in dispute that the claimant was employed by letter of appointment in July 2012 and was dismissed from service vide letter dated 24th September 2013 which read:- ‘ you have been dismissed from being an employee of Tesia Supermarket as from this date 22/09/2013...’
21. The issue in dispute then would be whether the claimant was a casual Employee or contractual employee. The Employment Act section 2 defines a casual employee as follows:- “casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time; and “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner; ’
22. The court finds that the claimant was an employee of the Respondent. As to whether she was a casual the claimant having served continuously for more than 3 months being from July 2012 to 24th September 2013 then even without the production of the letter of appointment on terms of engagement the said employment could not have been casual and if it was, then it converted to contractual employment upon lapse of 3 months of continuous employment as provided under section 37 of the Employment Act and the employee became entitled to all statutory rights of a permanently engaged employee. Section 37 of the Employment Act provides for conversion of casual employment as follows:- ‘37. Conversion of casual employment to term contract (1) Notwithstanding any provisions of this Act, where a casual employee— (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.’
23. The court found the authorities cited by the claimant on what was contract of service and contract for service irrelevant to addressing the issue.
24. In the upshot the court holds that the claimant was a contractual employee of the respondent from 1st July 2012 to 24th September 2013 when the contract was terminated vide summary dismissal.

Issue 2 Whether the Termination of Employment of the Claimant by the Respondent as Lawful and Fair

25. The court in determination of the issue was guided by the provisions of section 45 of the Employment Act which states:- ‘Unfair termination 45(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— (i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.’

Claimant’s case

26. On the validity of the reasons for the termination of the employment , the claimant submits that the termination was unfair as no proof was provided on the allegations of theft. That being a criminal allegation high standard of proof was required and for lack of proof that the claimant was involved in theft the employer had no option but to withdraw the case in name of saving the reputation of



the business. On procedural fairness the claimant was not accorded the chance for hearing to defend herself over the alleged claims that she had stolen from the respondents. To buttress her submissions the claimant relied on the decision by Justice D.K Marete in *Daniel Kiplagat Kipkeibut v Smep Deposit Micro Finance limited* (2016) eKLR where the court cited with approval decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the court held that:- ‘...For termination of employment to pass the test of fairness , there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.’ The claimant further relied on the decision in *Nicholas Muasya Kyula v Farmchem limited* industrial cause no. 1992 of 2011 (2012)LLR 235(ICK) where the court held that in allegations of misconduct the employer is required to have internal systems and process of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.

Respondent’s case

27. The dismissal letter (c-exhibit 1) dated 24th September 2013 was titled ‘dismissal letter due to theft and dishonesty’ and details were stated as follows:- ‘You have been dismissed from being an employee of Tesia Supermarket as from this date 22/09/2013 due to the above subject matter. You were caught up sneaking some products i.e two Vaseline jellys worth Kshs. 109 each without permission which is referred to as gross misconduct through the company rules ad regulations which you are well versed of.’ DW confirmed the foregoing as the reasons for the termination of the employment of the claimant and for lack of trust.

Decision on substantive fairness

28. The burden of proof of the validity of reasons for termination is on the employer under section 43 of the *Employment Act* which reads:- ‘43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’
29. In the instant case the dismissal letter (C-exhibit 1) disclosed the reason for the termination as theft and dishonesty. The claimant submits that being a criminal matter the allegation required a high standard of proof and that is why they withdrew the case to save reputation of their business. During cross examination the claimant told the court she was informed that the reason for her dismissal from employment was that she stole Vaseline oil, she said she wrote an apology letter on being forced so as to return to work but had no evidence of being forced, the claimant in paragraph 11 admitted she was found with the oil, she had no evidence in court that she got the oil from sales promotion lady. The claimant relied on the decision upheld by Justice D.K Marete in *Daniel Kiplagat Kipkeibut v Smep Deposit Micro Finance Limited* (2016) eKLR being *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the court held that:- ‘...For termination of employment to pass the test of fairness , there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.’ The claimant further relied on the decision in *Nicholas Muasya Kyula v Farmchem limited* industrial cause no. 1992 of 2011 (2012)LLR 235(ICK) where the court held that in allegations of misconduct the employer is required to have internal systems and process of undertaking administrative investigations and verifying the occurrence of the



misconduct before a decision to terminate is arrived at. The court finds the said authorities to be good law and relevant to the instant case.

30. The court having heard the witnesses and evaluated the reasons given by the employer of theft and lack of trust finds that those were valid reasons meeting the threshold under section 43 of the [Employment Act](#) being that: ‘ The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee’.
31. The claimant was caught delicto at the supermarket with Vaseline jelly oil which the court finds the employer had a plausible reason to believe was stolen being in the business of selling similar goods and for lack of proof the source of the said oil other than the supermarket goods. The claimant had no evidence of having received the oils from the alleged sales promotion lady and this was established at cross examination. The court further found that the apology by the claimant was in relation to the theft as there was no evidence to the contrary. The court finds that in the instant case the standard of proof was not that of beyond reasonable doubt but as per standard of proof stated under section 43(2) of the [Employment Act](#) to wit:- ‘(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’” The claimant did admit to being employed in the supermarket, having been caught with Vaseline jelly oils which she alleged was given by sales promotion lady but had no evidence to proof that before the court. The court believed that the said oils were from the supermarket. The court believed the reason of theft and dishonesty given by the respondent for the dismissal was valid and justified.

Procedural fairness

32. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the [Employment Act](#). The procedure would be as defined under section 41(2) of the [Employment Act](#) to wit:- ‘41(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.’” It was undisputed fact that there was no procedural fairness in the termination as contemplated under section 41(2) of the [Employment Act](#). The respondent led evidence that the claimant owned up and apologised but the employer dismissed her for lack of trust. The court of Appeal in [Pius Machafu Isindu v Lavington Security Guards Limited](#) [2017] eKLR observed on procedural fairness :-‘13. 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. The Act also provides for most of the procedures to be followed ...’”(emphasis given)The court in the upshot holds that there was no procedural fairness before the dismissal of the claimant which is a mandatory process under section 41 of the [Employment Act](#) as outlined above.

Issue 2 whether the claimant is entitled to reliefs sought

33. The remedies on finding unfair termination are as stated in section 49 of the [Employment Act](#) and the relevant ones in the instant case are:-‘ 49. Remedies for wrongful dismissal and unfair termination



- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
 - (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
 - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
 - (2) Any payments made by the employer under this section shall be subject to statutory deductions.”
34. In arriving at the suitable remedy after finding unfair termination the court ought to be guided by criteria under 49(4) of the [Employment Act](#) to wit:-

“49

- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
 - (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law;



- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination;”

35. The claimant sought various reliefs which the court proceeds to address under the various subheads:-

Underpayment

36. The claimant in their claim stated they were paid Kshs. 9600 as salary having started with 6377/- in July 2012. The employer did not produce record of salary paid as custodian of employee records under section 74 of the *Employment Act* which states:- ‘74. Records to be kept by employer (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars— (a) of a policy statement under section 6(2) where applicable; (b) specified in section 10(3); (c) specified in section 13; (d) specified in sections 21 and 22; (e) of an employee’s weekly rest days specified in section 27; (f) of an employee’s annual leave entitlement, days taken and days due specified in section 28; (g) of maternity leave specified in section 29; (h) of sick leave specified in section 30; (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee; (j) of food rations where applicable; (k) specified in section 61; (l) of a record of warning letters or other evidence of misconduct of an employee; and (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister...’. The court finds the claimant discharged her burden in stating she was paid Kshs. 9, 600/-. The claimant stated she was underpaid but did not produce the relevant wages order to substantiate their claims. The claimant told the court she was a form two drop out. The claimant was thus ungraded artisan. The *Regulation of Wages (General) (Amendment) Order*, 2012 Legal Notice No. 71 cited as the Regulation of Wages (General), (Amendment) Order, 2012 was deemed to have come into operation on the 1st May, 2012. The claimant was employed in July 2012 and this was the relevant order. The salary for ungraded artisan in all other municipalities was Kshs 10,687.95 exclusive of housing allowance. The claimant was thus underpaid by 1087.95. per month. The claimant was employed on 1st July 2012 and dismissed on 24th September 2013. Thus 14 months and 24 days worked. The total underpayment of basic salary was thus $1087.95 \times 14 (15231.3) + 24/30 \times 1087.95 (870.36)$ total underpayment basic salary of Kshs. 16,101.66.

Housing salary.

37. The court holds that housing allowance is calculated at 15% of employees basic salary. In the instant case the minimum wage which the claimant was entitled to excluding housing allowance was Kshs 10,687.95 thus 15% was Kshs 1603.20 per month. Thus $Kshs. 1603.20 \times 14 (22,444.8) + 24/30 \times 1603.20 (1282.56)$ total unpaid house allowance awarded for the sum of Kshs. 23,727.36 pursuant to the provisions of Section 31 of the *Employment Act* to wit: ‘31. Housing (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”

Notice Pay.

38. The claimant sought notice pay of Kshs. 9600/-. The court established there was no procedural fairness thus the notice pay is payable under section 49(1)(a) of the *Employment Act* for the unfair termination. The notice pay is awarded as prayed as parties are bound by their pleadings. .

21 Days Leave Due.

39. The claimant pleaded and testified she did not proceed on leave. Evidence by the respondent was that she was a casual. The respondent as custodian of employee records did not produce evidence of the claimant having proceeded on leave. Annual leave is a mandatory statutory right of the employee as stated in section 28 of the *Employment Act* to wit:- ‘28. Annual leave (1) An employee shall be entitled — (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;’ The court grants the untaken leave as prayed at Kshs. 9600/-.

22 National Holidays Pay

40. The respondent pleaded at paragraph 2.6 of answer to claim that the supermarket was closed on national holidays. There was no reply to the defence. The court takes the pleading as uncontroverted and disallows the claim for lack of proof.

Uniform Reimbursement.

41. The claimant alleged she purchased uniform for Kshs.1,100/-. At cross examination the claimant stated she had no receipt. A claim for reimbursement requires strict proof by way of receipts of payment. The claim fails.

Overtime.

42. The claimant claimed for overtime stating she worked all days. The claimant in the witness statement referred to overtime with respect to the national holidays. The court already found the claim for national holidays pay failed. The respondent relied on the decision in *Esther Wambura Ndegwa v Laboratory and Allied Limited* (2021) eKLR where the court failed to award overtime for lack of proof. The court upholds the said decision and in the upshot finds there was no proof of overtime work.

24 Days Worked In September 2023 and not paid.

43. The claimant claimed for Kshs. 7680 as unpaid salary. C-Exhibit 3 was demand letter addressed to the General Manager of the respondent. It was stated that her terminal dues were computed and she was paid Kshs. 10579/-. The court finds that the sum met the claimant’s salary for entire month hence the claim had no basis.

Compensation for Unlawful Termination

44. The court found that the reasons for the termination were valid and justified. The court further found the termination was unfair for lack of procedural fairness. The remedies for unfair termination under section 49(1) are as follows:-



- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;
 - or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.
- (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”
45. Under subsection 4 of section 49 of the *Employment Act* are the factors to take into account in deciding on the remedies to grant from under section 49(1). Under (49)4 the relevant factors related to the instant case were : ‘(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (k) any conduct of the employee which to any extent caused or contributed to the termination;’In the instant case the claimant’s conduct contributed totally to her dismissal from employment. The court is of the opinion that compensatory damages under (49(1)(C) of the *Employment Act* are only justified where the termination is substantively unfair, that is for the lack of valid reason. The court finds then that the remedy of notice pay under section 49(1)(a) of the *Employment Act* is sufficient compensation in the instant case. The same had been awarded under the subhead of Notice pay above. The court is guided by the Court of Appeal in its decision in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where it observed in allowing the appeal:- ‘Where, as here, an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given. Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway.’ The court finds that Court of Appeal decision supports the court’s opinion that for lack of procedural fairness notice pay in lieu was sufficient compensation to the claimant who was dismissed for valid reason of theft and dishonesty.



Conclusion and Disposition.

46. The court holds that the termination of employment of the claimant was procedurally unfair but the reasons for the dismissal were valid and justified. Notice pay of one month salary was adequate compensation for the procedural unfairness. The court also holds the claimant was underpaid by 1087.95/- per month applying the minimum wages order for the period of her employment. The court consequently enters judgment for the claimant against the respondent as follows:-

- a. Notice pay of Kshs. 9,600/-
- b. Payment in lieu of leave Kshs. 9600/-
- c. Underpayment of salary Kshs. 16,101.66.
- d. Unpaid house allowance Kshs. 23,727.36
Total award of Kshs 59,029.02
- e. Interest at court rates from date of judgement until payment in full.
- f. Costs of the suit

47. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST JUNE 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant: Lucy Macheso

For Claimant : Nechesa

For Respondent:- Absent

