



REPUBLIC OF KENYA



KENYA LAW
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**Osire v Mega Pack (K) Limited (Cause 66 of 2018)
[2023] KEELRC 1504 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1504 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 66 OF 2018
DN NDERITU, J
JUNE 15, 2023**

BETWEEN

MOHAMMED OCHIENG OSIRE CLAIMANT

AND

MEGA PACK (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. In a memorandum of claim dated 22nd February, 2018 and filed in court on 27th February, 2018 through Githui & Co Advocates the Claimant prays for: -
 - i. A declaration that the termination of the Claimant's employment was unlawful and unfair as the same was contrary to the *Employment Act* and other employment laws.
 - ii. The Claimant be awarded twelve(12) months compensation for the unlawful and unjustified termination as provided for under Section 49 of the *Employment Act* calculated as hereunder:
$$\text{Kshs } 17,900/= \times 12 \text{ months} = \text{Kshs } 214,800/=$$

Total claim for compensation Kshs 214,800/=
 - iii. The Respondent to pay the Claimant one month's pay in lieu of notice being Kshs 17,900/=.
 - iv. The Respondent to issue the Claimant with a certificate of service and in default the Respondent to pay the Claimant Kshs 100,000/=.
 - v. The Respondent to pay the costs of the suit and interest.
 - vi. The court to grant any other relief that it may deem fit to grant.



2. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.
3. On 10th July, 2019 the Claimant filed a supplementary list of documents comprising of a compact disk and a certificate of electronic records.
4. On 18th April, 2018 the Respondent appointed Wachira Wekhomba Aim & Associates Advocates to act for it in this cause and filed a response to the claim. In the said response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. Alongside the memorandum of reply to the claim the Respondent filed a list of documents dated 16th April, 2018 and a bundle of the listed documents. A supplementary list of documents and a bundle of the listed documents was filed on 19th July, 2018.
6. Further, the Respondent filed a witness statement by Daniel Bett Kiptui on 19th July, 2018. This intended witness also prepared a certificate of electronic records that was filed in court on 10th July, 2019. However, he did not testify in court. On 21st May, 2021 the Respondent filed a statement by Tom Welikhe (RW1) who testified in support of its case.
7. On 10th July, 2019 the Respondent changed its legal representation and appointed Wachira Wanjiru & Co Advocates to act for it in place of the above-mentioned law firm.
8. This cause came up in court (Mbaru J) for hearing on 21st November, 2019 when the Claimant (CW1) testified and closed his case.
9. On 24th November, 2021 it was agreed by consent of counsel for both parties that the matter shall proceed before this court from where Mbaru J had left.
10. The defence was heard on 17th May, 2022 when RW1 testified and the Respondent's case was closed.
11. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Miss Alwala, filed her written submissions on 31st August, 2022 while Counsel for the Respondent, Miss Wachira, filed on 16th September, 2022.

II. The Claimant's Case

12. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
13. In his memorandum of claim, the Claimant pleaded that he was engaged by the Respondent as a store clerk at a gross monthly salary of Kshs 17,900/= till 2nd January, 2018 when he was unfairly and unlawfully dismissed. The letter of appointment that was produced by the Respondent, which is not disputed, shows that the Claimant was employed by the Respondent effective 1st April, 2014.
14. The Claimant alleges that he was dismissed on account of suspected falsification of records and or being negligent in performance of his duties. It is alleged that the Claimant recorded receiving more paper reels than he actually physically did leading to loss of money and raw material leading to the Respondent not being able to produce at optimum capacity in meeting the orders from its clients. The Respondent manufactures various packaging products mainly from paper material.
15. The Claimant admits that he was invited for a disciplinary hearing and subsequently served with a letter of dismissal. He pleads that the dismissal was wrongful and unlawful for lack of both substantive



and procedural fairness. He pleads that the Respondent has unlawfully withheld a certificate of service and his terminal dues even upon demand, rendering this cause necessary.

16. In his testimony in court the Claimant denied falsifying records and or receiving the alleged goods on 9th January, 2018 when it is alleged that he recorded receiving 15 reels yet the physical count was 14. He alleged that the invoice, goods receipt note (GRN), and all the other documents were prepared and executed by other officers of the Respondent and not himself.
17. Further, the Claimant alleges that while the show-cause letter was clear and categorical that the discrepancies on the goods delivered and received related to records of 11th January, 2018, when he appeared for disciplinary hearing new charges were introduced relating to other dates. He stated that the CCTV footage that the Respondent relied upon was not shown to him prior to the disciplinary hearing.
18. It is on the basis of the foregoing that the Claimant pleads and prays that the dismissal was wrongful and unlawful and prays for the reliefs set out in the introductory part of this judgment. The submissions by his counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the Respondent.

III. The Respondent's Case

19. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel as summarized hereunder.
20. RW1 is the group human resources manager of the Respondent. His testimony in court was based on his filed statement and the response to the claim. He produced as exhibits all the documents filed on record by the Respondent.
21. As regards the electronic video recording the witness stated that the same confirmed that the Claimant is the person who received the subject goods and that 14 reels were off-loaded yet the Claimant recorded that 15 reels were delivered and received. He stated that the Respondent had paid for 15 reels and hence the shortfall of one reel was a loss to the Respondent. He stated that the discovery of the missing reel came about after stock-taking following a shortage of reels to meet an order from a customer.
22. He testified that following the discovery that the above-mentioned reel was missing the Respondent undertook a thorough stock-taking process and it was then discovered that four other reels were missing as a result of falsification of documentation by the Claimant and others.
23. He stated that it is the Claimant who received the 14 reels, wherein he falsified records to indicate that he had received 15 reels, and he signed for the same as "Osire".
24. In cross-examination he admitted that this delivery was done on 11th January, 2018 and the video recording relates to that date only. He admitted that there were no records of goods that left the store during the material time. He also admitted that the video recording did not show the delivery truck leaving the premises after the delivery. He stated that in total the Respondent lost at least five reels that were purportedly received by the Claimant over a period of time.
25. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by its counsel shall be considered alongside those of the Claimant's counsel in the succeeding parts of this judgment.



IV. Issues For Determination

26. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
- a. Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. The Dismissal

27. The terms and conditions of employment of the Claimant are not contested. The Claimant pleaded and testified that he was employed as a store-clerk from 1st April, 2014 to 22nd January, 2018. He stated that his gross monthly pay was Kshs 17,900/=. However, his pay-slip for January, 2018, his last, confirms that his gross monthly pay as at the time of dismissal was Kshs 18,246/=.
28. The jurisprudence on what constitutes fair and lawful dismissal or termination has to a large extent been settled by this court (ELRC) in a plethora of decisions spanning for over ten years since the establishment of the court as a special court of employment and labour related matters. There are two cumulative aspects that call for consideration by a court in determining the fairness and lawfulness of a dismissal or termination in whatever circumstances. The two aspects are that one, an employer is required to have a lawful reason for taking disciplinary action based on law and two, the procedure adopted in arriving at the dismissal or termination should be fair based on the rules of natural justice and fair administrative action as per law established. These twin tests are what are referred to as substantive and procedural fairness – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
29. In this cause the Claimant was summarily dismissed by the Respondent in terms of the letter of dismissal dated 22nd January, 2018. For clarity the said letter of dismissal stated as follows – See
- 22nd January, 2018
- Mohammed Ochieng Osire
- PO box 52,
- Migori.
- Dear Mr. Ochieng
- Re: Dismissal Of You Services
- On 11th January, 2018 and 17th January 2018, you as the Stores Clerk prepared and presented GRN'S for three consignments received. On the GRN's all reels were received as per delivery numbers 97381, 97300 & 97301. We have run and confirmed from the CCTV footage that less reels were received but records falsified to indicate otherwise. Footage to 11/01/2018 was also shown to you but you could not explain the shortage of one reel not received.
- From the disciplinary process involving the show cause and hearing (copies attached for your reference), you have not given a plausible reason or the discrepancy or your actions. You have also



failed to utilize the chance of physically showing where the missing reels are. This exercise would have involved identifying balance reels not utilized as all issuance from stores is documented.

Having no other plausible explanation for your failings, the management hereby dismisses you from employment guided by the *Employment Act* 2007 Section 44(4)(c) and (g) which states

- (c) “an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly;”
- (g) “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employers property.”

It was your duty as Store Clerk to present accurate and truthful records of material received in stores. This failure can lead to payments for non received goods and also affect our planning in production since the raw material is not available.

Yours faithfully

For:- Mega Pack(k)ltd

Signed

Tom Welikhe

Group Human Resource Manager

Received

Name:- Mohamed Osire

Signature – Signed

Date 22/01/2018.

30. It is very clear that the Claimant was summarily dismissed for misconduct that the Respondent deemed offensive to the provisions of Section 44(4)(c) and (g) of the *Employment Act* (the Act).
31. Section 43 of the *Act* places a burden on the employer to prove that the reason for termination or dismissal is lawful otherwise the termination or dismissal shall be deemed unfair and hence unlawful under Section 45 of the *Act* amongst other provisions of the law.
32. The reason or reasons for termination “are 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” – See Section 43(2) of the *Act*.
33. The foregoing provision of the Act is restated in Section 47(5) of the *Act* in the following terms – “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 termination of employment or wrongful dismissal shall rest on the employer.”
34. In my mind the foregoing provisions of the Act refer to one and the same thing – that an employee who claims to have been unfairly and unlawfully terminated or wrongfully dismissed shall bear the burden of demonstrating or proving as much. On the other hand, for an employer to be successful in its defence it has to demonstrate that the termination or dismissal was justified based on the circumstances and the law.



35. On the part of the employer the standard of justifying the action resulting in termination or dismissal is set under the provisions of Section 43(2) of the Act cited above. The test set by the law for the employer is fairly subjective. The employer needs to have genuine reason or reasons that it believed to exist that made it to take the action as it did.

36. The Respondent issued the Claimant with a show-cause letter dated 20th January, 2018 in the following terms –

20th January, 2018

Mohammed Ochieng Osire,

PO Box 52,

Migori.

Dear Mr. Ochieng,

RE:- Show Cause Letter

On 11th January, 2018 at about 07.30a.m. We received a consignment of reels from East Africa Paper Reels Limited that were transported by Kamongo Waste Paper Ltd as per delivery number 97281.

In the consignment were 15 reels. From the CCTV footage together with you confirmed receipt of 14 reels, contrary to the records provided by you as the Stores Clerk on duty that day indicating 15 reels. This is a falsification of records.

We are also looking at other CCTV footage to determine other discrepancies.

The above issues raised amounts to gross misconduct as per *Employment Act* 2007 Sec 44(4) (c) and (g) which states

(c) “ an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly;”

(g) “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employers property.”

Show cause why disciplinary action should not be taken against you. Write a replying statement so that it reaches this office by 20th January 2018 10:48a.m.

Yours faithfully

For:- Mega Pack(k)ltd

Signed

Tom Welikhe

Group Human Resource Manager

37. In the show-cause letter the Claimant was accused of falsification of documents relating to goods received on 11th January, 2018 indicating that he received 15 reels instead of the purported 14 reels that he physically received while on duty as the store-clerk. The Respondent alleged that a review of the



CCTV footage for the day had confirmed the foregoing and that further footage was to be reviewed to confirm if further records had been falsified on other dates. RW1 in his testimony in court stated that upon completion of the review of the footages it was established that the Claimant had falsified other records as a result of which the Respondent had lost four other reels.

38. In the circumstances, the Respondent had formed the opinion that the Claimant had either deliberately falsified the records and hence benefit from the sale or proceeds from the missing reels or that the Claimant was so negligent in performance of his duty or that he so improperly performed his duties that he had failed to perform the very work that he had been employed to do. In other words, the Respondent was of the view that the Claimant had misconducted himself to its substantial detriment and loss. The Respondent suspected that the Claimant has committed a crime against it and its property.
39. The court has gone through the records presented by the Respondent as produced in court by RW1 to the effect that it placed an order for 15 reels from East African Paper Mills worth Kshs 919,429.92 as per the invoice of 9th January, 2018. There is a packaging list showing that the 15 reels were loaded onto a truck Reg. KAG 571T belonging to Kamongo Waste Paper LTD on even date and a consignment note to that effect accompanied the goods. The goods were received at the premises of the Respondent on 11th January, 2018. The goods receipt note (GRN) indicates that the goods were received by “Osire” who signed for the same. It indicates that 15 reels were received as ordered as per the delivery note.
40. However, the Respondent alleges that only 14 reels were received and the Claimant falsified the records to read that 15 reels were delivered and received. To authenticate this assertion, the Respondent produced an extraction from the CCTV footage of the material date, 11th January, 2018. The digitally produced document was presented to court alongside the statement of Daniel Bett Kiptui who was to testify for the Respondent. The same was accompanied with a certificate under Section 106(4)(B) of the *Evidence Act* (Cap 80) prepared and signed by the said intended witness.
41. However, the said witness did not testify for the Respondent and instead the Respondent called RW1 whose statement was filed in court on 21st May, 2021. RW1 purported to have developed and produced the same digital record that had been developed and produced by Daniel Bett Kiptui as above. However, RW1 did not avail the disc that he allegedly developed and produced and his purported certificate of electronic records annexed to his witness statement is just a copy-paste reproduction of the certificate by Daniel Bett Kiptui mentioned above.
42. In the foregoing circumstances, the electronic recording availed in court is invalid and inadmissible in court as evidence and adds no value or weight to the Respondent’s case. Nonetheless, the court by consent directed that counsel for both parties view the video disk and record a consent on how many reels were offloaded from the truck before it left the Respondent’s premises. The court did this as the video production was not clear enough to enable the court to verify this.
43. On 16th June, 2022 counsel for both parties filed a consent in the terms that “The parties’ advocates viewed the contents of the video evidence together and observed that the truck left the offloading gate at 10.19am.” This consent did not answer to the issue that the court had sent both counsel to establish as above – how many reels were actually offloaded?
44. The only way of establishing and proving that indeed the Claimant falsified the records was by confirming that what he actually and physically received was at variance with what he recorded. The video recording, which in any event is not admissible in evidence for the reasons stated above, and the consent filed on record by counsel does not answer to the issue at hand. The only other way that the Respondent should have established and proved that the Claimant had falsified records was by



- examining and availing in court records of goods that moved in and out of the store as received by the Claimant. No such records were produced or availed in court and RW1 admitted as much during cross-examination.
45. During the trial the Claimant maintained that he received 15 reels as recorded and signed for. As far as this court is concerned and based on the evidence availed, it is not established that the Claimant falsified records and or performed his duties so improperly, negligently, carelessly, and or recklessly as to amount to gross misconduct, let alone amounting to criminal conduct.
 46. Section 43(2) of the *Act* deserves a second look before the court decides on the substance of the dismissal. What the employer is required to have is genuine belief that the employee has misconducted himself or herself in the alleged manner, even if such believe later on turns out to be untrue. However, the belief must be genuine and not based on malicious, discriminative, speculative, weird, whimsical, and capricious allegations.
 47. What this court understands to be the totality of the genuine belief imperative is that the employer should have some prima facie evidence that the employee has engaged in misconduct that deserves disciplinary action. For such a belief to exist, the employer ought to have carried out some reasonable investigation and gathered the evidence against the employee. In my opinion, mere suspicion cannot be a ground for taking disciplinary action that may lead to dire consequences, including dismissal as it happened in this cause.
 48. Inasmuch as the test is partly subjective on the part of the employer, this court holds the view that the belief should be genuine and reasonable founded on prima facie evidence. While it is not the duty of this court to substitute its view for that of the employer, the court has a duty and indeed an obligation to intervene where the position taken by the employer is unreasonable and not founded on reasons that go beyond mere suspicion. If employers were to act against employees on mere suspicion of misconduct, the environment at the workplace would become chaotic, uncertain, and untenable, hence not conducive for optimum productivity.
 49. It is in the considered view and holding of this court that what the Respondent held against the Claimant is mere suspicion that the Claimant had falsified documents to reflect that he received 15 reels on 11th January, 2018 while he in fact he had received only 14 reels. If the Claimant had not received 15 reels as per the records he prepared, it was upon the Respondent to convince this court that indeed only 14 reels were actually received and call evidence in support thereof. Of course, the Claimant was not working alone in the store area and the evidence is that there were other persons involved in ensuring that all goods ordered are received as invoiced and paid for. There is evidence that there are other persons who were supposed to supervise and take stock for the products received and in any event the Claimant was under supervision of a store manager. How come no one was able to detect the shortfall as soon as the goods were delivered or soon thereafter? It would appear that the Respondent singled out the Claimant and decided not to investigate all the others who were managing the stores including the manager thereof.
 50. The above position taken by the court is fortified by the fact that during the trial the Respondent did not avail records of the goods that left the store so as to confirm the one reel that was allegedly lost was not among those removed from the store for production. This court is not at any rate trying to put the Respondent to strict proof beyond reasonable doubt that one reel was lost in the hands of the Claimant. What the court is saying in not so few words is that no matter how strong the suspicion by the Respondent against the conduct of the Claimant, the Respondent ought to have obtained prima facie evidence on which to found the disciplinary action. It is the view and holding of this court that the belief, if at all, that the Respondent held, that the Claimant had either falsified records or stolen



- the one reel that was missing, or that he performed his duties so carelessly, improperly, or negligently so as to allow the loss of the one or more reels, was neither genuine nor reasonable.
51. For all the foregoing reasons, and based on the evidence on record, this court finds and holds that the Respondent had no genuine and lawful reason for taking the disciplinary action against the Claimant leading to his dismissal. The action by the Respondent fails to meet the required standard in establishing the substance or reason for dismissal.
 52. Likewise, no evidence was adduced to prove that the Claimant was responsible for the loss or theft of the other four or so reels that are alleged to have either not been received and or stolen or lost. There is no evidence that the Claimant performed his duties in such a reckless, careless, improper, or negligent manner such that he caused, contributed to, or occasioned such loss or theft, or that he falsified records to conceal that he received less reels than he recorded.
 53. As regards procedural fairness, the Claimant was issued and served with the show-cause letter dated 20th January, 2018 as reproduced above. The charges and allegations were specific and related to one reel that was allegedly not accounted for in the delivery of 11th January, 2018. There was a rider in the show-cause letter that the Respondent was reviewing the CCTV footage to establish any other discrepancies.
 54. Accompanying the show-cause letter was an invitation to a disciplinary hearing which was to take to place on 20th January, 2018, the same date of the letter. The Claimant was informed of his right to be accompanied with a representative of his choice.
 55. While it is alleged that the Claimant did respond to the show-cause letter the said response was not availed in court by either party. But both parties in their evidence confirm that the Claimant denied the allegations.
 56. This court has in several recent past judgments decried the manner in which most employers carry out hurried disciplinary proceedings without allowing the employee adequate and ample time and opportunity to prepare and present their response and evidence before and during the hearing. Inasmuch as disciplinary proceedings are not court trials, and this court does not expect or direct that employers shall follow the procedural technicalities of a court trial, the fundamental rules of natural justice ought to be followed. Article 47 of the Constitution, Fair Administrative Action Act, and various sections in the Employment Act provide on this.
 57. Counsel for the Respondent has cited Anthony Makala Chivati V Malindi Water & Sewerage Company Limited (2013) eKLR, Winnie Mbete Mutua V Brackenburst Kenya Limited (2022) eKLR, and Peter K Kabau & 2 Others V Riley Services Limited (2022) eKLR.
 58. In Winnie Mbete Mutua (Supra) this court deliberated at length on what it considers to constitute fair hearing or procedural fairness. It is not necessary to reproduce the same here but suffice it to state that for any administrative action to be fair it has to adhere to the basic rules of natural justice.
 59. The evidence on record in this cause is that the Claimant was served with a show-cause letter dated 20th January, 2018 on the same date and the disciplinary hearing was to take place on the same day. The hearing was then moved to 22nd January, 2018. During the disciplinary hearing the Claimant was accused that four other reels were missing, as per the minutes of the disciplinary hearing availed in court by the Respondent. There is no record to show that the Claimant was given an opportunity to defend himself against the new allegations regarding the four reels that were allegedly found missing after the show-cause letter of 20th January, 2018 had been issued.
 60. As this court writes this judgment it is appropriate to pose the following questions – Why was the Respondent in such a hurry to conduct the disciplinary hearing to the extent that the Claimant had



to answer to charges particulars whereof had not been supplied to him and to which he had not been given an opportunity to respond to? Why did the Respondent not consider suspending the Claimant from duty to enable proper and thorough investigation and gathering of evidence?

61. This court has proposed in the past, as I hereby do, that a reasonable notice must be issued to the employee to enable a proper response and preparation for such employee to attend and appear in the disciplinary hearing. This court has proposed a seven days' notice unless there is a particular urgency demonstrated by the employer requiring an urgent disciplinary hearing and disposal of the matter. In the circumstances, this court holds that the Claimant was not given adequate notice and opportunity to defend himself and to appear during the disciplinary hearing.
62. Further, the minutes of the disciplinary hearing indicate that the head of human resources management (RW1) indicated during the disciplinary hearing that investigations were on-going. The same question posed above lingers – what was the particular reason for hurrying the disciplinary hearing? Why could the Respondent not wait until investigations were fully concluded, serve the Claimant with a comprehensive show-cause letter, and give him adequate notice to respond and even look for a representative of his choice?
63. As stated above, the Respondent was not helpless in the situation as it had the option of suspending the Claimant from work to facilitate full and complete investigations and collection of evidence. It is only thereafter that the Respondent would have properly confronted the Claimant by first issuing and serving him with a detailed and particularized notice to show-cause, and then a proper notice inviting him for hearing, if his response to the show-cause letter was found unsatisfactory. It is not every show-cause letter that must yield to a disciplinary hearing.
64. After the hearing on 22nd January, 2018, which hearing commenced at 1450hrs, the Claimant was issued and served with a letter of dismissal of even date on the same day. This begs the question – what deliberations were made after the proceedings and at what time was the decision to dismiss made? In the mind of this court this hurried disciplinary hearing coupled with the hastened decision to dismiss the Claimant points only to one thing - that the Respondent had approached the disciplinary process with a predetermined mind to dismiss the Claimant.
65. In fact, in response to a demand notice for action dated 5th February, 2017 (sic!), the correct year should be 2018, RW1 stated that the matter was still under investigations. If that be so, on what evidence was the dismissal founded? As per the evidence on record, the Claimant was not charged with any criminal conduct relating to the subject matter.
66. For all the foregoing reasons, this court finds and holds that the Respondent denied to the Claimant both substantive and procedural fairness.

VI. Reliefs

67. Having held that the Claimant was unfairly and unlawfully terminated by the Respondent, this court shall now consider each of the reliefs sought as hereunder.
68. Prayer (i) is for a declaration that the dismissal of the Claimant by the Respondent was unfair and unlawful. This court has already made this finding above and a declaration to that effect is hereby issued.
69. Prayer (ii) is for compensation for unfair and unlawful dismissal under Section 49(1)(c) of the Act. The Claimant is seeking equivalent of 12 months' gross salary under this head. Section 49(4) of the Act provides for some of the factors that this court ought to consider in determining the appropriate award in compensation for unfair and unlawful dismissal or termination.



70. Neither of the parties has expressed an interest in re-engaging. I take it that the Claimant has moved on although he did not inform the court in his testimony if he has since the dismissal found another job and how long it took him to secure that job if any. The court has found that the Respondent denied the Claimant both substantive and procedural fairness. No terminal dues were offered and or paid to the Claimant from the Respondent.
71. However, the work performed by the Claimant of a store-keeper is not one that requires special training or skill. Such jobs are available in the market, although the court appreciates that it is becoming difficult to secure any type of a job in these dwindling economic times.
72. Due to the inadequacy of the evidence placed on record by the parties this court is not in a position to gather if indeed the Respondent lost the reels as alleged and to what extent the Claimant was culpable and or to blame for such loss. It is difficult to readily attribute any fault to the Claimant leading to his dismissal.
73. Considering the entire circumstances of this cause alongside the evidence tendered, this court is of the considered view that an award of equivalent of six months of his gross salary is fair compensation under this head. The same is calculated as Kshs 18,246/= * 6= Kshs 109,476/=. This amount is subject to statutory deductions.
74. The Claimant is awarded one month's salary in lieu of notice in prayer (iii) but as it was established in an earlier part of this judgment that his gross monthly pay as at the time of his dismissal in January, 2018 was Kshs 18,246/=. This amount is awarded to the Claimant accordingly.
75. Prayer (iv) is for a certificate of service under Section 51 of the Act. No lawful explanation has been advanced by the Respondent as to why the Claimant has not been issued with the certificate. The same is a right that is unconditional. The Claimant left the employment of the Respondent in 2018, over five years ago, and there is nothing left for him to clear with the Respondent. This court orders that a certificate of service be issued by the Respondent in the name of the Claimant and that the same be delivered to his counsel on record within 30 days of this judgment without fail. There is no legal basis of granting the award of Kshs 100,000/= in the alternate to the certificate of service as pleaded by the Claimant.

VII. Costs

76. The Claimant is awarded costs of this cause together with interest thereon and on the amounts awarded above.

VIII. Disposal

77. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was unfair and unlawful.
 - b) The Claimant is awarded a total of Kshs 127,722/= made up as follows –
 - i. Salary in lieu of notice Kshs 18,246/=
 - ii. Compensation for unfair and unlawful terminationKshs 109,476/=
 - TotalKshs 127,722/=



- c) The Respondent is ordered to issue and deliver to the Claimant's counsel a certificate of service in the name of the Claimant.
- d) Costs and interest to the Claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED ATNAKURU THIS 15TH DAY OF JUNE, 2023.

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DAVID NDERITU

JUDGE

