



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndoji v Questworks Limited (Cause 49 of 2020)  
[2023] KEELRC 2259 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2259 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 49 OF 2020  
NJ ABUODHA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**FRED OKOTH NDOJI ..... CLAIMANT**

**AND**

**QUESTWORKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim on 30<sup>th</sup> January, 2020 and pleaded inter alia:-
  - a. The Claimant was employed by the Respondent as a project Engineer on or about 1st November, 2014 at a salary of Kshs 75,000/= on a three month probation period where he was confirmed to that position on a permanent and pensionable terms due to the Claimants exemplary performance.
  - b. The Claimant continued to carry out his work diligently received several positive reviews throughout the year and on or about 15<sup>th</sup> August, 2018 the Respondent reviewed his salary upward to Kshs 150,000/= per month.
  - c. The Claimant further averred that it was an incorporated term of the employment contract that the Claimant was entitled to finder's fee of 4% of the project brought in.
  - d. On or about September, 2019 the CEO of the Respondent called the Claimant to his office and abruptly and without any prior notice whatsoever terminated the Claimant's employment contract and no reason as to his termination was given by the Respondent and the Claimant had never previously issued with any warning letter directed at his performance or conduct.
  - e. That upon inquiry the Claimant was casually informed that his employment had been terminated as the Respondent was restructuring due to financial difficulties which to the



Claimant knew was a fraudulent misrepresentation since the Respondent never faced financial difficulties during the time of their engagement.

- f. The Claimant further averred that he was unduly coerced in to signing a discharge voucher dated 14<sup>th</sup> October,2019 stating that the Claimant had been informed of the Respondent's restructuring due to financial constraints and that he had no further claims against the Respondent upon the Respondent payment of his dues where he was advised unless he signs the discharge voucher he would not receive his dues.
  - g. The Claimant further averred that despite signing the discharge voucher the Respondent never paid his dues as it created roadblocks and came with an excuse that the Claimant should sign a non-disclosure agreement before he gets his dues which the Clamant refused to sign and the Respondent refused to release the said dues.
  - h. The Claimant averred that he was terminated without any real reason and states the main reason was because he decided to report the Respondent's criminal activities of paying bribes to government officials to be awarded projects hence the reason they wanted him sign non-disclosure agreement.
  - i. The Claimant averred that at the time of termination the Respondent had never issued him with termination letter showing the reasons for termination of his employment and averred that the was terminated unprocedurally without any valid reason and that his constitutional rights of fair labour practices and fair hearing among others were infringed.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration that the decision by the Respondent to terminate the Claimant's Employment was procedurally unfair and substantively unjustified.
  - b. A declaration that the Respondent breached the Claimant's rights to fair hearing and fair labour practices.
  - c. A declaration that the termination of the Claimant was wrongful, unfair and unlawful.
  - d. Damages for violation of constitutional rights of fair hearing and fair labour practices.
  - e. An order directing the Respondent to reinstate the Claimant to his immediate former position with back pay and benefits from the month of September 2019.

In alternative to the above

- i. An order directing the Respondent to issue the Claimant with a certificate of service.
- ii. An order of 12 month's salary to be paid to the Claimant for the wrongful and /or unfair termination at Kshs 150,000/= per month.
- iii. One month notice pay of Kshs 150,000/=
- iv. Severance pay at the rate of 15 days for each year worked at Kshs 375.000/=
- v. 105 days of unutilized and unpaid leave days at Kshs 525,000/=
- vi. Finder's fee at 4% of all projects brought in by the Claimant being KSMS PROJECT-Kshs 73,400,000/= Kirubi Project-Kshs 125,000,000/= and ICIPE Project-Kshs 11,000,000/=
- vii. Costs of the suit and interests on present court rates.



3. The Respondent with the leave of the court filed its Amended statement of Reply and counterclaim dated 9<sup>th</sup> February, 2022 and they averred inter alia:
  - i. The Respondent denied the contents of the claim and averred that the Claimant mooted for the idea of the Respondent considering a proposal of payment of a finder's fee of projects brought in, this was never agreed to and that the same request was tabled before management meeting minutes that took place on 13<sup>th</sup> August, 2019 and it was concluded that this incentive was abolished in 2016 for being counterproductive to the company and the Claimant was notified through detailed emails to him.
  - ii. The Respondent averred that two formal warning notices and termination of employment was issued to the Claimant on 17<sup>th</sup> June, 2019, 26<sup>th</sup> August, 2019 and 23<sup>rd</sup> September, 2019 respectively whereby the Claimant was cited for gross misconduct, gross absenteeism, delayed implementation of work and complaints from both clients and colleagues.
  - iii. The Respondent further averred that the Claimant did not change after the warnings and they decided to convene disciplinary proceedings against the Claimant for gross absenteeism and unavailability in the office and at the projects which disciplinary hearing was held on 14<sup>th</sup> June, 2019 and 16<sup>th</sup> September, 2019.
  - iv. The Respondent averred that the Claimant was notified in advance of the right to attend the hearing with an employee of his choice but he refused saying he could sufficiently defend himself where during the meetings he was informed of his unbecoming behavior and he promised to change which he did not and the Claimant was terminated vide a letter dated 23<sup>rd</sup> September, 2019 stating absenteeism and lack of output.
  - v. The Respondent further averred that they notified the Claimant of all his dues including payment in lieu of notice amounting to Kshs 892,346 inclusive full pay for the month of September 2019 which the Claimant has refused to collect to date and that the Claimant has failed to reconcile the expenses and surrender petty cash and monies owed to Respondent amounting to Kshs 158,000/= where the Claimant presented exaggerated claims, fraudulent receipts and unapproved expenses all flagged by the Respondent.
  - vi. The Respondent further averred that the Claimant retained company information which without authorization he forwarded the same to his personal email in breach of his contract hence why they requested the Claimant to sign a Non-disclosure agreement which he refused and they raised their counterclaim of Kshs 158,000/= and prayed that the court dismisses the Claimant's Claim and allows its counterclaim.
4. The Claimant's case was heard on 30<sup>th</sup> May, 2022 where the Claimant testified and adopted the documents filed before the court as evidence in chief.
5. CWI testified that there was no time he was absent from work in his five year period unless he was on leave which he stated he took some days and could confirm with the records and he would report to Philip and when absent from office he would send Philip a message or email who knew he was on site.
6. CW1 testified that the contract did not include finder's fee and that he did not provide documents in support of the finder's fee apart from the emails although he approached the said Philip on the issue of finder's fee to lobby on the same and as much as his benefits were salary he was entitled to Finder's fee part of it was paid at Kshs 1 Million.



7. CW1 further testified that it was consultants who were entitled to finder's fee even though he was not a consultant but an employee but the Respondent told him to note the same as bonus not finder's fee.
8. CW 1 testified that while working with the Respondent he had no disciplinary case or warning, he was never before any disciplinary committee team and he was terminated for absenteeism when he was never absent but issued with the termination notice and signed a discharge voucher.
9. CW1 testified that the termination was abrupt and he signed the discharge voucher so as to get paid since he did not have any other source of income and that he read the discharge voucher before he signed it.
10. He further testified that he was claiming finder's fee of 4% upon discharge even though there was no undertaking save for the correspondences and that he was entitled to Kshs.150,000/= salary and no finder's fee and after termination. He further stated that the Respondent appointed him as a consultant.
11. He produced all petty cash receipts which were approved by Philip before cash was released and attached the receipts to accounts and that after termination, he had a meeting with the Respondent and produced receipts which the Respondent said did not add up despite the same being approved by Philip. He denied owing the respondent the said Kshs 158,000/=
12. It was his evidence that when he had issues with the Respondent over payment of his dues, he knew this matter will end up in court which was why he forwarded the official email to his personal email account and this did not amount to any breach of contract.
13. CW1 testified that he did not own the Marvel Car Hire and he hired cars from them for private use.
14. On re-exam the Claimant clarified that the discharge voucher gave reasons to be company restructuring due to financial difficulties and that there was no mention of absenteeism or misconduct and he did not sign the termination letter. He further did not receive the warning letters produced and only saw them for the first time in court.
15. On the issue of finder's fee CW1 confirmed that they discussed with Philip his supervisor a partner at the Respondent at 4% of all projects and he worked in his mind knowing he was entitled to the 4% on completed projects and he was not aware if the same was canceled.
16. CW1 confirmed that the emails he forwarded to himself were what were related to him and he did not divert any information to third parties.
17. The Respondent case on the other hand was heard on 16<sup>th</sup> May, 2023. They called three witnesses the first was Dominic Chesire the Chief Business officer of the Respondent who said he adopted the documents filed in court as exhibits as well as his statement as evidence in chief.
18. RW1 testified that he was in charge of daily operations and HR and that he knew the Claimant as project engineer employee who was a good worker at the beginning but his performance deteriorated by being absent or late. His performance went down and clients were complaining.
19. RW1 testified that the Claimant did not dispute the termination and further that he was not entitled to finder's fee but normal salary as any other employee. He was issued with his final dues and signed a discharge voucher without raising any questions.
20. On cross examination RW1 testified that the Claimant's salary was increased over time while he was performing. In 2018 overtime was abolished. Employees were consulted even though no document was filed to show they were consulted.



21. RW1 testified that his assistant was in charge of time shifts and if not it was the CEO. The Claimant was reporting to Philip and that the time sheets were not before the court as well as any complaints as they did not find them relevant.
22. RW1 testified that they did not fabricate any document as the meeting held on 10/9/2019 the minutes were signed. He was the one who recorded the minutes and that the Claimant was issued with verbal warnings together with previous written warning and there was no document to show how the meeting was called. After the meeting of 13/8/2019, the next meeting was to be on 6/9/2019 but it not happen.
23. RW 1 testified that the Claimant was terminated on account of absenteeism which were based on his Facebook posts. He was absent from office and site and colleagues complained of his absence in the WhatsApp group and he was invited for disciplinary hearing on Thursday, 16<sup>th</sup> September,2019. The invite was dated 14<sup>th</sup> September, 2019. He further stated that the termination letter did not make reference to disciplinary hearing.
24. RW1 testified that the Claimant did not sign the letters and even his contract and he knew how to reach the Claimant through email, phone and what Sapp and the Claimant did not sign the disciplinary hearing minutes.
25. On the issue of discharge voucher, he testified that it was him and the Claimant who signed it and that it talked of restructuring. Regarding Facebook posts, it was his evidence that these were done while claimant was not at work. He further stated that the Claimant did not collect his pay and further that there was no show cause letter in court and any document to show the Claimant was given chance to respond to charges against him.
26. RW1 testified that the finder's fee was payable to consultants alone not employees. Further, there was no document in court to show the same was abolished.
27. In re-examination RW1 confirmed that he had not provided all the minutes and that time sheets were made for capturing overtime. They were not used as a measure to absenteeism and confirmed that the finder's fee was not an internal incentive but for outside consultants.
28. RW2 one Philip Mwangi Kamau testified and adopted his witness statement as his evidence in chief and the documents filed in court as respondent's exhibits. He further stated that he was the immediate supervisor of the Claimant and that he used to oversee the claimant's duties and performance. He could tell when the Claimant was available at work or not and if absent he would call him and also inform management. Sometimes he would share them on the WhatsApp platform or verbally.
29. Mr. Mwangi further testified that he was aware of steps taken by the Respondent to correct the conduct of Claimant. It was his evidence that when the respondent discovered that the claimant was running another business, the claimant never discussed with him and that he was a good worker until around 2019 when he started absenteeism.
30. RW2 testified that the Claimant was not entitled to finder's fee as this was for external consultants, he wrote severally requesting to be included and these were forwarded to management. The directors made decisions and they declined the claimant's request for finders fee.
31. RW2 testified that the Claimant was issued with warning letters and taken through disciplinary hearing on 16/09/2019 which he attended and gave his defence.
32. On re-exam the he confirmed that the Claimant never asked about finder's fee prior to 2018 and that time sheets were used to measure overtime and also record attendance and that termination was handled by Human Resource.



33. RW3 one Maureen Kamau the Respondents accountant testified that she had worked for the Respondent for 7 years. She adopted her witness statement and documents as her evidence in chief and exhibits. Concerning claimant's dues, she stated that the respondent was holding the Claimant's dues because he had not reconciled his petty cash issue and that he submitted fabricated receipts, duplicates and others were overvalued. The claimant had been notified about it. According to her the Claimant owed the Respondent about Kshs 273,000/= which was the difference between monies sent and receipts surrendered.
34. In cross examination RW3 told the court that the Claimant was required to provide an actual invoice but not ETR, the record was for 2016, 2017 and 2018. This was raised with him before termination, she however did not produce any prior demand before termination and the pending balance was shown as Kshs 158,000/=.
35. In re-exam the RW3 confirmed that the Claimant did not dispute having the petty cash and that why he provided receipts after being asked for them many times and that they were ready to pay the Claimant less what he owed the respondent.

### **Claimants' Submissions**

36. The Claimant filed submissions dated 29<sup>th</sup> May, 2023. On the issue of termination being substantially justified the Claimant submitted that the Respondent failed to justify the reason for the Claimant's termination as per section 43 of the *Employment Act* and failed to prove the allegations of absenteeism as required by section 107 of the *Evidence Act*. On this point Counsel relied on the case of *Josef Kori v Race Guards Limited*(2018) eKLR and *Chase Bank(Kenya) Limited v Cannon Assurance (K) Limited*(2019)eKLR. On the issue of face book posts the Claimant submitted that some were posted outside working hours and even posted during working hours it did not necessarily mean the Claimant was not at work.
37. On the reason for termination the claimant submitted that no clear reason was given and relied on the case of *Zephania O. Nyambane & Another v Nakuru Water & Sanitation services Company Limited* (2013) eKLR and *Bamburi Cement Ltd versus William Kilonzi*(2016) eKLR.
38. Regarding the fairness of the termination, the Claimant submitted that no investigation done and no report issued to the claimant and that the claimant was not given as chance to defend self. In this regard Counsel relied on the case of *Nicholus Muasya Kyula v Farmchem Ltd*(2012) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*(2014) eKLR.
39. The Claimant submitted that he was never issued with any warning letters and that he was never invited to any disciplinary hearing. The same were never sent to his known email address. In this respect he relied on the case of *George Muteti v Express DDB Kenya*(2015) eKLR and *Muthama Maithya v A.O Basid Limited*(2019) eKLR.
40. The Claimant further submitted that the termination letter did not make reference to the disciplinary hearing and relied on the case of *James Ondima Kabesa v Trojan International Limited* (2017) eKLR and *Peter Mutinda Ngei v Rentokil Initial (K) Limited* (2022) eKLR.
41. The Claimant further submitted that he was not given a show cause letter before termination and relied on the case of *Naomi Wangui Kung'u Board of Governors S.C.L.P Samaj School*92022) eKLR, *Alex Wainaina Mbugua v Kenya Airways Limited*(2017) eKLR, *Wanyama Murabwa v Independent Electoral Boundaries Commission* (2021) eKLR and *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR .



42. On the issue of poor performance the Claimant submitted that the contract provided that he was to be placed on performance improvement plan before termination under clause 15(b) and in addition proof of appraisal was required before termination. In this regard counsel relied on the case of Gladys Chelimo Bii v Kenya Power and Lighting Company(2021) eKLR .
43. On the issue of finder's fee the Claimant submitted that he was entitled to the same as an implied term and relied on the case of Isabel Wayua Musau v Copy Cat Limited(2013) eKLR on management practice which created legitimate expectation and on the case of Kenya Chemical & Allied Workers Union V Bamburi Cement Ltd(2013)eKLR which stated that this expectation was created by the Respondent and if there was change the same was to be communicated by the Respondent as per section 10 of the [Employment Act](#).
44. On the issue whether the Respondent was entitled to its counterclaim the Claimant submitted that it was a special damages claim which should be strictly proved and that it was time barred under section 90 of [Employment Act](#) and relied on the cases of Kenya Women Microfinance Ltd v Martha Wangari Kamau (2021) eKLR and Yaron Gurevich V carnation Plants Limited(2021) eKLR/Japheth Koome Inyngi v Baraka FM(2021) eKLR respectively.
45. In conclusion the Claimant submitted that the court should find that his employment was unlawfully and unfairly terminated by the Respondent and relied on the case of Anthony Yamo Ihito v Basco Products (Kenya) Limited (2022) eKLR.
46. On the other hand the Respondent filed its submissions dated 26<sup>th</sup> June, 2023. On the issue of whether the termination was unfair, unprocedural and unjust the Respondent submitted that it followed the due process set out under sections 41,43,44,45 and 47(5) of the [Employment Act](#) and relied on the cases of CMC Aviation Limited v Mohamed Noor (2013)eKLR and Naima Khamis v Oxford University Press(EA) Limited (2017)eKLR .

### **Respondent's Submissions**

47. The Respondent further submitted that the Claimant was issued with warning letters hoping that he would change his absenteeism behavior but he did not and that section 41 of the [Employment Act](#) was coached in mandatory terms and relied on the case of Postal Cooperation of Kenya vs Andrew K. Tanui(2019) .
48. The Respondent submitted that the Claimant never challenged the termination process until calculation of his final dues and that section 44(4) recognizes absenteeism as a reason for summary dismissal and relied on the case of Banking Insurance and Finance Union(Kenya) V Barclays Bank of Kenya Ltd(2014) eKLR.
49. The Respondent further submitted that the Claimant was given a fair hearing by being invited for disciplinary hearing which he attended on 16<sup>th</sup> September, 2019 and relied on the case of Zephania Nyambane & Another v Nakuru Water & Sanitation Services Company Limited (2013), Walter Ogal Anuro v Teachers Service Commission (2013) eKLR.
50. The Respondent Submitted that they resolved to terminate Claimant's employment on absenteeism and poor performance having followed applicable law and relied on the case of Janet Nyandiko vs Kenya Commercial Bank Limited (2017)eKLR.
51. On the issue of whether the Claimant was entitled to finder's fee the Respondent submitted that the Claimant was not entitled to a finder's fee but only the salary and bonus where he received some Kshs 1 million and that the finder's fee was only for external consultants who did not earn salary and the



Claimant was only relying on emails he himself sent to his immediate supervisor requesting to be considered for finder's fee and had not produced any agreement or documentation in proof this fact apart from the email.

52. In addition, the Respondent submitted that there was no legitimate expectation created to the Claimant and relied on the case of *Teresa Carlo Omondi v Transparency International Kenya (2017) eKLR*.
53. On the issue of whether the Claimant is entitled to the reliefs sought the Respondent submitted that the Claimant could not be compensated under section 49 of the *Employment Act* and that the maximum relief of 12 months could not be awarded to the Claimant and relied on the case of *Kenya Airways Limited vs Alex Wainaina Mbugua (2019) eKLR*. On the issue of unutilized leave days, the Respondent submitted the claimant was only entitled to 51 days of leave.
54. On the issue of whether the Respondent was entitled to its counterclaim the Respondent submitted that the Counterclaim was not time barred as this was filed with the leave of the court and that the Claimant never disputed, he owed the Respondent petty cash claimed and that he in fact cooperated to produce receipts in order to be paid his final dues.

### **Determination**

55. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The Court has further considered authorities relied on by Counsels and has come up with the following issues for determination:
  - a. Whether the termination of the claimants service was fair in terms of reason and procedure followed.
  - b. Whether the Claimant is entitled to a finder's fee
  - c. Whether the Claimant is entitled to the reliefs sought.
  - d. Whether the Respondent is entitled to its counterclaim.

### **Whether the reason for the Claimant's termination was fair and justified**

56. On this issue, the respondent alleged that they terminated the Claimant on grounds of absenteeism and delayed implementation of projects. The termination letter was however titled 'restructuring and termination of your employment'. The Claimant's case was that he was never absent from work unless on leave and if absent from office or while at site he would communicate with his immediate supervisor who communicated with the management.
57. The Warning letters on the other talked of absence from work. The claimant denied ever receiving these letters. Further, while the discharge voucher talked of company restructuring due to financial difficulties, the Claimant denied that the Respondent ever had any financial difficulties during the period he worked for them.
58. Section 44 (4) (g) of the *Employment Act, 2007* stipulates what amounts to gross misconduct and categories of gross misconduct. Absenteeism is one of them. The Respondent's witnesses during hearing more so RW1 and RW2 stated that there were time sheets which were used for recording overtime as well as attendance of employees but they did not produce the same in court stating they did not think they were relevant. It was the duty of the Respondent to prove the fact that the Claimant was absent. This was their legal and evidentiary burden under section 107/ 109 of the *Evidence Act*.



59. On the issue of poor performance and delayed projects the employment contract signed by the parties under clause 11 provides for performance review where the Claimant was to be placed on performance improvement plan before termination after appraisal.
60. In the case of Peter Kamau Mwaura and Another Vs. National Bank of Kenya (2020) eKLR the court quoted Jane Samba Mukala Vs. Oltukai Lodge Limited [2010] KLR 225 and observed that–
- “Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”
61. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:
- “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
62. In this case the Respondent kept on changing the reason for termination of the Claimant’s employment ranging from absenteeism, poor performance and company restructuring due to financial difficulties hence there was no clear reason in the Court’s view for the termination of the Claimant’s employment.
63. The Respondent alleged that the Claimant was running a parallel business from the Facebook posts. The said business was for car hire which was not in competition with the business of the Respondent. According to the claimant, most posts were made past working hours and even if posted during working hours did not necessarily mean the Claimant was at that particular place. The respondent needed to prove that the business the claimant was engaged in was during official working hours and took up his work-time making him perform poorly on duties assigned to him by the Respondent. This was never proved by the respondent.
64. Regarding procedural fairness, it was held in the case of Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
65. The Respondent maintained that they dismissed the Claimant on absenteeism and poor performance and they gave the Claimant two warning letters which the Claimant disputed receiving. The Respondent did not prove if at all the Claimant received the same. The Respondent also produced an invitation to disciplinary hearing dated 14<sup>th</sup> September, 2019 indicating that a meeting was to be held on 16<sup>th</sup> September, 2019 which they said was a Thursday but a close look at the calendar it was clear that 14<sup>th</sup> September, 2019 was a Saturday while 16<sup>th</sup> was a Tuesday. That aside, the Respondent did not demonstrate to the court that they gave the Claimant any show cause letter outlining the charges against him requiring him to respond to the charges. The Respondent also submitted that the Claimant attended the disciplinary hearing on 16<sup>th</sup> September, 2019 which fact the Claimant denied.



66. From the foregoing the Court finds and holds that the termination of the claimant's service was unfair in terms of reason and procedure followed.

**Whether the Claimant was entitled to a finder's fee.**

67. The Claimant alleged that he was entitled to a finder's fee on the three projects he brought in and during hearing he testified that he did not have any documents to prove his case apart from the email correspondences mostly done to his immediate supervisor requesting for the same.

68. The Court has looked at all the email referred to by the Claimant and notes that in all email it was the Claimant who was raising this issue. His immediate supervisor Philip, raised it with the management of the Respondent and they concluded that the internal finder's fee was abolished in 2016 and the same was communicated to the Claimant via email.

69. The Court also noted that during hearing, the immediate supervisor RW2 told the court that Finder's fee was payable to consultants and not employees who the claimant was.

70. In support of the claim for Finders fee the claimant invoked the principle of legitimate expectation. The threshold for determining if there exist a legitimate expectation was stated in the case of *Mary M Gitao & 3 others v Chief Registrar – Judicial Service Commission & 3 others* [2017] eKLR where the court will deliberate over three key considerations;

- (1) Whether a legitimate expectation has arisen
- (2) Whether it would be unlawful for the authority to frustrate such an expectation and
- (3) If it is found that the authority has done so, what remedies are available to the aggrieved person.”

71. From the evidence tendered before the Court the court has come to the conclusion that no legitimate arose as the claimant failed to show any practice or incident where employees were paid finder's fee besides in the emails produces it was him who constantly raised the issue with Philip who in turn forwarded the same to management and was advised to inform the claimant that only consultants but not employees were entitled to finder's fee. The claimant was therefore not entitled to finder's fee and the court so holds.

**Whether the Claimant is entitled to reliefs sought.**

72. The Claimant prayed for reinstatement which prayer he abandoned during hearing and so the court will not deal with the same but alternative prayers which the Respondent did not object to apart from the leave days which it said were 51 days while the Claimant claimed 105 days. The Respondent did not produce any records as required of it under section 74 of the *Employment Act* to dispute that the Claimant claim for 105 leave days.

73. As found above that the claimant's service was unfairly terminated, in assessing the commensurate award under section 49 of the *Employment Act*, the Court notes that the claimant was employed in 2014 and worked until 2019. This was a period of approximately 6 years. Further claimant was involved in business hence he was properly cushioned from any eventuality that could occur to him in the course of his employment. An award of six months' salary as compensation for unfair termination would be reasonable in the circumstances. The Claimant is further entitled to certificate of service as envisaged by Section 51 of the *Employment Act*.



**Whether the Respondent is entitled to its counterclaim**

74. RW3 told the court that they were holding the Claimant’s final dues until he cleared with petty cash issue and that there was no formal demand served upon the Claimant before the said termination. The Counterclaim is a special damaged which ought to be strictly proved. At the trial it was not clear how the amount changed from Kshs 287,000/= to Kshs 158,000/= and the fact that the petty cash was for the years 2016, 2017 and 2018 which was a long time back. It was not clear why the respondent waited for the termination of the claimant to bring it up. From the foregoing the Court will disallow the counterclaim for lack of proof.
75. In conclusion the Claimant’s claim is successful and judgment entered against the respondent as follows:
- i. Unpaid leave days for 105 days @ 21 days pay per year ( 3.5 months)  
.....525,000/-
  - ii. Six month’s salary as compensation for unfair termination.....  
900,000/-  
Total.....1,425,000/-
  - iii. Costs of the suit
  - iv. The respondent shall issue the claimant with a certificate of service
  - v. Items (i) and (ii) shall be subject to taxes and statutory deductions but shall earn interest at Court rates from the date of this judgment until payment in full.

It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**ABUODHA JORUM NELSON**

**JUDGE**

