



**Odhiambo v Nyota Clothing Limited (Employment and Labour Relations Cause 1441 of 2017) [2023] KEELRC 2253 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2253 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1441 OF 2017**

**K OCHARO, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**AMOS ONYANGO ODHIAMBO ..... CLAIMANT**

**AND**

**NYOTA CLOTHING LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times up until the 8<sup>th</sup> of June 2017, the Claimant was an employee of the Respondent. Contending that his employment was unfairly and unlawfully terminated by the latter, the Claimant instituted the claim herein through a Memorandum of Claim dated 22<sup>nd</sup> July 2017 seeking: -
  - a. A declaration that the Claimant's termination was unfair and unlawful.
  - b. A declaration that the Claimant is entitled to a certificate of service having served the Respondent diligently for eight months.
  - c. A declaration that the Claimant was underpaid.
  - d. Compensation to the Claimant as follows: -
    - i. Kshs. 16,872/- in lieu of termination notice;
    - ii. Kshs. 5,061/- compensation for 9 days untaken leave;
    - iii. Kshs. 5,000/- deducted from salary in the month of May;
    - iv. Kshs. 26,803/ underpaid wages for seven months;
    - v. Kshs. 202,464/- being compensation for unfair termination;



- vi. Kshs. 3,500/- for unpaid wages for the period between 9<sup>th</sup> November 2016 to 15<sup>th</sup> November 2016; and
    - vii. Kshs. 10,000/- being unpaid wages during the period that he was sick.
  - e. General damages.
  - f. Costs of this suit.
2. Contemporaneously with the filing of the Memorandum of Claim, the Claimant also filed a Verifying Affidavit sworn on 22<sup>nd</sup> July 2017; Claimant's List of Exhibits dated 22<sup>nd</sup> July 2017 and documents thereunder; Claimant's List of Witnesses dated 22<sup>nd</sup> July 2017; and Witness Statement dated 22<sup>nd</sup> July 2017.
3. In response to the Memorandum of Claim, the Respondent filed a Response to the Memorandum dated 13<sup>th</sup> September 2017. In addition, it filed a Witness Statement of Karim Ramzan Lalani dated 11<sup>th</sup> September 2017; a Witness Statement of Caroline Makungu Isadia dated 11<sup>th</sup> September 2017; and a List and Bundle of Documents dated 13<sup>th</sup> September 2017.
4. This matter proceeded for hearing of the Claimant's case on 28<sup>th</sup> March 2022. The Claimant testified on his own behalf. It was adjourned to 16<sup>th</sup> June 2022 for hearing of the Respondent's case, when the two witnesses for the Respondent testified.
5. Pursuant to this Court's directions that parties file written submissions, the Claimant filed his submissions dated 20<sup>th</sup> July 2022, while the Respondent filed its dated 19<sup>th</sup> September 2022.

#### **Claimant's case**

6. At the hearing the Claimant adopted his witness statement as part of his evidence in chief and urged the Court to admit the documents filed as hereinabove mentioned as his documentary evidence. As there was no opposition from the Respondent, the documents were admitted as such.
7. It was the Claimant's case that he first came into the employment of the Respondent on the 9<sup>th</sup> of September 2016 as a storekeeper, at a gross salary of KShs. 15000. His employment contract was in nature an open-ended one. In his said employment, his duties included receiving incoming goods, dispatching outgoing goods, assorting, stacking and arranging bales of clothing as required.
8. As a storekeeper, the Claimant states that he was entitled to a monthly pay of Kshs. 16,872, being the minimum wage applicable to all workers in the same cadre. The contractual salary was therefore less than this stated statutory minimum wage. Consequently, at all material times, he was underpaid. The underpayment had a direct effect on his house allowance (15% of the basic salary). He was resultantly underpaid, by Kshs. 1,239/- per a month.
9. The Claimant further stated that in addition to his duties as a storekeeper, the Respondent also engaged him in other duties including sales and marketing, duties which required him to travel outside his workstation to various towns within the country. This engagement was at all times on the understanding that he would be paid upon returning from the trips. In May 2017, the Claimant travelled to various towns for these duties on the understanding but was not paid.
10. The Claimant alleged that due to the nature of his duties and more specifically lifting of goods in the store, he developed chest problems in May 2017, and was consequently prompted to seek treatment at various medical facilities with the knowledge and consent of the Respondent. Permission for him to seek treatment was given by the Respondent's Managing Director.



11. The Respondent's knowledge, consent and permission notwithstanding, surprisingly the Respondent turned around purporting that the Claimant had absconded duty. It consequently terminated his employment unlawfully on 8<sup>th</sup> June 2017. The termination was without notice. Further, he was not given any opportunity to defend himself on any count before the termination.
12. The Claimant testified that the days that the Respondent alleged the Claimant to have absconded duty, were the days when he was off duty due to his illness and with the direction of the Doctor. He gave the Respondent a sick-off sheet as a testament to the Doctor's direction. The sick-off days were to run from 26<sup>th</sup> May 2017 to 3<sup>rd</sup> June 2017.
13. When he resumed duty, the Respondent gave him warning letters. The letters were written when he was away on sick-off.
14. After unlawfully terminating his employment, the Respondent further deducted Kshs. 5,000/- from his May salary without any justification.
15. That the Claimant attempted to resolve this matter amicably, to no avail.
16. Cross-examined by Counsel for the Respondent, the Claimant reiterated that he was employed as a storekeeper and his duties entailed receiving goods that came in and giving out the purchased ones to customers. He was serving alone in the store. Record-keeping was being done by his "boss". He was reporting to one Mr. Kharim, who was the Director of the Respondent.
17. The Claimant further testified that the employment contract was reduced to writing but the Respondent didn't give him a copy thereof.
18. The health challenges started when he was only three months into the employment. He informed Mr. Kharim of it. He first went to the Hospital on 19<sup>th</sup> March 2017. He handed over the treatment notes regarding the treatment to the Director. The Director didn't acknowledge receipt of the same in writing. On this occasion, he visited the Hospital after work hours.
19. The Claimant contended that he was on sick off with the authority of the Director, Mr Karim. The Director only allowed him to proceed for the off after getting persuaded that he [the Claimant] had medical documents in support of his allegation that he was unwell. The Director accorded him the authority without first requiring him to fill out an application form.

### **Respondent's case**

20. The Respondent presented two witnesses to testify on its behalf. The 1<sup>st</sup> Witness, Karim Ramzan Lalani, the Respondent's Operations Manager urged the Court to adopt his witness statement dated 11<sup>th</sup> September 2017, as his evidence in chief and the documents that the Respondent filed under the list of documents mentioned hereinabove as its exhibits.
21. The witness stated that his Job entailed receiving, dispatching, marketing, recruiting, remunerating and terminating the Respondent's workers.
22. The witness testified that the Claimant came into the employment of the Respondent on the 15<sup>th</sup> November 2016, as a general labourer with a salary of Kshs. 15,000 per month. At all material times, the Respondent paid its workers' wages above the minimum set under the relevant wage orders. As a general labourer, the minimum wage for the material time was Kshs. 12,926. He was therefore being remunerated above the recommended minimum sum. His allowance was calculated on the gross pay, and as such he was earning KShs. 1,956.52, and not KShs. 1,239.13 as he alleged.



23. The witness stated that in May 2017, the Claimant volunteered to look for new markets outside Nairobi for the Respondent's goods. The witness allowed him to travel to Western Kenya for this purpose and gave him KShs. 10,000 to cater for his expenses. The money was paid on a petty cash voucher, EXH. KMRL2.
24. The witness stated further that upon getting back from the marketing tour, the Claimant did not appear at work for eleven [11] days. The witness was forced to employ a casual labourer for a while to work in his place.
25. Further, the Claimant kept missing to report to work on diverse dates citing ill health, and promising that he would duly resume work once he was through with Hospital treatment. However, he didn't produce any treatment documents to support his claim that he was unwell and undergoing treatment until he was issued with a second warning letter. It was at that point that he produced an unverified copy of the sick sheet purportedly from Mbagathi Hospital.
26. It was stated further that he advised the Claimant to alternatively sign a leave form but he refused. On or about the 24<sup>th</sup> of December 2016, the Claimant had been allowed to proceed for leave upon application.
27. As the Claimant didn't turn up for work on most of the days in May 2017, the Respondent decided to deduct his salary for those days, as a disciplinary action.
28. The Claimant was issued with three warning letters dated 22<sup>nd</sup> May 2017, 25<sup>th</sup> May 2017, and 31<sup>st</sup> May 2017, following his failure to change his poor attitude, notwithstanding the efforts by the Respondent urging him to. When the Claimant received the last warning letter on the 31<sup>st</sup> May 2017, he just left and reported to duty on 8<sup>th</sup> June 2017.
29. The witness stated that as a consequence, he had to issue the Claimant with the termination letter dated 8<sup>th</sup> June 2017, as he had grossly violated the terms of his employment, by failing to attend work and while he attended he would refuse to work as instructed.
30. Cross-examined by Counsel for the Claimant, the witness testified that the Respondent didn't issue the Claimant with any letter of appointment. Contrary to his assertion, he never signed any contract of employment.
31. The Claimant was employed as a casual labourer. According to the witness, there is no difference between a storekeeper [the position that the Claimant alleged to have been employed into] and a general labourer.
32. His salary was deducted only in respect to the days that he didn't show up for work completely.
33. The witness testified further that on any day the Claimant didn't turn up for work, he would call him to ascertain why he did not. More often than not, the Claimant could fail to pick up the calls.
34. On the 25<sup>th</sup> of May 2017, when he reported to work, the Claimant informed the witness that he was unwell. The witness permitted him to go for treatment. He thereafter didn't bother to call the witness, he only reported back on 31<sup>st</sup> May 2017, with a medical document that did not have any stamp to aid in ascertainment of its authenticity.
35. The document gave the Claimant seven days of sick off. The seven days were to lapse on the 1<sup>st</sup> of June 2017. The witness admitted that the Respondent didn't visit Mbagathi Hospital to ascertain the authenticity of the document.
36. The witness stated that he didn't issue any notice to the Claimant since the latter had absconded duty.



37. On the Claimant's claim for compensation for leave days untaken, the witness testified that the Claimant was not entitled to the same as at the time of termination he had not worked for the Respondent for a period of one year.
38. The 2<sup>nd</sup> Witness for the Respondent was Caroline Makungu Isadia. Like RW1, the witness asked this Court to adopt the contents of the witness's statement as her evidence in chief. She stated that she joined the workforce of the Respondent in May 2015.
39. The witness stated that she became aware that the Claimant was not reporting to duty as he was supposed to, and on inquiry why, he informed her that he was upset with Mr. Karim who had employed new employees with better salary terms than him. He vowed to push Mr. Karim to hike his salary and if Mr. Karim didn't, he would find ways of fixing him to teach him a lesson.
40. Cross-examined by the Claimant's Counsel, the witness testified that the Claimant's work was to load purchased goods into customers' vehicles and arrange goods in the store.
41. The inquiry as to why the Claimant was not reporting to work as expected, was informed by the fact that over time he had noticed him idling in Gikomba. Sometimes he would get into the Respondent's Gikomba outlet to just idle.

### **Claimant's Submissions**

42. The Claimant's Counsel identified two issues for determination in this matter, thus; whether the Claimant's termination was unfair; and whether he is entitled to the prayers sought.
43. Counsel submitted that it is now trite law that in order for the termination of an employee's employment to pass the fairness test, the Court must be satisfied that there was substantive and procedural fairness.
44. It was further submitted that Section 41 of the [Employment Act](#) provides what amounts to procedural fairness. Further, in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, the Court of Appeal, elaborately brought out the components of the procedural fairness contemplated in the stated provision of the law, thus the employer must explain to the employee in a language he understands the grounds of termination; the reason for which the employer is considering termination must be disclosed; the employee must be made aware of their entitlement to the presence of another employee of his choice when the explanation of grounds of termination is made; and there must be a hearing and consideration of representations made by the employee and the person chosen by the employee.
45. The material placed before this Court is all indicative that the Respondent didn't adhere to the mandatory procedure set by Section 41, before terminating the Claimant's employment. The termination was therefore unfair.
46. On substantive fairness, Counsel submitted that as regards the justification for the termination, the parties took totally parallel positions. While the Respondent held that the same was as a result of the Claimant's desertion of duty and therefore justified, the Claimant maintained that for all those days he was alleged to have absconded duty, he was absent with the knowledge and authority of RW1, due to his illness. Therefore, the reason for the termination was not fair.
47. It was further submitted that the Claimant was able to demonstrate to this Court that indeed on the days he is alleged to have been absent from duty, he was so absent as a result of his ill-health. The various documents from the hospital are a testament to this.



48. That the Claimant's Exhibit 9, a Medical Report dated 19<sup>th</sup> March 2017, shows that he had been given 2 days off duty. Exhibit 10, a Medical Report dated 8<sup>th</sup> April 2017, shows that the Claimant had been given 3 days of rest while recovering. The Medical Report dated 19 May 2017 shows that the Claimant had been given 2 days off duty for ill health, while the Medical Report from Mbagathi Hospital dated 25 May 2017 shows that the Claimant had been given 7 days off duty with a recommendation to resume on light duties thereafter for 3 months.
49. The Claimant states that sick leave is provided for under Section 30 of the *Employment Act*, and an employer cannot lawfully dismiss an employee because he took sick leave.
50. It was further submitted that in the circumstances of this matter, the Respondent failed to discharge the legal under section 43 of the *Employment Act*, proving that the termination of the Claimant's employment was substantively justified.
51. On the reliefs sought it was submitted that the Claimant's employment was terminated without notice. Consequently, he should be awarded pay in lieu of notice, thus, KShs. 16,872.
52. The Claimant argued that at the time of the termination, he had worked for the Respondent for a period of seven [7] months. He, therefore, had earned a total of 13 leave days, out of which he utilized four. Pursuant to the provisions of Section 28 of the *Employment Act*, he is entitled to compensation for nine [9] unused leave days, KShs. 5,061.
53. The Claimant submitted that the deduction of his salary as a disciplinary measure was unjustified as his failure to be at work on the affected days was due to illness. He should be refunded the sum of Kshs.5000.
54. The Claimant urged the Court to find that he merits a compensatory award equivalent to twelve months' gross salary for unfair termination.

### **Respondent's Submissions**

55. In its submissions dated 19<sup>th</sup> September 2022, the Respondent identifies three issues for determination, thus, Whether the Claimant was underpaid, whether the Claimant's employment was unfairly terminated, and whether the Claimant is entitled to the reliefs sought.
56. The Respondent's Counsel argued that considering the Claimant's duty, i.e. loading and offloading bales at the Respondent's store and reporting directly to the Manager who had control over the store, a duty that didn't require any skill, it is safe for one to conclude that he was a general labourer and not a storekeeper as he alleged. To buttress this submission, reliance was placed on the case of Caleb Ouya Opule vs Bhupendra R. Bid & Anor [2014] eKLR. Therefore, as a general labourer, his salary was at all material times above the minimum prescribed wage. The salary of KShs. 15000 was inclusive of the house allowance.
57. On whether the Claimant was unfairly terminated, the Respondent submits that the reason for termination was valid. This is because the Claimant absconded work, which amounts to gross misconduct whose sanction under Section 44 (4) (a) as read together with (c) is summary dismissal without notice.
58. The Respondent urges this Court to look carefully at the circumstances of this case, particularly the time frame of events, as recommended by the Court in Ann Njoroge vs Topez Petroleum Limited as quoted in the case of Banking, Insurance & Finance Union (Kenya) vs Barclays Bank of Kenya Limited [2014] eKLR.



59. The Respondent states that on 27<sup>th</sup> April 2017, the Claimant was given an allowance to facilitate his work travel to Western Kenya to market the Respondent's products. He was expected to resume his duties immediately after returning but failed to attend work for ten (10) days soon after his return. During the period when he alleges he was sick, RW2 saw him at Gikomba market. To support his claims that he was absent due to illness, the Claimant produced an unverifiable sick sheet purportedly from Mbagathi Hospital dated 25<sup>th</sup> May 2017.
60. The Respondent submits that the Claimant absented himself from work without leave or communication to the Respondent and/or lawful reason to do so. This amounted to absconding.
61. That it was not the first time that the Claimant absconded work under the guise of being sick. In fact, the Claimant admits that the first time he missed work due to illness on 19<sup>th</sup> March 2017, he had not informed the Respondent's manager.
62. The Respondent casts doubt on whether the Claimant was actually sick on the days that he claims to have been and cites Banking, Insurance & Finance Union (Kenya) vs Barclays Bank of Kenya Ltd [2014] eKLR where the Court found that failure to bring illness to the attention of the employer and being away from work without authorization amounts to absconding duty.
63. It was further submitted that the Respondent had a justified reason to terminate the Claimant's employment. The Claimant had been issued with three warning letters over the issue of absconding. He never changed his ways. In support of these submissions, reliance was placed on Kenya Shoe and Leather Workers Union vs Fast Track Management Consultants Limited [2015] eKLR.
64. For the above reasons, the Respondent concludes that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim dated 22<sup>nd</sup> July 2017.

#### **Issues for Determination**

65. From the material placed before me by the parties, I distil the following issues for determination, thus;
  - a. At what position did the Claimant join the Respondent's employment?
  - b. Was the termination of the Claimant's employment fair?
  - c. Is the Claimant entitled to the reliefs sought?

#### **At what position did the Claimant join the Respondent's employment?**

66. From the premises hereinabove, it is clear that the parties in this matter didn't have a common stand on the position at which the Claimant joined the Respondent's workforce. Considering that the Claimant has claimed underpayment, which claim I hold finds anchor on the provisions of section 48 of the [Labour Relations Act](#), it therefore becomes imperative, that this Court first interrogates the Claimant's job classification.
67. In a situation like is in this matter where the exact job classification of an employee is in contest, the court is charged with the responsibility not to just pick the description given by the employer. It must make an informed decision based on the circumstances of the case and the relevant stipulations of the law. It must cut the label.



68. In the case of Caleb Ouya Opule v Bhupendra R. Bid and Sere [supra], Justice Rika aptly stated and I am persuaded;

“ 15. .... This Court is not bound by the classification or tags that Employers impose on their Employees but must examine the duties performed by the Employee and find out if they fit the description given. This is more so in a situation where the Employer has failed to give a written contract, with a specific job classification.....”

69. It is important to point out that the law [sections 9 and 10 of the *Employment Act*] contemplates that certain contracts of service be in writing and charges the Employer with the responsibility of causing contract[s] to be drawn, executed by the Employee, and issued. Further, the contract[s] drawn in pursuance thereto embody certain particulars, inter alia, the employee’s occupation or a brief description of the work for which he or she is employed. This is to ensure certainty between the employer and the employee, and gears towards protecting the vulnerable employee against the employer who holds the purse strings in the event of disagreement. Suffice it to state that through the evidence of RW1, the Respondent admitted that it didn’t discharge this responsibility.

70. That being so, the Respondent had to bear and discharge the burden of proving the Job classification for the Claimant. This Court has stated severally before, that the discharge of a legal burden requires cogent evidence to be adduced by the person charged with the responsibility to discharge the burden. A legal burden cannot be discharged by mere assertions.

71. I have agonized over whether the material placed before me by the Respondent helps demonstrate that the Claimant was employed as a general labourer, and return that it doesn’t. Testifying under cross-examination, RW 1, stated that according to him there was no difference in meaning between a storekeeper and a general worker. In my view, this kind of evidence could by no means be deemed a rebuttal of the Claimant’s.

72. The Respondent’s Counsel submitted that considering the nature of the duties that the Claimant was undertaking in the course of his employment, it cannot be difficult to conclude that the same didn’t require any skill. This submission ignores the Claimant’s evidence and that of the Respondent’s witnesses’ that on certain occasions, the Respondent would send him to towns outside Nairobi to market its goods. In my view, the Claimant cannot fit in the description ‘an employee rendering duty that required no skill’, and “Mtu Wa Mkono” to employ Justice Rika’s description of a general worker in the Caleb Ouya case [Supra].

73. By reason of the premises, I am not persuaded by the Respondent’s position that the Claimant was in its employment as a general labourer. The Claimant’s evidence which I find consistent and unshaken under cross-examination, persuades me that he was employed as a storekeeper.

#### **Was the termination of the Claimant’s employment fair?**

74. The circumstances of this case are that the Claimant’s employment was terminated vide a letter dated 8<sup>th</sup> June 2017 titled “REF: RELIEVE OF DUTY.”

75. The said letter reads:

“It is with deep regret that I have to inform you that, even though I have warned you so many times, you have still not improved and are continuing to abscond duties and refusing to



follow instructions. I am therefore left with no option but to relieve you of your duties with immediate effect.” (Emphasis mine)

76. There can be no doubt that the Claimant was summarily dismissed from employment. I now turn to consider whether the dismissal was fair.

77. When invited to consider whether or not a termination of an employee’s employment or summary dismissal of an employee was fair or not, the Court has to interrogate the presence or otherwise of procedural fairness and substantive justification. The two aspects are codified in the [Employment Act, 2007](#). Substantive justification speaks to the decision, while procedural fairness does to the process leading thereto.

78. Section 45[2] of the [Employment Act, 2007](#) provides what would constitute unfair termination, thus;

“Unfair termination

- (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.”

79. Elaborating on the two aspects the Court in *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR*, stated;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

80. Section 41 of the [Employment Act](#) provides for a mandatory procedure that an employer contemplating terminating an employee’s employment or summarily dismissing his or her employee from employment must adhere to. The provision speaks to procedural fairness. Discernable from the section are three components that constitute procedural fairness, thus; the notification component, the employer must notify the employee affected of his or her intention and the reason[s] stirring the intention, the hearing component, the employer must accord the employee an opportunity to prepare and make a representation on the grounds, this component is conjoined with the employee’s right to be accompanied by a colleague of his own choice or a trade union representative [if he or she is a member of the union], and the consideration component, the employer must consider the representation made by employee and the person accompanying him, before taking a decision on the ground[s].

81. I have carefully considered the material placed before me by the parties and find no difficulty in concluding that all the stated components were absent in the process leading to the decision to



summarily dismiss the Claimant. In fact, the tone of the Respondent's witnesses' evidence, sounds explicit admission, that the statutory procedure was not followed at all.

82. By reason of the premises, I come to an inescapable conclusion that the dismissal of the Claimant was procedurally unfair.
83. In a dispute regarding termination of an employee's employment, Section 43 of the *Employment Act* places the onus of proving the reason or reasons for termination of employment, on the employer. The failure to discharge the burden as contemplated under this provision of the law shall render the termination unfair by dint of the provisions of section 45[2] of the Act.
84. From the termination letter, it is clear that the Claimant was summarily dismissed from employment on account that he had continued to abscond duties and refuse to follow instructions. Keenly looking at the ground[s] as set out, one cannot fail to see the vagueness in the manner it is couched. It is not possible to tell when the alleged absconding of duty occurred, and the instructions that the Claimant refused to follow.
85. Further, this Court notes that the witness statement by the Respondent's first witness, its operations manager, does not at all mention the specific dates when the Claimant absconded duty and or refused to adhere to instructions given to him. The warning letters that were allegedly issued to him were also very silent on the specific dates when the absconding they purported to refer to occurred. It is surprising that the Respondent did not make any averment in its pleadings specifically mentioning the date[s].
86. Lastly, it is imperative to state that the Respondent's first witness in his oral testimony before Court admitted that the Claimant informed him of his health condition and that he allowed him to go for treatment. That he however had an issue with the documents that the latter handed over in support of the fact that he had been treated, and allowed sick offs. According to him [Rw1], the documents were not authentic. I am not persuaded that the alleged concern over the authenticity of the documents is genuine for two reasons. First, the Respondent upon doubting the same didn't seek to ascertain their authenticity from the medical institutions or doctors that issued the same, Second, the documents are on the letter heads of the facilities that issued them, lastly, the Respondent having been with the documents way back the year 2017, did not find it necessary to challenge their authenticity at any time, or challenge their production as exhibits.
87. By reason of the premises, I am impelled to find that the Claimant was absent from duty on the dates mentioned in the documents he tendered before this Court on account of illness, and with the knowledge and consent of the Respondent. Consequently, I find the reason[s] that the Respondent cited as the basis for the dismissal of the Claimant not valid, and unfair.
88. In the upshot, I hereby conclude that the dismissal of the Claimant from employment was without substantive justification.

#### **Is the Claimant entitled to the reliefs sought?**

89. Having found as I have hereinabove, I now turn to consider the reliefs sought and whether the Claimant is entitled to them or any of them.
90. There is no dispute that the Claimant was deducted KShs. 5000 from his pay for May 2017, as a disciplinary action for his absenteeism. Having found that his absence from duty was at all material times with the authority of the Respondent, and that the ground[s] for his summary dismissal was substantively unjustified therefore, I am convinced that he is entitled to a refund of the same.



91. It is imperative to state at this point that considering the massive protection the *Employment Act* accords employees' wages and salaries, deduction of an employee's salary as a disciplinary measure can only be valid if his contract of employment and or the employer's Human Resource Manual expressly authorizes, or the employee consents to, the same.
92. The Claimant's employment was one terminable by a twenty eight days' notice or pay in lieu of notice pursuant to the provisions of sections 35 as read together with section 36 of the *Employment Act*. Had this Court found the summary dismissal fair, the Claimant's claim for notice pay would could have been for rejection as section 44 (1) allows an employer to terminate an employee's employment summarily, that is, without notice or less notice than statutorily provided, for lawful cause. However, in view of my finding hereinabove, I award the Claimant one month's salary in lieu of notice, KShs.16,872.
93. On the claim for 9 days untaken leave, this Court states that the Claimant had worked for 7 months before his dismissal, therefore on a prorated basis, he had earned 12.25 leave days. I have noted that the Respondent has produced a Leave Application Form which evidences that the Claimant had only taken 4 days leave. There was therefore 8.25 unutilized leave days. For the unutilized leave days, the Claimant is awarded, KShs.  $8.25 / 21 \times 11,810.4 = 4,639.8$ .
94. On salary underpayment, the Claimant submits that he received a gross salary of Kshs. 15,000/- per month and that what the Respondent was paying him was below the minimum wage that the law sanctioned during the material times. He consequently and claims an underpayment of Kshs. 1,872.00 per month for 7 months.
95. I have no doubt that the Regulation of Wages (General) (Amendment) Order 2017 is applicable to the Claimant's period of employment. The same provided the minimum wage as KShs. 16,872 for storekeepers. Having found as I have hereinabove that the Claimant was employed as a storekeeper, and cognizant of section 48 of the *Labour Institutions Act*, I find that for the period that the Claimant worked for the Respondent he was underpaid to the extent stated above and therefore entitled to the cumulative figure of the monthly underpayments. He is consequently awarded KShs.  $1,872 \times 7 = 13,104$ .
96. The Claimant further claimed for KShs. 3500 unpaid wages for the period 9<sup>th</sup> November 2016 to 15<sup>th</sup> November 2016. The Claimant did not place any evidence before me to demonstrate what informed this claim and his entitlement to the same. Consequently, I reject the same.
97. Finally, I consider the issue of compensation for unfair termination. I have found that the Claimant was unfairly terminated. Under Section 49 (1) [c] of the Act, under this provision an employee who has successfully assailed his or her employer's act of terminating his or her contract, is entitled to a compensatory relief to a maximum extent of 12 months' gross salary. Imperative to state that the Court's power under the section to grant the compensatory relief is discretionary, depending on the circumstances of each case.
98. Considering the manner in which the Claimant was dismissed, without, substantive justification and, procedural fairness, the length of time he served the Respondent and the fact that he didn't contribute to the dismissal, I find that he is entitled to the relief and to the extent of 3 [three] months' gross salary, KShs. 50,616.
99. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
100. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
  - a. A declaration that the Claimant's termination was unfair and unlawful.



- b. A declaration that the Claimant is entitled to a certificate of service. The same to be issued to him within 30 days of this judgment.
- c. Compensation to the Claimant as follows: -
  - i. Kshs. 4,639.8/- for 8.25 days untaken leave days;
  - ii. Kshs. 13.104/- salary underpayment.
  - iii. Kshs.50,616/- being compensation for unfair termination.  
Total - Kshs.68,359/-
- d Interest on (c) above at Court Rates from the date of judgment until payment in full.
- e Costs of this suit.

**READ, DELIVERED AND SIGNED THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**OCHARO, KEBIRA**

**JUDGE**

**In the Presence of:**

Ms Aradi for Respondent

No appearance for Claimant

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

.....

**OCHARO KEBIRA**

**JUDGE**

