



Rotich v Jirani Cultural Organisation (Employment and Labour Relations Cause 407 of 2016) [2023] KEELRC 2468 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2468 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 407 OF 2016
K OCHARO, J
SEPTEMBER 18, 2023**

BETWEEN

COLLEEN CHEPTOO ROTICH CLAIMANT

AND

JIRANI CULTURAL ORGANISATION RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 10th March 2016 the Claimant instituted a claim against the Respondent seeking the following reliefs: -
 - a. An order declaring that the Respondent's purported termination of the Claimant's services vide letter dated 19th November 2015 is unfair, illegal, null and void.
 - b. The Sum of Ksh.6,989,603 as tabulated in paragraph 15 of the statement of the Claim.
 - c. The sum of Ksh.2,400,000 being 12 months compensation for the unfair termination.
 - d. An order directed at the Respondent to issue the Claimant with an unconditional Certificate of Service.
 - e. Cost of the suit.
 - f. Interest on (b), (c) and (e) above at the court's rate.
 - g. Any other relief this court may deem fit to grant.



2. The Memorandum of Claim was filed together with the Claimant's witness statement, and documents that she intended to place reliance on as documentary evidence in support of her claim.
3. Having been served with the summons to enter appearance, the Respondent entered appearance on 6th October 2016 and filed a memorandum of reply on 11th November 2016. In it, the Respondent denied the Claimant's Claim and her entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit. The Claimant's case was heard on 23rd May 2022 while the Respondent's case was heard on 21st September 2022.
5. At the hearing, the parties urged the court to adopt the contents of the witness statements that they had filed herein as their respective evidence in chief, and the documents as their documentary evidence.

The Claimant's case

6. It was the Claimant's case that she first came into the employment of the Respondent organization in 2010 as a Human Resource Manager at a monthly salary of KShs. 25,300. This followed her secondment to the Respondent by the parent organization based in Korea. Further, she was later elevated to the Respondent organization's Board in the year 2012. The elevation was a product of her diligent, faithful, and honest delivery of services.
7. The Claimant asserted that due to her exemplary work, she got appointed to the position of the Organization's Ag Director and remained in service until 19th November 2015 when the Respondent terminated her service with immediate effect alleging that she had grossly misconducted herself, abused her office, and neglected duty.
8. She further stated that the persons who decided to terminate her employment were not bona fide members of the Board. They had no mandate to deliberate on and or determine the disciplinary issues that were raised against her. The decision in flagrant breach of the rules of natural justice, her legitimate expectation, arbitrary, unreasonable, and prompted by ulterior motives.
9. The Claimant had been a Board member since 2012 hence she Could not be removed from the Organization in the manner the Respondent purported to. Its action was a clear violation of the provisions of section 18 of its constitution thus rendering the decision irregular, null and void.
10. The Claimant further asserted that the persons who signed the termination letter dated 19th November 2015 did not have any authority to sign it, therefore.
11. It is asserted that the termination of her employment was orchestrated by people who saw her as a stumbling block to their ill-intentioned scheme to mismanage and embezzle funds to run down the Organization. Her continued service with the Respondent organization was discomfoting to them. They resorted to harassing, intimidating and discriminating her at work.
12. She contended that on the 19th of October, 2015 she was assaulted by a junior employee. The employee was subsequently charged in a criminal court. Testament of their ill motive, the Respondent did nothing about the assault case.
13. Given of the foregoing, the Claimant contends that she is entitled to the following reliefs from the Respondent:
 - a. Salary for the position of Ag Director from 1st Oct 2013-19th November 2015.....Ksh.5,400,000



- b. House allowance from 1st Oct-19th Nov 2015 – Ksh.75,000 per month.....Ksh.2,025,000
 - c. Tuition fees for 2 children for the 1st,2nd and 3rd term,2015
 - i. Lower primary Ksh 24,000 x 3 terms Ksh.31,000
 - ii. Kindergarten fees Ksh.21,000 X 3 terms ...Ksh.31, 800
 - d. Fuel reimbursements for the period between
5th Aug 2014-3rd Nov 2014 Ksh.11,003
14. It was the Claimant’s testimony on cross-examination that she started serving the Respondent in 2010 as an Administrator and was later promoted to the Human Resource Manager. She was promoted as such under a letter dated 10 August 2012. On or about the 12th of October 2013 became an acting Director in the Place of Peter Kim. *The Constitution* of the Respondent provides for *the constitution* of the Board with a membership of three. She took over the role of the Executive Director. She was appointed in the manner provided for in *the Constitution*. The appointment placed her on the list of the top three officials of the Organization.
 15. She further stated that in her role as the Human Resource Manager, she was the Secretary to the Board, and could also advise the Board. Referred to the minutes of May 30, 2015, she testified that therein her name was captured under the sub-cation “Sitting Board Members”.
 16. Pressed further, she admitted that she was referring to *the Constitution* of Jiran Children’s Choir. Jiran Cultural Organization has a different Constitution. The two Organizations are registered under different regimes. One birthed the other. She was appointed into the latter Organization which was a successor of the former.
 17. The minutes tendered will demonstrate that she was to remain on the Board of the Jiran Cultural Organization. Further, the records at the Ministry of Sports, Culture and Arts indicate that she was its Secretary. She was appointed to the position of Acting Director on 4th October 2013, under a letter by Peter Kim, which letter wasn’t on the Respondent’s letterhead.
 18. The position of the acting Director was remunerated. There were several email correspondences from whence this can be discerned. However, there was no letter setting forth the pay. As an acting Director, she was to earn as a Director.
 19. It is her testimony that she was not invited to a disciplinary hearing nor given the reasons for the termination of her employment. She just received a termination letter while she was in her office. The letter dated 16th November 2015, that purportedly invited her for the hearing was received on the same day that was appointed for the purported hearing, 18th November 2015.
 20. On re-exam, it was her testimony that the letter dated 16th November 2015 was apparently received by the NGO Coordination Board on 17th November 2015, as evidenced by the receipt stamp on it. Further, she received the same on 18th November 2015, at 5.00 pm.
 21. She testified that she did not pay herself for the acting position as she was under instructions from Peter Kim to wait until a substantive Director was in office. Then she could negotiate the pay with him.
 22. She sent an email dated 15th October 2014 to the overall Director of the Respondent, an email which largely spoke to her services as the Acting Director and her concerns that the issue of pay for the same was not being addressed.



23. The Claimant asserted that as one of the signatories to the Respondent's accounts, she was aware that Directors were earning KShs. 200,000. The Bank statement, tendered is a testament to this.
24. CW2 Fredrick Mwikya Munyalo, invited the Court to adopt the contents of his witness statement dated 25th March 2022 as his evidence in chief. The witness stated that he is the current Chairman of both Jirani Cultural] Organization and Jirani Children's Choir in Kenya. He acknowledged that the Claimant was part of the Respondent's management team. The management team comprised of Koreans and Kenyans.
25. The witness stated that from 2013 through 2014, there emerged wrangles between the management and the staff members of the entities. The wrangles culminated in the founder management members leaving the Country for their Country Korea. As a result, the Claimant was handed over the position of Acting Director in the place of Kim Kyong, pending his return.
26. The witness stated further that towards the end of 2014, a new team arrived from Korea asserting that they had been sent by the Founder Korean members to take over the management of the Jirani Children's Choir/ Jirani Cultural Organization. This took parents and stakeholders by surprise as they had not been informed of the new team and the takeover.
27. The leadership of Sihm Jaung [the new Director], plunged the Jirani Centre into a state of unprecedented challenges. The Centre got closed. It took the intervention of the Court in Nairobi Children's Case No. 275 of 2015 to have it reopened.
28. The new Director was not paying school fees for the Children at the Centre. It didn't matter that funds were available and that part of the funds had been raised by the Children themselves through their activities for instance the Choir /Concert during the tour in Korea. His push through the Claimant for the pay of the school fees didn't sit well with the new Director. The relationship between the two became sour. Subsequently and as a result, the Claimant was dismissed from employment in a manner that was not fair.
29. Cross-examined by Counsel for the Respondent, the witness testified that he is aware of a matter pending in Court by parents against the Respondent. The matter relates to a violation of the Children's and employee's rights in the Respondent Organization.
30. The witness testified that the Respondent Organization was established by the Management of Jirani Children's Choir, as a vessel for owning property on behalf of the Choir. The Respondent Organization is funded by the Choir. It doesn't have its own funds. It is funded through the activities of the Children. The funds raised as such are then utilized to pay school fees for the Children and take care of their medical, feeding and clothing needs.
31. The witness asserted that the Respondent is a registered Non- Governmental Organization.

The Respondent's case

32. The Respondent presented one witness, Jonathan Mwitikathawe to testify on its behalf. The witness stated that he is the Manager of Jirani Children's Choir/ Jirani Cultural Organization. He was employed by the Respondent as such in the year 2015.
33. He further stated that the Claimant first came into the employment of the Respondent as a Human Resource Manager on or about the 10th of August 2012 at a monthly salary and allowance of Ksh.25,300. The Claimant resigned from her employment on 12th May 2013 on account that she was



going back to University for studies. Apparently, the ambition failed. She sought re-employment. The Respondent was re-employed in August 2013 in the same position and remuneration.

34. The witness contended that in discharging her duties, she committed acts of gross misconduct. Several complaints were laid against her, following her failure to perform her duties as expected. She would fail to pay salaries on time and issue scholarships to students as required. She could solicit bribes from service providers.
35. Her relationship with colleagues deteriorated seriously. She was antagonising everybody. She got into the habit of persistently absenting herself from work without authority.
36. As a result of the gross misconduct and multiple complaints against, the Respondent was constrained to issue her with an invitation letter dated 16th November 2015 for a disciplinary hearing which was slated for 18th November 2015. In the letter, all the allegations levelled against her were set out; abuse of office; incitement; and neglect of duty. Despite the invitation, the Claimant failed to attend the hearing. The Respondent was left with no choice but to terminate her employment on 19th November 2015.
37. Following the termination, the Respondent evinced the intention to pay her terminal dues in the sum of KShs. 200,573 being payment for, severance pay, leave allowance, NHIF contribution, extraneous allowance and salary in lieu of notice. The payment was subject to her handing over office property. She failed to hand over despite numerous demands.
38. The Claimant was at no time elevated to the position of a board member. She at all material times carried out her duties as the Human Resource Manager only. Further, she was not at any point the Acting Director of the Respondent organization. The position of Board Directors was reserved for founder members. She was not a founder member.
39. Testifying under cross-examination the witness stated that the Respondent has not availed to the Court the alleged resignation letter by, and, any document in support of the existence of the complaints against, the Claimant.
40. On the invitation letter, the witness stated that the same was served on the Claimant minus any other document concerning and in support of the allegations against her.
41. The witness testified further that the Respondent's intention to pay the Claimant her terminal dues in the sum hereinabove stated was not expressed in writing. The Respondent never demanded the surrender of the office property from the Claimant.

The Claimant's submissions

42. The Claimant filed her submissions on 7th December 2022 distilling two issues for determination thus:
 - a. Whether the termination of the Claimant from employment was unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
43. The Claimant submitted that her termination from employment was unfair and unlawful. It was orchestrated by the officials of the Respondent who wanted to get rid of her as she was seen as the stumbling block to their ill-intentioned scheme to embezzle funds. The material placed before the Court does not demonstrate that there was substantive and procedural fairness in the termination of the Claimant's employment. The same cannot pass the fairness test. In support of this point, reliance was placed on the cases of *Walter Anuro v Teachers Service Commission* [2013] eKLR and the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.



44. The evidence of the Respondent's witness supports the Claimant's contention that the termination was unfair. For instance, he admitted under cross-examination that details of the alleged misconduct were not given to her. The Respondent didn't carry out any internal investigations to test the veracity of the allegations against her. Further, the Respondents chose. On the essence of internal investigations, the Claimant relied on the case of *Nicholas Muasya Kyukla vs Farmchem Limited 2011* where it was held:

“it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:

- (a) A report to the relevant authority that misconduct has been committed by an employee.
- (b) A preliminary report to gather relevant information on the alleged misconduct.
- (c) If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss.
- (d) If the evidence is not obvious and the misconduct is not gross or its weight is not clear during the preliminary investigation, the proper notification is drawn. The notification commonly called a show cause letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity. The particulars must be clear enough for the employee to be able to effectively defend himself or herself. The notice must give the employee reasonable time within which to respond.
- (e) Upon responding or the time allowed lapsing, the employee should be called to a hearing. At the hearing all relevant information should be recorded in a fair process where the complainant is not leading or chairing the proceedings. The employee should be given ample chance to exculpate oneself. A third party of the employee's choice should be permitted to attend the hearing.
- (f) A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of due process of fairness. The report must set out the findings on the allegations, any mitigating or aggravating factors and the recommendations which may include the termination.
- (g) The decision made must then be communicated to the employee.”

45. The Claimant submitted that after the Departure of Peter Kim [the Director], she was asked to step in and carry out the functions of the Director besides those of the Human Resource Manager. She was entitled to compensation for the services rendered as the Acting Director. She managed on a balance of probabilities to prove that the Directors of the Respondent were earning KShs. 200,000 per month, the Director's Children's tuition and House allowance, k.SHS.75,000.

46. As She was terminated unfairly, she is entitled to a compensatory relief equivalent to twelve months gross salary and the other reliefs sought. To fortify these submissions, support was sought in the case of



Felix Mbolonzi Kioko v Director of Public Prosecutions [2020] eKLR and the case of Hema Hospital v Wilson Makongo Marwa [2015] eKLR where it was held:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee’s loss and not to punish the employer.”

The Respondent’s Submissions.

47. The Respondent filed its submissions on 7th December 2022 identifying three issues for determination;
- SUBPARA a.
- Whether the Claimant was ever appointed as the Ag Director of the Respondent.
- b. Whether due process was followed in the Claimant’s termination.
- c. Whether the Claimant is entitled to the reliefs sought
48. On the first proposed issue, the Respondent submitted that the Claimant was unable to explain how and whether she was actually appointed to the office of Acting Director. Directors could normally be appointed from founder members. The Claimant was none of them. She would therefore not qualify to be a Director.
49. Submitting on its 2nd proposed issue, the Respondent stated that the evidence tendered by the Claimant sufficiently demonstrated that the Claimant grossly misconducted herself, persistently absconded duty, abused office, failed to perform her duties as required, and solicited bribes from service providers. Therefore, the Respondent had a valid and fair reason[s] to terminate her employment.
50. The Respondent further submitted that in adherence to procedural fairness, it invited the Claimant to attend a disciplinary hearing. The invitation letter elaborately set out the allegations that were being levelled against her, and which allegations she was to defend herself against at the hearing. The Claimant refused and or neglected to appear for the hearing. The Respondent issued a termination letter. The letter brought out the grounds of termination, for the Claimant’s information. The Respondent cannot be accused of procedural unfairness.
51. For the last issue it was submitted that the Claimant was invited to collect her dues amounting to Ksh.200, 573 but declined. The Respondent has demonstrated that the Claimant never qualified to act as a Director of the Respondent and that in fact she never acted as such at any point. She cannot be availed any relief flowing from her allegation that she served as an Acting Director at some point. Further, the compensatory relief sought doesn’t have any foundation as she was fairly discharged from employment.

Analysis and determination

52. From the pleadings, evidence on the record and the submissions by the parties, the following issues present themselves for determination before this Court:
- a. Whether the termination of the Claimant from her employment was fair.
- b. Whether the Claimant is entitled to the reliefs sought.



- c. Who should shoulder the Costs of the Claim?

Whether the termination of the Claimant from employment was fair

53. Whenever a court is invited to interrogate fairness in the termination of an employee's employment or summary dismissal of an employee, the law obligates to consider the presence or otherwise of substantive justification for the decision to terminate or dismiss, and the adherence to procedural statutory edicts in the process leading to the decision. The two constitute the total unit of fairness. The absence of both or any one of them deprives the termination or summary dismissal of the character of fairness and, the ability to pass the fairness test.
54. In the case of *Walter Anuro Ogal v Teachers Service Commission* [2013] eKLR it was held:
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
55. Section 41 of the *Employment Act* provides for a mandatory procedure that must be followed by any employer intending to terminate the employee's employment, or summarily dismiss the employee. The fair procedure contemplated under the section inherently has three components. The notification component-the employer must notify the employee of his/her intention to terminate and the grounds arousing the intention, the second is the hearing component-the employer has to give an employee an adequate opportunity to prepare and defend himself/herself against the grounds, the right of accompaniment-the employee shall be allowed to be accompanied to the hearing with a colleague or a trade union representative if the affected employee is a member, and lastly, the consideration component-the employer has to consider the representations by the employee or the accompanying person before making a decision.
56. To demonstrate that it adhered to the statutory command[s] on procedural fairness, the Respondent asserted that by a letter dated 16th November 2015, it invited the Claimant for a disciplinary hearing on the proposed termination of her employment. The hearing was scheduled for 18th November 2015 at 2.00 pm for the hearing. This Court has carefully read the letter. In content, it satisfies the notification component.
57. However, the Court has not lost sight of the fact that the Claimant challenges the sufficiency of the notice that was issued. In her testimony, she contended that the invitation letter was served on her on the 18th of November 2015, at around 5:00 p.m. With this assertion, it became imperative for the Respondent to prove when the service of the letter was effected. An employer alleging service of a document on an employee, service which is denied or challenged in one way or the other bears the burden of providing in evidence sufficient details regarding the service. It would not help for the employer to just mention that service was effected as is in this case. In essence, the Claimant was stating that the invitation was given on the day of the hearing, but after the hour that had been appointed for the same. The Court finds that the Respondent did not place forth any evidence before it to clearly demonstrate when exactly the invitation letter was served on the Claimant, and discount her version.
58. By reason of the foregoing premise, it is not difficult for this Court to conclude and it does that the service of the letter on the date of the disciplinary hearing but after the hour appointed for the hearing, rendered the invitation worthless for purposes of procedural fairness.
59. Assuming that this Court was to agree with the Respondent that the letter was served on the 16th of November 2016, it could still find considerable difficulty in agreeing with the Respondent as regards the sufficiency of the notice. In the converse, it is persuaded by the Claimant that the notice was too



short to allow her to prepare for the defence against the accusations against her. meeting. The Court is cognizant of the fact that sufficiency of the notice timewise, depends on the circumstances peculiar to each case, and more specifically when the parties have not placed any material before the Court from which it can discern an agreed notice period.

60. In determining the sufficiency of the notice timewise, the Court has to consider whether there were any internal investigations prior to the notice and if the employee was involved at all or to an extent in the investigation process; the complexity of the accusations against the employee; whether in support of the accusations the employer was to rely on documents; the volume of the documents; whether reliance was placed or to be placed on witness statements; and whether any documents to be relied on during the hearing were contemporaneously served with the notice.
61. The Court has taken into consideration the factors above more specifically that; the charges levelled against the Claimant were many and serious; there is no mention in the letter or demonstration by evidence that the notice was served contemporaneously with the invitation letter; prima facie there no internal investigations carried out; and the accusations were complex. In its view, the notice was short and not sufficient for the Claimant to adequately prepare for her defence. It is not possible to tell whether the disciplinary committee met and resolved to terminate her employment.
62. In the premises, I come to an inescapable conclusion that the Claimant's termination was procedurally unfair in total disregard to the mandatory provisions of section 41 of the *Employment Act* 2007.
63. Section 43 of the *Employment Act* places a duty on the employer to prove the reasons for the termination of an employee's employment in a dispute as herein. Section 45 of the Act imposes a further burden on the employer to prove that the reasons were fair and valid.
64. In the case of *Naima Khamis v Oxford University Press E.A Limited* [2017] eKLR the Court observed:

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2) (c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
65. It was the Respondent's case that it terminated the Claimant's employment on account of the grounds set forth in its letter dated 16th November 2015. The Respondent did not bother to provide any evidence in support of the grounds in order to demonstrate the validity of the grounds. For the employer to discharge the legal burden under sections 43 and 45[2] of the *Employment Act*, he or she must provide evidence justifying the termination. In his evidence under cross-examination, the Respondent's witness admitted that though the Respondent had made averments in its pleadings regarding that there were numerous complaints against the Claimant, it did not provide any documents in support of the allegations.
66. The Court notes that the Respondent all through maintained that one of the reasons for the termination of the Claimant's employment was 'gross misconduct'. In my view, gross misconduct comes in many shades and styles. It is too omnibus for an employer to state that the ground of



termination was ‘gross misconduct’ without specifics. In such a situation the Court can only find that that couldn’t be a valid ground for dismissal.

67. The accusation of abuse of office needed cogent evidence in terms by way of documents and evidence by the alleged students. I note that the invitation letter does not indicate dates when some of the alleged incidents took place. This in my view heightened the imperativeness on the part of the Respondent to provide cogent evidence regarding the same. The Respondent failed to.
68. In his evidence, the Respondent's witness asserted that the Claimant was soliciting bribes from service providers. A very serious allegation against her. However, looking at the termination letter, and the invitation letter, this ground is not mentioned. One wonders where he picked it for. In any event, a serious allegation like that requires clear evidence to be laid before to demonstrate that she was involved in the vice. There was no evidence tendered. The accusation remained a bald assertion.
69. Section 47 (5) of the *Employment Act* provides:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
70. It is incumbent upon the employer to demonstrate the Claimant’s termination was pegged on valid or justified grounds failure to discharge this legal burden, the termination shall be deemed substantively unfair.
71. The Respondent at paragraph 7 of his witness statement alleges that the Claimant absented herself from duty without permission the said paragraph states:
- “The Claimant’s work and relationship with other colleagues deteriorated so much that she was virtually on warpath with everybody before she started to absent herself from work without leave or permission.”
72. There is no evidence presented before this court by the Respondent in the form of an attendance register or any from which one can discern that indeed the Claimant was absent from duty on such and such date. In fact, this alleged ground is not in sync with the invitation and termination letters. The ground is not mentioned in the letters. This only helps to give an impression of the Respondent as an employer who is not very sure why it terminated the employment of the Claimant.
73. In view of the foregoing, I conclude that I am not convinced there was any substantive justification for the termination of the Claimant’s employment.

Whether the Claimant is entitled to the reliefs sought.

74. Before I delve into this issue further, it is imperative to determine whether the Claimant did act as a Director of the Respondent at any point in the course of her employment with the latter. It was her case that she did this alongside her Human Resource Managerial Position in the period between 1st October 2013 to 19th November 2015. The Respondent resisted this Claim vehemently. The Claimant contended that vide a letter dated 4th October 2013 which is on record herein, the Director Mr. Peter Kim assigned her the role of the acting Director until his coming back from Korea.
75. It is patently clear that Mr. Kim Peter left for Korea following the wrangles that existed in the organisation handing over his roles to the Claimant herein. The Respondent does not allege or



demonstrate that the document that conferred the authority upon her was not executed by its then Director, Peter Kim. Further, the Respondent doesn't deny the fact that Peter Kim, left the country in the circumstances explained by the Claimant. It didn't tell this Court who stepped in as the Executive Director after Mr. Kim left until the new team came from Korea. I am persuaded by the Claimant that she did.

76. The Respondent contended that it would have not been possible for her to be appointed as she was not a member of the Respondent's Board. It didn't point out who were. Its witness did not explain how then the record with the Ministry of Sports, Culture, and Arts could indicate that she was the secretary of the Respondent and that the transactions and affairs pertaining to the twin entities could be presided by her and two others named in the letter of 17th March, 2015.

77. The Court gathers an undoubted impression that the new Executive Director got into office in or about May 2014. Her own email dated 15th October 2014 speaks to this, thus:

“Peter handed over management and I assumed/acted the post as that of the Director from Peter Kim Moon with a signed handover memo since he was needed in Korea because there was a crisis in the organisation. I took full charge and responsibility in Jirani till May 2014.”

Consequently, I am not persuaded by the Claimant's claim that she acted as the Respondent's Director up until 19th November 2015.

78. CW2 Fredrick Munyalo confirmed that after Peter Kim left the Country in the circumstances of wrangles within the Organization, his position was entrusted to the Claimant. His evidence was not rebutted.

79. In view of the foregoing, this Court concludes that the Claimant herein held the position of an Acting Director of the Respondent from 22nd July 2013 to May 2014 alongside her Human Resource Managerial position.

a. Salary for the position of the Ag. Director from 1st Oct 2013-19th November 2015.

80. The Claimant sought Ksh.5, 400,000 as salary for the position of the Ag. Director for the stated period. The Claimant in her written submissions asserted that the Directors of the Respondent's Organisation were entitled to Ksh. 200,000 per month. There is no evidence on record in the form of the Directors' pay slips or any other documentary evidence in support of the assertion. Without proof of what the Directors were earning monthly, I am unable to award and compute what the Claimant was entitled to earn in her capacity as acting Director.

81. For clarity of record, I must state that she was entitled to benefit[s] for discharge of functions as an Acting Director, functions outside the Human Resource Management scope.

b. House allowance (Ag. Director) from 1st Oct 2013-19th Nov 2015.

82. The Claimant also sought Ksh.2, 025,000 as house allowance for the stated period. The Claimant further in her submission submitted that the said Directors were entitled to Ksh.75, 000 per month as house allowance. The Claimant's bundle of documents at page 86 item number 5 and page 87 item number 32 clearly indicate that the Directors were drawing Kshs.70, 000 house allowance. However, in view of my finding hereinabove that she acted only up to May 2014, she can only be awarded 10 months' house allowance, Kshs.700,000.



c. Tuition Fees for the two children for the three terms

83. Clause 11.5 of the employment contract provided as follows:

The Children of the staff members of the Jirani Children’s choir shall be awarded scholarships as follows;

- i. If a staff member has worked in the Jirani Children Choir for 2 years or more, his/her children may receive scholarships for their primary level of school education.
- iv. The Scholarship for the staff’s children shall only cover tuition requirements for their children any additional costs such as books and transport fees shall be met by the parents.

84. The Claimant was in the Respondent’s employment for more than two years and thus meets the criteria and the entitlement for the school fees for her children. She has only prayed for the tuition fees for the three terms. In the premise the Claimant is hereby awarded tuition fees for her two children as follows:

- a. Lower primary Fees for the three terms.....Ksh. 31,000.
- b. Kindergarten Fees for the three terms..... Ksh. 31,800.
- d) Fuel reimbursement

85. The Claimant sought fuel reimbursement for the period between 5th August 2014 to 3rd November 2014. Clause 6.5 of the employment contract on record provides:

“You will be entitled to be reimbursed for all reasonable expenses properly incurred in the performance of your duties in accordance with the Jirani Children’s Choir Expenses Policy.”

86. The Claimant contended that from the said period she was entitled to Ksh.11, 003 reimbursement for the fuel. The Claimant has not presented before this Court any evidence in support of her claim under this head. This being a special claim that required to be specifically proved, I hold that the Claimant fell short of doing so. I reject the claim under this head.

e One month’s salary in lieu of notice.

87. The Claimant’s employment was one terminable under section 35 of the *Employment Act* by twenty eight days’ notice or pay in lieu thereof under section 36. It is clear that the notice was not given. No notice pay was made. Further, the Respondent’s witness stated that the Respondent had the intention of paying salary in lieu of notice. The claim under this head is admitted. I award her KShs. 25,300, under this head.

f Compensation for the unfair termination.

88. The Claimant sought Ksh.2, 400,000 as 12 months compensation for the unfair termination. The authority to make this award flows from the provisions of section 49 of the *Employment Act* 2007 and the making of this award depends on the circumstances of each case. It is imperative to state that the Claimant relinquished her role as the acting Director in May 2014 and at the time of her termination she only held the role of Human Resource Manager. The compensation available to her shall therefore be based on her salary as the Human Resource Manager and not that of the Directors.



89. Having found that the Claimant was unfairly terminated, considering that the Respondent didn't discount her assertion that the termination was mal fides, that she acted as Director for the Respondent a role that this has not directed compensation for, the length of time she served the Respondent, and the fact that she did not influence the termination of her employment, I hold that the Claimant is entitled to a compensatory award under Section 49[1][c], to an extent of 10 months gross salary, thus Ksh.253, 000.

Who should bear the cost of the suit?

90. The cost of this suit shall be borne by the Respondent.

91. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- a. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- b. House allowance for the Acting Director from 23rd July 2013 –May 2014.....Ksh. 700,000.
- c. Tuition fees her two children for the three termsKsh. 31,000 and Ksh. 31,800 respectively.
- d. One month salary in lieu of notice.....Ksh.25, 300
- e. Ten [10] months' gross salary.....Ksh. 253,000
- f. The Cost of suit.
- g. Interest from the date of this judgment till payment in full.
- h. The Respondent to issue the Claimant with the Certificate of service.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2023.

.....

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Odoyo for the Claimant.

No Appearance for the Respondent.

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 15th March 2020 and subsequent directions of 21st 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

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