



**Mulwale v Cleanpoint Drycleaners Ltd (Employment and Labour Relations Cause  
1340 of 2017) [2023] KEELRC 2790 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2790 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1340 OF 2017**

**K OCHARO, J  
OCTOBER 19, 2023**

**BETWEEN**

**GEORGE KIGUDWA MULWALE ..... CLAIMANT**

**AND**

**CLEANPOINT DRYCLEANERS LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant commenced this suit vide a Statement of Claim dated 10<sup>th</sup> July 2017 where he prayed for: -
  - a. A declaration that the Claimant's dismissal was wrongful and unfair.
  - b. The Claimant be and is hereby paid Kshs. 366,000/- as terminal benefits as set out in paragraph 14 above.
  - c. The Respondents to pay costs and interest.
2. The Memorandum of Claim was accompanied by the Claimant's Witness Statement; and the Claimant's List and bundle of Documents dated 10 July 2017.
3. In response to the Memorandum of Claim, the Respondent filed a Response to the Memorandum of Claim and Counter-Claim dated 10<sup>th</sup> November 2017, Documents under a list dated 10<sup>th</sup> November 2017; Witness Statement of Terezi Mwakesi filed on 10<sup>th</sup> November 2017; Documents under a list dated 25<sup>th</sup> April 2022; and Witness Statement of Harshad Shah dated 25<sup>th</sup> April 2022.
4. As a rejoinder to the Respondent's Counterclaim, the Claimant filed a reply dated 7<sup>th</sup> May 2019 denying the Respondent's counterclaim and the reliefs sought.



## Claimant's case

5. The Claimant's case is that on or about 1<sup>st</sup> April 2015, the Respondent employed him as a Pressman. The employment was not under any written employment contract, it was verbal. His monthly salary was agreed at Kshs. 18,300/-. Later on, or about the 1<sup>st</sup> of April 2016, the Respondent issued him with a one-year contract of employment on 1<sup>st</sup> April 2016.
6. The Claimant stated that throughout his tenure with the Respondent, he worked from 9.00 a.m. to 6.00 p.m. throughout the week including during weekends and public holidays. He was never on an off duty off duty day. The Claimant states that he discharged his duties diligently and honestly throughout the period that he worked for the Respondent.
7. On or about 12<sup>th</sup> December 2016, he requested permission to be off duty to attend to his unwell parent. He was given authority to be off duty for three days. On 15 December 2016, when he returned to work, the Respondent's Human Resource Manager informed him that work had diminished, and consequently the Respondent had decided to let him go. He was promised to be called back as and when there was work to be allocated to him.
8. Faced with this, he decided to escalate the matter to his 'Boss' Mr. Harshad. The Boss didn't offer a solution. He referred him back to the Human Resource Manager. The Human Resource Manager maintained his stance, that there was no work for the Claimant. His employment was therefore terminated.
9. The Claimant asserted that prior to this date he had no information from the Respondent that it intended to terminate his employment.
10. The appointed day for the lapse of his contract of employment was 1<sup>st</sup> April 2016. The contract was prematurely terminated. He had four months to serve the Respondent under the contract. As a result of the premature termination, he lost Kshs. 73,200.00, being the salary for the remaining period of the contract.
11. The Claimant states that he was unfairly and maliciously summarily dismissed from employment by the Respondent without; any valid reason; being accorded audience and; payment of his terminal dues. He was not ready and prepared for the abrupt and unplanned termination of employment, consequently, he suffered tremendous financial embarrassment as he could not meet his basic needs.
12. The Claimant asserted that for the two years he was in the service of the Respondent, he was not allowed to proceed for his leave. Hence his claim for earned but unutilized leave days.
13. The Claimant argues that his dismissal was contrary to the principles of natural justice and Section 41 of the *Employment Act* 2007. This puts him in the space of entitlement to the various reliefs he has sought in his statement of claim.
14. He further contended that contrary to the assertion by the Respondent, he did not abscond duty. The counterclaim should fail. Further, the Respondent didn't issue any notice to him or a demand letter.
15. In his evidence under cross-examination, the Claimant stated that he was first employed by the Respondent on 1<sup>st</sup> April 2015 for a fixed term of one year. The contract lapsed on 1<sup>st</sup> April 2016. The Respondent never paid him service pay, however, it was making NSSF remittances dutifully.
16. He could report to work at 9.00 a.m. and work until 6.00 p.m. or 8.00 p.m. to 5.00 p.m.



17. He reiterated that he was authorized to be off duty for three days. In his witness statement, he stated that when he reported back, he found that he had been replaced by another person. In the year 2016, he never proceeded with his annual leave. Under the 2<sup>nd</sup> contract, he worked for eight months.

### **Respondent's case**

18. Mr. Harshad Shah testified on behalf of the Respondent. The witness urged the Court to adopt his witness statement as his evidence in chief. The witness stated that the Claimant was first employed by the Respondent under a contract that lasted between 10<sup>th</sup> March to 31<sup>st</sup> April 2015. At the lapse of this contract, he entered into another contract for the period 1<sup>st</sup> April 2016 which had an appointed date for lapse in April 2017. and does not deny that the Claimant was its employee.
19. The witness asserted that the first employment contract of 10<sup>th</sup> March 2015- 31<sup>st</sup> April 2016 having expired and the parties subsequently entered into a fresh contract, the Claimant cannot anchor any claim whatsoever on the lapsed contract.
20. Further, contrary to the Claimant's assertion, and as can be discerned from the attendance sheet and muster roll, 90% of the time, the Claimant reported at around 9.00 a.m. or thereabouts and left at 5.00 p.m. He never worked on Sundays and public holidays as alleged. Only on rare occasions, the Claimant worked overtime on weekends. Whenever he worked, he was compensated.
21. The witness stated further that the Claimant; took 24 days of paid leave from 5<sup>th</sup> September 2016 to 29<sup>th</sup> September 2016; was absent from work on 9<sup>th</sup> and 10<sup>th</sup> November 2016; attended work on 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> November 2016; absent from work from 16<sup>th</sup> December 2016 to 31<sup>st</sup> December 2016 excluding the public holidays of 25<sup>th</sup> and 26<sup>th</sup> December 2016; and never reported back to work after his 3 days off duty from 16<sup>th</sup> to 19<sup>th</sup> November 2017.
22. It was asserted that the Claimant's employment was never terminated as alleged but rather he absconded work and never resumed his duties after the 3 days off duty aforesaid, and all attempts by the Respondent to contact him proved futile.
23. The Respondent denied that the Claimant was unfairly, maliciously and summarily dismissed from employment as claimed. On the contrary, the Respondent contends that the Claimant unilaterally terminated his employment contract without giving the Respondent the requisite 1 month's notice or paying 1 month's salary in lieu of notice.
24. The witness urged the Court to allow the Respondent's Counter-Claim dated 10<sup>th</sup> November 2017 and grant the reliefs sought thereunder.
25. Cross examined by Counsel for the Claimant, the witness testified that the Claimant was an employee of the Respondent up until December 2016 when he left without notice. His contract was to lapse on 31<sup>st</sup> March 2017 by effluxion of time. His salary was Kshs.18,300.
26. The Claimant was not given any termination letter. This could not be possible as he absconded duty. The Respondent didn't write him any letter requiring him to get back to work in the defaulting he faces disciplinary action.
27. He alleged that tried calling they tried calling the Claimant but were not able to reach him.

### **Claimant's Submissions**

28. The Claimant submitted that the Respondent alleges that it terminated his employment on account of desertion. Whether an employee is being terminated on account of desertion, the employer is



still enjoined to adhere to the edicts of procedural fairness contemplated under section 41 of the *Employment Act*. He was not served with any notice to show cause, invited for a disciplinary hearing, heard and finally a decision taken. To buttress this point, reliance was placed on the cases of *David Gichana v Mombasa Maize Millers Limited* [2014] eKLR; and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited* [2013] eKLR.

29. The Claimant goes on to submit that he has discharged his burden of proof as imposed by Section 47 (5) of the *Employment Act* 2007 by demonstrating that an unfair termination or wrongful dismissal occurred but the Respondent has failed to avail sufficient evidence to support justification for his dismissal from employment.

### **Respondent's Submissions**

30. The Respondent insists that contrary to what the Claimant's claims, his employment was never terminated. In reality, the Claimant absconded work and never resumed his duties after the 3 days off duty. All attempts by the Respondent to contact him proved futile. This amounted to absenteeism and desertion of duty. That the Claimant unilaterally terminated his employment without giving the Respondent the requisite 1-month notice or paying one month's salary in lieu of notice as provided in the contract.
31. It is the Respondent's position that by absenting himself from work without leave or lawful cause, the Claimant was guilty of gross misconduct and is not entitled to payment in lieu of notice under Section 36 of the *Employment Act*.
32. On service pay, the Respondent submits that the Claimant was a member of NSSF with the Respondent deducting and remitting money to NSSF on his behalf as evidenced by the master roll. Under Section 35 (6) of the *Employment Act* 2007, an employee who is a member of NSSF is not entitled to service pay. To buttress this submission, the Respondent relied on the case of *John Karanja Mbogo vs Leah Wangui Mburu t/a Gilgil Distributors Limited* [2020] eKLR.
33. On the claim for Kshs. 36,600/- for leave not taken, the Respondent submits that the Claimant has not tendered any evidence that he did not go on leave and/or was denied leave by the Respondent. Further, he did not precisely plead and sufficiently prove his claim under this head. The claim must fail. In any event, the Claimant took 24 days of paid leave from 5<sup>th</sup> September 2016 to 29<sup>th</sup> September 2016.
34. On the claim for 12 months compensation for unfair termination, the Respondent submits that the Claimant was on a fixed term contract which carries no rights or obligations beyond the expiry dates. The Respondent states that the Claimant's contract was for 1 year and was scheduled to lapse on 31<sup>st</sup> April 2017. In his view, it is therefore absurd for the Claimant to claim 12 months' gross pay as compensation for unfair termination, when in fact the contract was to lapse in 4 months.
35. Nevertheless, the Respondent submits that the 12 months imposed by the *Employment Act* is not mandatory but only a recommended maximum, which should be an exception rather than a default award for every and any case of unfair dismissal. In support of this submission, the Respondent relies on the Court of Appeal case of *Kiambaa Dairy Farmers Cooperative Society Limited vs Rhoda Njeri & 3 others*.
36. On breach of contract, the Respondent contended that it never breached any term of the contract of employment between it and the Claimant. To the contrary, it is the Claimant who did by absconding duty.



37. The Respondent submitted further that the sum of Kshs. 366,000/- sought by the Claimant is not only exaggerated but is based on unfounded allegations and misapprehension of the law. It is only intended to enrich the Claimant unjustifiably.

### Issues for Determination

38. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities. The issues for determination are as follows: -
- a. Whether the Claimant deserted his employment.
  - b. Whether the Respondent unfairly terminated the Claimant's employment;
  - c. Whether the Claimant should be awarded the terminal benefits sought in his Memorandum of Claim dated 10<sup>th</sup> July 2017.
  - d. Whether the Respondent's Counter Claim dated 10<sup>th</sup> November 2017 should be allowed.
- a. Whether the Claimant deserted his employment.
39. It is not in dispute that the Claimant was engaged as an employee of the Respondent through a Contract of Employment dated 1<sup>st</sup> April 2016. The Contract of Employment was for a term of 1 year from 1<sup>st</sup> April 2016 to 31<sup>st</sup> April 2017, under Clause 1 thereof. It provided for payment of a gross salary of Kshs. 18,300/- made up of a basic salary of Kshs. 14,175/- and a House Allowance of Kshs. 4,127/-. Working hours were from 0900 hours to 1800 hours with a 1-hour lunch break per Clause 5 thereof. Clause 6 of the Contract provided for 21 working leave days; while Clause 10 thereof provided that either party could terminate the agreement without giving any reason by giving one month's notice or on payment of one-month salary in lieu of notice.
40. It is also not in dispute that the Claimant and Respondent separated in December 2016. The manner of separation is the bone of contention between parties. The Claimant contended that his employment was terminated, whilst the Respondent held that he deserted duty.
41. Under Section 45 (5) of the *Employment Act* 2007, the burden of proving the fact of the termination of employment lies on the Claimant, while the Respondent has the onus of proving that the reason for the termination was valid.
42. Upon perusing the attendance sheet produced before this Court by the Respondent I take notice that the Claimant was present at work from 13<sup>th</sup> December 2016 to 15<sup>th</sup> December 2016. On 16<sup>th</sup> December 2016 to 18<sup>th</sup> December 2016, he was absent, and his absence continued until the end of the year. The Claimant's signature, which is similar to his signature throughout the attendance sheet from page 19 of the List of Documents, is affixed next to 13<sup>th</sup>-15<sup>th</sup> December 2016. The foregoing means that the Respondent's account that the Claimant took 3 days off from 16<sup>th</sup> December 2016 to 18<sup>th</sup> December 2016 appears to be correct. More so, I take this position as the Claimant has not challenged the attendance sheet produced.
43. After 19<sup>th</sup> December 2016, the Claimant stopped reporting to work. The Respondent claims that he simply took a leave of absence without notice and deserted his duties. The Claimant states that he returned to work but was informed that his services were no longer required.
44. While the Respondent insists that they tried to contact the Claimant to establish his whereabouts, to no avail, they have not produced any evidence whatsoever to establish the alleged attempts to get



in touch with the Claimant. I find this particularly peculiar as it is evident that the Respondent kept immaculate records concerning the Claimant prior to this point, as evidenced by the attendance sheets, muster roll and contracts of employment that it produced before this Court. Yet when it comes to the pivotal matter of the alleged communication its evidence becomes sketchy and bald assertions. For instance, when were the calls made? through which phone number? By Who? All these it did not provide the Court. Did the Claimant have a postal address, if so why wasn't any letter dispatched to the address?

45. Desertion is contemplated in Section 44(4)(a) of the *Employment Act* 2007 in the context of gross misconduct which justifies summary dismissal. It is defined as: -

“ 44. (4)(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work”.

46. In *Black's Law Dictionary*, Ninth Edition, desertion is defined as:-

“ The willful and unjustified abandonment of a person's duties or obligations”.

47. In the present case, both parties agree that the Claimant took 3 days off from work, although their account of the dates varies slightly. The Claimant was therefore absent for the 3 days with permission from the Respondent.

48. By reason of the foregoing premises, this Court is persuaded that the Claimant returned to work after the 3 days but was informed verbally that he had been terminated from employment.

49. Desertion, like all cases of gross misconduct, must be proved by the employer. In the instant case, upon the basis of the foregoing premises, I find that the Respondent failed to discharge its burden of proof. I gather support for this finding from the case of *Moses Gichubi Gateru v Njuca Consolidated Company Limited* [2019] eKLR where the Court held thus: -

“ The Respondent on the other hand alleges that the Claimant deserted duty after being told to go to the head office for further duty allocation but he refused. Desertion amounts to gross misconduct and renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty. The Respondent's witness testified that they tried to follow up with the Claimant, however, there is no such evidence to show that indeed they tried communicating with the Claimant to find out why he had absconded what efforts the Respondent undertook to see if the Claimant could come back to work. After the verbal dismissal of the Claimant, the Respondent did nothing until it received a letter from the labour offices requiring it to attend a conciliation meeting. They ought to have at least attempted to contact the Claimant if at all he had deserted duty as alleged.”

50. Similarly, in *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the Court held:-

“ 10. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that



termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).”

51. Imperative to note that the Respondent’s witness admitted that no notice of whatever nature was issued to the Claimant over his alleged desertion.
52. In the upshot, I come to an inescapable conclusion that the Claimant herein did not desert his duties, but his employment was terminated in the manner he explained.
  - b. Whether the Respondent unfairly terminated the Claimant’s employment
53. Having held that the Claimant herein was terminated from employment, I now turn to whether the termination was unfair.
54. Having accepted the Claimant’s version as the true one regarding the manner the separation of employment occurred, I’d have no hesitation to conclude that what happened was a summary dismissal from employment.
55. Section 44 of the *Employment Act* 2007 contains provisions on summary dismissal. It states that:

“ 44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
  - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
  - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
  - (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;



- (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

56. Section 44 (4) of the *Act* puts forth a catalogue of matters that may amount to gross misconduct to justifiably attract the sanction summary dismissal. However, in my view, the list is not exhaustive. Any other matter can attract the sanction of summary dismissal justifiably for as long as its impact on the employee-employer relationship is as contemplated under sub-section [3]. Having held that the Respondent was unable to convince this Court that the Claimant deserted duty, I return that the summary dismissal was not upon the basis of a fair, valid and justified reason.

57. In a dispute concerning the termination of an employee's contract, the law, Section 43 of the *Employment Act*, places a burden on the employer to prove the reason[s] for the termination. The burden placed on the employer under this provision cannot be discharged by the employer just asserting that he terminated the employee's employment for this or that reason. The true existence of the reason must be proved by the production of sufficient evidence for the purpose. In the present case, the Respondent has fallen far short of proving the reason for the termination.

58. Section 45(2) of the *Employment Act* 2007 defines unfair termination as: -

“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 capability, and
  - ii. Based on the operational requirements of the employer, and
- c. That the employment was terminated in accordance with fair procedure.”

59. The above provision speaks to both procedural and substantive submissions. This was aptly brought out in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court held that:

“... 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.”

60. My analysis hereinabove demonstrates that this Court is not persuaded that the Respondent had a substantive justification to summarily dismiss the Claimant from employment.

61. Resultantly, I now turn to consider whether the termination of employment was procedurally fair. Procedural fairness is a statutory prescript. Section 41 of the Act supplies the foundation and essence of procedural fairness in matters of termination of an employee’s employment. An employer contemplating terminating an employee’s employment or summarily dismissing him or her must adhere to the procedure set out therein. The provision is couched in mandatory terms. The section provides;

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of her choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of her choice present during this explanation.

(2) Notwithstanding any other provision (2) of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

62. In a dispute concerning the termination of an employee’s employment, the onus is on the employer to demonstrate that he or she adhered to the procedure contemplated under section 41 of the Employment Act. I have carefully considered the Respondent’s pleadings and evidence supplied by the Respondent’s witnesses, and conclude that it does not in any sufficient manner or at all demonstrate that before reaching the decision to terminate the employment of the Claimant, he; was notified of the Respondent’s intention to terminate his employment and the grounds stirring the intention; given an opportunity to make representations on the grounds; and that it made a conscious decision after consideration of the representations.

63. For the above reasons, I return that the termination of the Claimant’s employment by the Respondent was procedurally unfair.



Whether the Claimant should be awarded the terminal dues contained in his Memorandum of Claim dated 18<sup>th</sup> April 2018.

64. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of the terminal dues that he is entitled to. The Claimant seeks One month's salary in lieu of notice Kshs. 18,300.00; Leave allowance for 2 years Kshs. 36,600.00; Service pay for 2 years Kshs. 18,300.00; Breach of contract 3 months Kshs. 73,200.00; and 12 months' gross salary compensation for unfair termination, Kshs.219,600.00.
65. In the ordinary run of things, the Claimant's employment was one terminable by a twenty eight days' notice pursuant to the provisions of section 35 of the Act. Having found that no notice was issued by the Respondent and that the summary dismissal was unfair, I am convinced that notice pay in lieu of notice is deserved. To fail to make the award would be tantamount to rewarding the Respondent for its misdeeds.
66. On the claim for leave allowance, the Claimant states that for the two years he worked for the Respondent, he was not accorded an opportunity to go on leave. However, the Respondent has countered this claim by producing copies of the muster roll and attendance sheets which show that the Claimant was on leave from 6<sup>th</sup> September 2016 to 30<sup>th</sup> September 2016. I am satisfied that the Claimant did indeed take leave from work for 24 days as stated by the Respondent. As the Claimant's contract of employment was for 1 year, the subject of this suit is the 1-year contract which began on 1<sup>st</sup> April 2016 and was to end on 31<sup>st</sup> April 2017. For these reasons, the claim for leave allowance is declined.
67. The Claimant prays for damages for breach of contract to an extent of the salary for the remainder of the contract period, four months. Hereunder shortly I shall make a compensatory award under section 49[1][c] of the *Employment Act*. Consequently, I decline to make the award sought under this head, as such an award in the circumstances of this case might lead to over compensation of the Claimant. However, this is not to say that in a matter where its justice demands, "payment of salary to the end of the contract period", this Court can feel gagged to grant the relief.
68. On service pay, during the hearing of the case on 20<sup>th</sup> September 2022, the Claimant admitted while giving his evidence in chief that the Respondent dutifully made NSSF remittances for his account. This fact is corroborated by the muster roll produced by the Respondent which shows that NSSF deductions were made from the Claimant's salary. Section 35 (5) and (6) of the *Employment Act* 2007 forbids an employee who is a member of the National Social Security Fund, to pursue the benefit of or assert entitlement to. For this reason, the Claimant's prayer for service pay is hereby declined.
69. Finally, I have carefully considered the prayer for compensation for unfair termination. This Court has already found that the Claimant was unfairly terminated. Under Section 49 (1) 9c) of the *Act*, he is entitled to compensation, up to a maximum of 12 months' gross salary. This Court's power to grant the compensation is discretionary.
70. The Claimant prays for 12 months' gross salary as compensation. The Respondent is of the view that the Claimant is attempting to unjustly enrich himself through this prayer as he was employed on a 1-year contract and had already worked for 8 months, only leaving 4 months.
71. I have taken notice of how the Claimant was terminated from employment, the casual disregard by the Respondent for fair labour practices and Sections 41 and 43 of the *Employment Act*, the fact that the Claimant's termination of employment arose from no fault of his own; and the period that was left to the conclusion of the Claimant's contract of employment. I conclude that the Claimant is entitled to 6 months gross salary as compensation.



72. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
73. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant's dismissal was wrongful and unfair.
  - b. The Claimant be paid terminal dues as follows: -
    - i. One month's salary in lieu of notice Kshs. 18,300.00
    - ii. Compensation for Unlawful termination of his employment pursuant to section 49[1][c] of the Employment Act. 109,800.00
  - c. Interest on (b) above at Court rates.
  - d. The Respondent bears the costs of this suit.
  - e. The Respondent is ordered to issue the Claimant with a Certificate of Service.
  - f. The Respondent's Counterclaim is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.**

.....

**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

**Mr. Khalwale for the Claimant**

**Mr. Njiru holding brief for Gitonga 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 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 Civil 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**

