



Mulwa v Kenya Film Commission (Employment and Labour Relations Cause E528 of 2021) [2023] KEELRC 3102 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E528 OF 2021**

K OCHARO, J

NOVEMBER 16, 2023

BETWEEN

ALEX KATHYINDI MULWA CLAIMANT

AND

KENYA FILM COMMISSION RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 28th June 2021, the Claimant herein sued the Respondent seeking; a declaration that his employment was terminated unlawfully and/or wrongfully and consequently he be awarded general damages; compensation for wrongful dismissal equivalent of twelve months' salary; pay in lieu of notice; unpaid house allowance; compensation for earned but unutilized leave days; and costs of the suit.
2. The Respondent resisted Claimant's claim through a Reply to Memorandum of Claim dated 16th August 2021. The Claimant's Claim was denied in toto. His entitlement to the reliefs sought too.
3. Pursuant to the Procedure Rules, the Claimant filed a Reply to Respondent's Response, which appears to be erroneously dated 3rd August 2021. At the close of pleadings, the matter became destined for hearing inter partes on merit. The parties were heard on their respective cases on 31st January 2023.

Claimant's case

4. At the hearing the Claimant moved the Court to adopt the contents of his witness statement filed herein as part of his evidence in chief, and the documents also filed as his documentary evidence. The adoption was done as there was no objection by the Respondent.



5. It was the Claimant's case that he first came into the employment of the Respondent under a letter of appointment dated 8th July 2010 on permanent and pensionable terms as a Marketing and Product Development Manager Job Group FC 2. His employment took effect on 9th August 2010.
6. His emoluments were agreed as;
 - a) Basic Pay..... KShs. 139,350
 - b) House Allowance..... KShs. 40,000
 - c) Transport Allowance.....KShs. 20,000
 - d) Responsibility Allowance KShs. 15,000
 - e) Telephone Allowance KShs. 5000
 - f) Leave Allowance KShs. 46,450
7. In 2015, the house allowances for all staff members, including the Claimant, were reviewed upwards to Kshs. 60,000/- under a Government guideline and his job title was changed to Director of Marketing to conform with the Respondent's organogram.
8. The Claimant stated that on 28th February 2019, he received a new letter of offer, letter that was captioned "Placement Following Suitability Test". He was placed in the position of Manager, Film and Digital Marketing, KFC Scale 3. As a result, his job group/scale changed, however, his remuneration remained the same. The new offer didn't sit well with him. He felt that he was being demoted. This notwithstanding, he had no choice but to accept the offer as he was threatened with loss of his job if he didn't. Further, the acceptance came in after he had been assured that his remuneration would remain the same.
9. On 27th January 2020, the Claimant received a letter of appointment Ref: KFC/6/03/20100034/132 for the position of Manager, Film and Digital Marketing. Even though his job title and roles had not changed or the Respondent organization gone through any restructuring, the letter expressed that his terms of service were changing from permanent and pensionable to service under a three [3] year contract. The fixed-term contract was to commence on 1st February 2020, and his remuneration was reviewed downwards, thus;

a)	House Allowance	Kshs. 50,000/-
b)	Transport Allowance	Kshs. 15,000/-
c)	Entertainment Allowance	Kshs. 9,000/-
d)	Responsibility Allowance	Kshs. 7,000/-
e)	Telephone Allowance	Kshs. 3,000/-

His allowances were thereby reduced by Kshs. 36,000/-. Upon protest, he was informed that review flowed from his re-designation. Consequently, those were his rightful entitlements.

10. The Claimant avers that the reduction of his allowances contravened Sub-Clause 2.32 of the Respondent's Human Resource Policy and Procedure Manual 2016, which provides that upon being re-designated, the employee will not in any way suffer a reduction in remuneration. Further, the



- Claimant avers that house allowance can only be reviewed if an officer is deployed to a different workstation; that he was not given a chance to negotiate the terms of service; and that the offer letter did not stipulate the compensation being offered by the Respondent for loss of the permanent and pensionable terms.
11. That the Claimant rejected the offer and requested to retain his initial permanent and pensionable terms of service and allowances. Consequently, the Respondent removed him from the payroll for February 2020. However, he was later reinstated after petitioning the Respondent.
 12. The Claimant testified that the Respondent issued him with an appointment which embodied the changed terms. He declined to accept the offer therein. He offered reasons for the rejection, thus; he was only given three days to make a decision; the reduction of his remuneration by Kshs. 36,000 was punitive, and the decision to change his terms of service was based on a Manual that was not valid as it was not approved by the Public Service Commission, through the State Corporations Advisory Committee.
 13. After declining the offer, a meeting between him, the CEO, Mr. Wase, and the Human Resource Manager ensued. In the meeting, the matter, of terms of his employment was discussed and it was consequently agreed that he retains the terms, a permanent and pensionable service. Through a letter dated 16th May 2021, the Respondent confirmed the discussions and the agreement.
 14. On the 16th of June 2016, while on leave, he received a letter from the Respondent directing him to vacate the office with immediate effect and hand over any Government property in his possession. The letter didn't embody any notice period. To his knowledge, he had not misconducted himself in any manner or at all to warrant the sanction of dismissal from employment.
 15. He charged that the termination of his employment was unlawful and unfair.
 16. Cross-examined by Counsel Odukenya for the Respondent, the Claimant testified that the Respondent's Board of Directors are guided by various Instruments in the discharge of their functions. However, the Instruments must be duly approved. There were minutes by the Respondent proposing the Human Resource Management Instruments of 2016. In 2018, the Board approved the proposed amendments. However, the proposed amendments didn't bring into stage the Suitability test and Placement.
 17. Referred to the Minutes of the Board of 19th June 2018, he testified that on the last page thereof, the Board approved the remuneration of 2016, not 2018. There was no provision for a suitability test under the 2016 or 2018 Instruments.
 18. The Claimant further testified that after the test, he was placed in KFC3. The placement was backdated to October 2017. The test and placement were applied across the Commission.
 19. The letter of 1st February 2020, indicated the term of service as three years, renewable upon satisfactory performance. He raised concerns as regards the terms. However, he would not tell whether the matter was ever escalated to the Board for consideration. The CEO had indicated through correspondence that it was to be, for consideration.
 20. He further testified that through the letter dated 16th May 2021, the CEO informed him that his pension was to be processed, for the period he worked under permanent and pensionable terms.
 21. The Claimant testified that under the letter dated 30th July 2020, the CEO informed him of the Board of Director's decision on the conversion. However, he was not given the minutes of the Board relating to the same.



22. The Claimant reiterated that in the meeting between him, the CEO and Eric Owino, it was agreed that his terms of service were to be retained. The letter dated 26th May 2020 confirmed that his terms were to so maintained.
23. He testified that the reason for the termination of his employment was given as his refusal to accept the conversion.
24. He admitted that in his statement of claim, he hadn't specifically sought; reinstatement; and a declaration that the Human Resource Manual of 2018 be declared unlawful.
25. In his evidence in re-examination, the Claimant contended that the Board had no right to reduce employees' salaries. The reduction of his salary was not consensual but arbitrary.

Respondent's case

26. The Respondent presented one witness to testify on its behalf, Timothy Owase, its Chief Executive Officer. The witness asked the Court to adopt his Witness Statement dated 21st March 2022 as his evidence in chief and the documents that were filed contemporaneously with the Reply to the Memorandum of Claim, admitted as the Respondent's documentary evidence.
27. The witness stated that the Respondent is overseen by a Board of Directors whose membership is drawn from relevant Government ministries and independent members.
28. The witness further stated that the Respondent's Human Resource functions are guided by various instruments and laws. It received its Human Resource Instrument of 2016 and fully implemented it.
29. It was further stated that sometime in 2015, the Respondent Commission was re-established through Legal Notice No. 147 of 2015. The Notice enhanced its mandate. Following the enhanced mandate, the Commission was re-categorized from PC3D to PC3. This necessitated amendment of the Human Resources Instruments applicable at the time to align them with the Respondent's changed status. The amended Human Resources instruments were promulgated by the Board in October 2018 and duly communicated to the State Corporations Advisory Committee [SCAC] as had been requested by SCAC.
30. The amended Instrument resulted in changes in operational structures and Performance management. A decision was made that employees who were serving in Grade KFC 3 and above to serve on fixed term contractual basis. Those under KFC 4 were to serve on permanent and pensionable terms. Therefore, the right to work up to 60 years was taken away from those who were placed to serve on contract.
31. The Claimant participated in the suitability test, resulting to his placement. Pursuant to the new HR Policy, the Claimant was offered a 3-year renewable contract with effect from 1st February 2020, which fact was communicated to the Claimant vide the letter dated 27th January 2020 Ref. No. KFC/6/03/20100034/132.
32. The witness stated further that the Claimant rejected the offer giving a couple of reasons as the basis for the rejection. Thereafter, the Respondent engaged him vide several letters of 27th January 2020, 16th March 2020, 10th May 2021, 26th May 2021 and 30th July 2021 urging him to accept the changed terms of employment. However, he remained adamant, insisting on retaining his permanent and pensionable terms of service. The Respondent wouldn't agree to it as to do so could have resulted in unfairness and discrimination.



33. The Respondent was forced to ask the Claimant to vacate office by 30th June 2021. By his actions, stirred his dismissal. Actions that were in breach of, and refusing to abide by, the Respondent's HR Policy.
34. Cross-examined by Counsel Omwansa for the Claimant, the witness testified that the Board's decision to terminate the Claimant's employment was anchored on the stipulations of its Human Resources Manual of 2018. The predecessor manual was that of 2016. The 2018 manual was already approved at this time.
35. Further, for a Human Resource Manual to be operationalized, the input of the Public Service Commission is imperative. Involvement of SCAC, too. At the time this instrument was being, the Respondent hadn't obtained approval from SCAC. He would not tell when the manual was eventually approved.
36. Currently the Respondent is using the 2022 manual. This one was approved by SCAC.
37. The witness admitted that the Board had no right whatsoever to reduce the salary of the Respondent's employees. Further, the Board's position was that the salary of the employees was to be maintained. The Claimant's salary was not affected as he alleges.
38. The witness asserted that the Claimant didn't at all complain about the review of his salary. The suitability test was not anchored on any of the stipulations of the HR manual.
39. The witness testified that he issued the Claimant with a termination letter. The letter didn't give any notice period. The letter was captioned "rejection of appointment". Prior to this, the Claimant had not been served with any notice to show cause.

Claimant's Submissions

40. The Claimant filed his submissions dated 17th February 2023.
41. It was submitted by the Claimant that considering the termination notice that he was issued, which was shorter than that contemplated under the *Employment Act*, and the contractual notice period of one month, he was summarily dismissed from employment. He had not committed any infraction or omitted to do a thing in the course of his employment that could warrant the sanction. The failure to issue an appropriate notice rendered the termination procedurally unfair.
42. For a summary dismissal to be considered substantively justified, the employer must demonstrate that through his conduct the employee had fundamentally breached his or her obligations under the contract. In this matter, the Respondent didn't establish this. Therefore, it failed to demonstrate that the reason for the dismissal was fair and valid, as required under section 45[2] of the *Act*.
43. The Claimant also submits that the Respondent prepared and adopted the 2018 human resource instruments without the approval of the Public Service Commission or SCAC, which bodies are mandated by the *Public Service Commission Act* and the SCAC Act to approve such instruments. As such, the unapproved 2018 Manual couldn't be legally used to amend the Claimant's terms of service. The Claimant cites the case of *National Social Security Fund vs Consumer Federation of Kenya* Petition E003 of 2022 in support of his aforesaid submission. In that case, the Honourable Court held that:

“Having found that the 1st Respondent had a legal mandate to originate the human resource instruments but were not approved by the public service commission, the instruments are ineffectual until approved by the commission.”



44. The Claimant was not heard before the decision to terminate his employment was taken. This affronted procedural fairness.
45. On the relief sought of compensation for unfair termination of employment, the Claimant urged the Court to award him general damages to the extent of twelve months' gross salary. This is on the basis that the Respondent failed to do that which the law enjoined it to, ensure substantive justification for, and procedural fairness in the process leading to, the dismissal.
46. The Claimant submitted further that there is ample evidence that his remuneration was unlawfully deducted in the sum of Kshs. 36,000 monthly for 16 [sixteen] months. His allowances were unilaterally varied between 28th February 2019 to 26th May 2020. The unilateral variation of the Claimant's benefits amounted to a breach of the right to fair Labour practice guaranteed by Article 41 of the Constitution of Kenya, 2010. To buttress this submission the Claimant cites Bakery Confectionary Food Manufacturing vs Kenafic Industries Cause Number E867 of 2020 where the Honourable Court held:-
- “The Court...finds that the reduction of the grievants' salaries without consultation was unjustified and amounts to an unfair labour practice. It violates Article 41 of the Constitution.”
47. As a result, the Claimant, lost earnings of Kshs. 576,000/- in the 16 [sixteen]. He ought to be compensated in this sum.
48. The Claimant submitted further that Section 10 (5) of the Employment Act 2007 commands that the employer can only vary the employee's remuneration, or terms in respect of the other matters set out in the sub-section in consultation with the affected employer. Contrary to this provision, the Respondent varied the Claimant's terms of service unilaterally.
49. The Claimant's employment contract provided for 35 leave days. At the time of his dismissal, he had 24 [twenty-four] earned but unutilized leave days. He should be compensated prorata for the same.
50. The Claimant urged the court to direct that he be reinstated to his former position upon the basis of the provisions of Section 49 (3) (a) of the Employment Act and Section 12 (3) (vii) of the Employment and Labour Relations Court Act. In considering whether or not to grant an order for reinstatement, the Court must consider the factors enumerated under Section 49[4]. Where a court finds that there was no genuine reason for the termination, then an order of reinstatement should be issued. To fortify this submission reliance was placed on the case of Aggrey Lukorito Wasike vs Kenya Power and Lighting Company Limited [2016] Eklr. The circumstances of this case indicate that the Respondent had no genuine reason[s] to terminate the Claimant's employment. He should be reinstated.

Respondent's Submissions

51. The Respondent notes the Claimant has through his submissions sought inter alia for reinstatement. This remedy cannot be availed to him as the prayer was not sought in the Memorandum of Claim. The Court cannot grant a remedy which has not been sought in a party's pleadings, as parties are bound by their pleadings. To support this point, reliance was placed, on the Court of Appeal decision in the case of Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2015] eKLR; Justice Kalpana H. Rawal vs The Judicial Service Commission [2016] eKLR; and IEBC & Another vs Stephen Mutinda Mule [2014] eKLR.
52. It was further submitted that the Claimant's assertion that the Respondent's Human Resources Manual was illegal and therefore one which was not binding on him stands on quicksand. The



- Claimant benefited from a suitability test that was conducted under the same manual, as a result of which he was placed in the position of Manager, Film, and Digital Marketing KFC Scale 3 and the pay was backdated to October 2017. He is estopped from denying the validity of the same document that he drew a benefit from. To bolster these submissions, reliance was placed on the Court of Appeal decision in
53. [*National Bank of Kenya Limited v Hamida Bana & 103 others*](#) [2017] eKLR, wherein the holding of the Supreme Court of India in *State of Punjab & Others vs. Dhanjit Singh Sandu*-Civil Appeal No. 5698-5699 of 2009 was cited with approval.
 54. The Respondent expressed difficulty in understanding why the Claimant rejected the offer of the contract of service with the new terms yet the same was to uniformly apply to all persons in management positions. Further, one was still able to work under the contract until the retirement age of 60 years. All that one needed was good performance throughout the three years and an application for renewal of the contract six months before its termination by effluxion of time.
 55. It was further submitted that the Claimant admitted that the parties engaged for over 15 months and that he was given three days to make up his mind as regards accepting the offer for employment under the new arrangement. Had the Respondent acceded to his demand to remain in employment under the permanent and pensionable terms that would have bred discrimination against the other Senior Managers who had accepted to work under the new arrangement. Were placed to was bound by the 2018 HR Policy. The Respondent is a master of its own procedure, the Court should allow it to remain such. Further, Courts should not overly interfere with internal management at the workplace. To support these points the holding in [*Kenya Revenue Authority vs Menginya Salim Murgani*](#) Civil Appeal No. 108 of 2009, and the statement by Justice Kiage in [*Judicial Service Commission Vs Gladys Boss Shollei*](#), Civil Appeal No. 50 of 2014. was cited.
 56. The Respondent engaged the Claimant for a whole 15 months but the engagement didn't bear fruit. The Respondent didn't have an option but to disengage with him.
 57. The Respondent further submitted that stipulations of the HR Manual of 2018, which was the anchor for the employment arrangement, the subject matter of the suit herein, were in essence and legally part of the contractual terms of the employment relationship between it and the Claimant. To bolster these submissions, the judicial decision in ELC Petition E065 OF 2021 *Eric Omondi Owino vs Kenya Film Commission* was relied on to support this position.
 58. The Respondent urged this Court to decline the Claimant's Claim for unpaid House allowance and Unpaid leave days, stating that the reliefs as sought are in nature special damages which needed to be specifically pleaded and strictly proved. This, the Claimant didn't do. The Claimant's Counsel was off mark by attempting to supply specifics for the claim through submissions. Submissions shall never be allowed to be a substitute for evidence. To buttress these submissions, reliance was placed on the case of *Nyamogo & Nyamogo Advocates vs- Barclays Bank of Kenya*, Civil Appeal No. 69 of 2005, and [*Daniel Toroitich Arap Moi v- Mwangi Stephen and Another*](#) [2011] eKLR.
 59. Further, the contents of the various correspondences placed before this Court prove the Claimant's assertion that his salary was reduced, wrong.
 60. The Respondent further submitted that the evidence on record demonstrates clearly that the Claimant instigated the termination of his contract of employment by refusing to accept the Respondent's offer and execute a fresh contract of employment. He cannot therefore be entitled to the compensatory relief sought, twelve months' gross salary. Further, the Claimant can only be entitled to notice pay as per the



Respondent's HR manual. The Respondent sought fortification on this submission in the holding in the case of CMC *Aviation Limited v Mohammed vs. Mohammed Noor* [2015] eKLR.

Issues for Determination

61. I have reviewed the pleadings, oral and documentary evidence, submissions filed by both parties and authorities cited therein. The following issues present themselves for determination, thus: -
- a. How did the termination of the Claimant's employment occur?
 - b. If the termination was by the Respondent, was it fairly or unfairly done?
 - c. Whether the Claimant should be granted the reliefs sought.

a. How did the termination of the Claimant's employment occur?

62. There is no common cause as regards how the termination of the Claimant's employment occurred. The parties herein have taken diametrically opposite positions on the how. It is at this point that I must say that the Respondent was not unambiguous, as regards how the separation in employment between the Claimant and it occurred. At one point, it asserts that the Claimant terminated his service [see para. 19 of the Respondent's witness's statement], at another, it argues that the Claimant stirred the termination. For reasons that I have found a challenge to fathom, the Respondent avoided addressing the effect of its letter dated 16th June 2021. Did the letter amount to a summary dismissal letter? Or was it in character a termination letter?
63. The Claimant asserted that it is through the stated letter that the separation occurred and that the letter was in nature a summary dismissal letter. In essence, therefore, the termination of his employment was by the Respondent.
64. There cannot be any doubt that the term "termination" in the context of employment, connotes an end thereof. The effect of termination of a contract of employment is to bring the employment relationship to an end. An end of a contract of service has a corresponding effect, the end of an employment relationship. However, it should be noted that the reverse isn't necessarily true. That is to say that bringing an employment relationship to an end, does not necessarily give rise to termination of the contract of employment. This occurs in a situation where a party to the contract is in a repudiatory breach of the contract.
65. The Respondent's witness stated, that the Claimant terminated his employment by accepting the offer and executing a contract of employment with the new terms of service. The Respondent's Counsel submitted that the Claimant, by refusing to accept the offer, breached the provisions of the Human Resource Manual, and fundamentally violated the terms of his contract of employment. In my view, I get them stating that the Claimant did bring the employment relationship to an end by committing a repudiatory breach of employment.
66. It is trite law that where a party is in a repudiatory breach of the contract of employment, the contract subsists until the innocent party accepts and puts an end thereto. It is only then that it can be said that the contract of employment has been terminated. In my view, the Respondent accepted what they had considered a repudiatory through its letter dated 16th June 2021. The tone of the letter suggests so. However, as to whether the Claimant did commit a repudiatory breach, I will shortly herein after discuss herein.
67. In sum, I hold that the Claimant's employment was terminated on the 16th of June 2021, through the Respondent's letter of the same day.



Of whether the termination was fair or not.

From the onset, it should be stated that considering the material placed before me, the Claimant was summarily dismissed from his employment. Section 44[1] of the [Employment Act](#), provides for what constitutes summary dismissal, thus;

“ 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.”

68. It is also not in dispute that the Claimant was earning the allowances set out in paragraphs 2 and 3 of the Memorandum of Claim dated 28th June 2021.

69. The Claimant’s complaint arises from the change of his terms of service from permanent and pensionable to a three-year contract and the reduction of his allowances, which eventually culminated, after he rejected the said change of terms, to his termination from employment vide letter dated 29th August 2021.

70. The Claimant’s employment was terminable by a twenty eight days’ notice under the provisions of section 35 of the [Employment Act](#). Having stated as I have hereinabove that the termination of the employment was under the letter dated 16th June 2021, no doubt the letter didn’t give the Claimant statutory notice contemplated under the above-stated provision. The letter read in part;

“ However, you rejected that first offer given and subsequently rejected four other offers insisting your terms of service must be changed to permanent contrary to the Kenya Film Commission Human Resource policy.

Your rejection of the appointment offer has left the organization with no other option but to ask you to vacate office and return all government property in your custody with immediate effect and in any case not later than 30th June 2021.”

Further, the Respondent’s witness stated that the Respondent’s manual provided for a 30 days termination notice. No doubt, the Claimant was not given this contractual the Claimant.

71. When confronted with the task of interrogating and determining whether or not the employment of an employee or summary dismissal of an employee from employment, was fair, the Court must consider two aspects which are statutory in the Kenyan situation, procedural and substantive fairness. See. [Pius Machafu Isundu vs. Lavington Security Limited](#).

72. Section 41 of the Act speaks to procedural fairness. It provides a mandatory procedure that any employer contemplating terminating an employee’s employment or summarily dismissing an employee. Non-adherence to the procedure shall render the termination or summary dismissal unfair.

73. The procedure requires the employer to undertake a process that mandatorily encompasses three components; the notification component, the employer must notify the employee affected that he or she intends to take action against him and the grounds arousing the intention. The notification shall be in writing and unambiguous; the hearing component, the employer must accord the employee reasonable time to prepare and make representations on the grounds. Conjoined with this, is the employee’s right to be accompanied by a colleague of his own choice or a union representative [if he



or she is a member of a union] during the hearing; and the consideration component, before taking a decision, the employer shall consider the representations by the employee and or the accompanying person.

74. From the onset, and throughout the proceedings, the Claimant maintained that the mandatory procedure contemplated under section 41 of the *Employment Act* was not followed by the Respondent. The Respondent did not at all place evidence before this Court demonstrating that it followed the procedure before deciding to dismiss the Claimant. It is not surprising that Counsel for the Respondent did not address the Court on the requirements of this provision and whether there was adherence thereto by the Respondent. Consequently, I hold that the Respondent didn't discharge its burden under section 45 [2] of the *Employment Act*, proving that the dismissal was procedurally fair.
75. The Court has not lost sight of the fact that the Human Resource Manuals that were placed before this Court, both the 2016 and 2018, elaborately provided for the Disciplinary procedure to be applied by the Respondent. Whether the Respondent was to use the 2018 or 2016 manual at the time of dismissing the Claimant, it was bound to apply the Disciplinary procedure. I note, that the procedure mirrors the one which obtains in section 41 of the *Employment Act*. I cannot be off the mark to conclude that the Respondent didn't follow the Disciplinary procedure set out in the manual.
76. Section 43 of the *Employment Act* 2007, provides;
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
- No doubt this provision places upon the employer a legal burden to be discharged if an action by it of either terminating his employee's employment has to pass the test of substantive fairness. However, it is imperative to note that a further burden is imposed on the employer under section 45[2] of the Act, requiring the employer to prove that the reason[s] established pursuant to section 43, was valid and fair.
77. Therefore, it is possible for the employer to discharge the legal burden under section 43, but still fail to pass the substantive fairness test, if he fails to demonstrate that in the reason inheres validity and fairness.
78. There is no doubt in my mind that the Respondent in or about the year 2020 embarked on a reorganization of its Human Capital, a process which could see some of its employees' contracts of employment converted from service under permanent and pensionable terms to fixed contract terms. Further, the Claimant was uncomfortable with the conversion, he objected to the same, giving reasons for the discomfort. In my view, the reasons were not idle reasons.
79. The Claimant's resistance culminated in a host of correspondences, and some meetings between the Respondent and the Claimant. I hold that this was a rightful move considering the circumstances under which the reorganization was initiated and the impact it could have on the employees, including the Claimant. The correspondence and meetings culminated in the Respondent's letter dated 26th May 2020. In my view, the letter embodied a meeting of the minds of the parties, and the conditions and terms of service, thenceforth. The letter was conclusive as regards the sticky issue.
80. The letter is pivotal in the direction this matter shall take. It is therefore necessary to quote its contents verbatim,

“ Re; Terms Of Service



Reference is made to the letter dated 27th January, 2020 placing you on a three [3] year renewable, contract terms of service with remuneration of Kshs. 181,900 per month, housing allowance of KShs.50,000 per month, transport allowance of KShs.15,000 per month, entertainment allowance of KShs.9,000 per month, responsibility allowance of 7,000 per month and telephone allowance of kshs. 3,000 per month; totalling to Kshs.265,900 per month.

Reference is also made to the letter dated 16th March, 2020 of Ref. No. KFC/6/03/20100034/133 on the above subject matter and the meeting held on 28th April 2020 between the CEO, Ag. Director Corporate Services and yourself to discuss your terms of employment.

In the above mentioned meeting, your terms for the position of Manager, Film and Digital Marketing, KFC Scale 3, was negotiated and agreed on as follows:

- (i) Terms of Service: Permanent and Pensionable
- (ii) Remuneration:
 - a. Basic salary - 206,400
 - b. Housing allowance - 50,000
 - c. Transport allowance - 15,000
 - d. Entertainment allowance - 9,000
 - e. Responsibility allowance - 7,000
 - f. Telephone allowance - 3,000

The above terms shall commence on the 1st February, 2020.”

- 81. The Respondent placed before this Court a letter dated 30th July 2020. In my view, the letter was produced with the sole aim of demonstrating that subsequent to the agreement encompassed in the letter of 26th May 2020, the Respondent had found it necessary not to abide by the agreement but to stick to the conversion arrangement. In his evidence under cross examination, the Claimant vehemently denied that the letter dated 30th July 2020, was ever served on him. It was never brought to his knowledge either.
- 82. Where an employer asserts that he or she effected service of a document on its employee, service which the latter denies, it becomes obligatory on the part of the employer to prove service of the document. The Respondent, deliberately or otherwise didn't make any effort to demonstrate to the Court how and when the service was effected. By reason of the premise, I come to an inescapable conclusion the letter that was never served on the Claimant.
- 83. Maybe it is imperative to put forth the contents of the letter, to enable a further understanding why the court shall hold hereinafter that the letter doesn't come to the aid of the Respondent's case. The letter read in part;

“ Re; Terms Of Service

Reference is made to your letter dated 26th May, 2020 of Ref No. KFC/6/03/20100034/134 in regards to your terms of service and a letter dated 27th January 2020 Ref. No.



KFC/6/03/20100034/132 placing you on a three (3) years renewable contract terms of service.

Reference is also made to the letter dated 16th March 2020 of Ref. No. KFC/6/03/20100034/133 in which you were informed that your concerns regarding your terms of service will be forwarded to the Board for policy direction.

This is to inform you that due consideration has been made by the Board regarding your request to be considered for a permanent and pensionable terms of service. However the Board directs that you be placed and you are hereby placed on contractual terms of service with effect 1st February 2020.

Your contractual term will be a three years renewable contract term subject performance.”

84. The letter completely mentions not the letter dated 26th May 2020 which in my view settled the issue of the terms of service for the Claimant. The author only chose to mention the letter preceding it. The letter mentioned not the meetings that culminated in the agreement expressed in the letter dated 26th May 2020. There is no indication as to when the alleged decision by the Board was taken. The Respondent didn't place before this Court, any minutes of the Board on the issue. Further, the letter dated 26th May 2020, [which I have held to be expressive of a concluded agreement on the issue, the bone of contention between the parties] didn't indicate that the matter or the terms thereon were to be subjected to approval by the Board. Following these, I have no hesitation in concluding that the letter is an afterthought.
85. The Court notes that after the purported letter of 30th July 2020, there appears to have been no correspondence between the parties, and more specifically one by the Claimant stating that he had received the same and was still adamant in his stance against the conversion.
86. The reason advanced by the Respondent for the termination of the Claimant's employment was that he declined to execute the agreement converting his terms of employment in the manner stated hereinabove. Having concluded as I have hereinabove that an agreement was reached on the conversion, that the Claimant was to remain serving under the permanent and pensionable terms, as was expressed in the letter dated 26th May 2020, the reason cannot be held to be fair and valid. No reasonable employer would dismiss an employee on a basis that could glaringly appear to be an affront to a reached agreement between him/her and his/her employee.
87. By reason of the foregoing premises, I conclude that the dismissal of the Claimant from his employment was substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

88. Having held that the Claimant was indeed unfairly dismissed from his employment, I now turn to consider the matter of the reliefs sought.
89. The Claimant has sought a compensatory remedy pursuant to the provisions of section 49 of the *Employment Act*. The Court is cognizant of the fact the relief sought is contemplated under sub-section [1] [c]. Granting the relief is discretionally, however, it must be exercised judiciously. The factors of each case dictate whether or not the relief is to be granted and if so to what extent.
90. I have carefully considered; the circumstances of the summary dismissal as a whole; that the Respondent brazenly breached the statutory procedure, and that provided in its manual, requisite for a fair termination of employment; that the reason for the termination was not valid, fair and equitable; the length of service of the Claimant; and that the Respondent's action in my view appears retaliatory,



and find that he is entitled to the compensatory relief and to the extent of eleven [11] months' gross salary.

91. The Claimant's employment was terminable by twenty eight days' notice, under the provisions of section 35 of the *Employment Act*. Having found that the Claimant was summarily dismissed from employment, therefore without the statutory notice. I find no difficulty in holding that he is entitled to payment of salary in lieu of notice. Further, the Respondent did not demonstrate that salary in lieu of notice was ever paid to him pursuant to section 36 of the Act. Consequently, I award him one month's salary in lieu of notice.
92. The Claimant urged this Court to hold that the Respondent unilaterally varied his house allowance from the sum of Kshs. 60,000 that he used to earn pre-27.1.2020, to KShs. 50,000. I have carefully considered the material placed before me by the Respondent and find that there hasn't been any specific denial of the detrimental variation. The Claimant's assertion is not disputed therefore. The question that pops up then is, in the circumstances of this matter, can the law sanction such a variation?
93. Employee salary/wages, contractual or statutory allowances inclusive, are heavily protected by the law. Contractual terms on salary/wages are among those terms that the employer cannot vary without first consulting and seeking concurrence of the employee. Section [10][5] of the *Employment Act*, speaks to the terms. In my view, a unilateral decision to vary the protected terms render the decision unlawful abinitio, entitling the employee affected recourse to challenge the decision and or recoup any sum unearned following the variation.
94. The Court in, *Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafri Industries Limited* [2021] eKLR held: -

“ 56. The law is also clear on the procedure to be followed before a reduction of salary is deemed to be valid. Section 10(5) of the *Employment Act* provides as follows:

Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

57. In *Nakuru ELRC Petition No. 29/2016 Maxwell Miyawa & 7 Others v JSC* (2017) eKLR the Court held as follows:-

“Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.

65. The Respondent also did not suggest that the variation(s) involved consultations with these Petitioners.
66. The decision by the Respondent in regard to the contracts of the 7th and 8th Petitioners as conveyed through letters of 6 August 2013 were therefore



not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements”.

58. In the instant case, it is not in dispute that the Respondent did not consult the grievants before reducing their salaries. This Court finds that indeed the action of the Respondent in unilaterally reviewing downwards the salaries of its employees without consultation was unfair and unjustified and amounts to an unfair labour practice.”
95. The Respondent did not demonstrate, and the circumstance of the dispute herein express, that there was no consultation or concurrence prior to the variation. Consequently, I can only agree with the decision in the matter above stated and allow the claim under this head. The Respondent argued that the Claimant didn't specifically plead for this relief and therefore it shouldn't be availed to him. I have carefully looked at the statement of claim and hold that the relief was sought with the requisite specificity, and to expect more shall be requiring pleadings to contain evidence.
96. On unpaid leave, the Claimant submitted that he was entitled to 35 days leave per year. He took leave on 17th May 2021 but was recalled. He therefore had twenty-four unutilized leave days at the time of separation. The Respondent didn't demonstrate that the Claimant didn't have that many unutilized leave days or that he was compensated for the same. With no much ado, I grant him the sought compensation, computed thus,
- $$(165,700/30 \times 24 \text{ days}) = 132,360.$$
97. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service, the certificate is a statutory right.
98. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a) A declaration that the termination of the Claimant's employment was unfair and unlawful.
 - b) The Claimant be paid following dues: -
 - i) Compensation for Unlawful termination pursuant to section 49[1][c] of the [Employment Act](#), 11 months' gross salary (285,700x11) - Kshs. 3,142,700
 - ii) One month's salary in lieu of notices - Kshs. 285,700
 - iii) Compensation for Unutilized leave days - Kshs. 132,560
 - iv) Unpaid House Allowance (10,000x17) - Kshs. 170,000Total - Kshs. 3,730,960
 - c) Interest on (b) above at Court rates on the sums awarded from the date of this judgment till full payment.
 - d) The Respondent shall bear the costs of this suit.
 - e) The Respondent is ordered to issue the Claimant with a Certificate of Service within 30 days of this date.
99. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 16TH DAY OF NOVEMBER, 2023.



OCHARO, KEBIRA

JUDGE

In the presence of:

Mrs. Muchiri holding brief for Omwansa for the Claimant

Mr. Odukenya 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

