



**William v Bollore Africa Logistics Limited (Cause 1494 of 2017)
[2023] KEELRC 3030 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3030 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1494 OF 2017
K OCHARO, J
NOVEMBER 16, 2023**

BETWEEN

REINHARD MUNYASYA WILLIAM CLAIMANT

AND

BOLLORE AFRICA LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Claim dated 31st July, 2017 on grounds that the Respondent wrongfully and unlawfully terminated his employment and thus sought the following reliefs:
 - i. A declaration that the Respondent's termination of the Claimant's employment amounted to an unlawful, unfair and unjustified dismissal from employment.
 - ii. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded in paragraph 14 of the statement of claim.
 - iii. An order for the Respondent to pay the Claimant his employment terminal dues and damages totalling to Kshs 622,271.00.
 - iv. An order for the Respondent to pay General damages to be assessed and awarded by the Court for the unfair, unlawful, illegal and false arrest, detention and prosecution.
 - v. Interest on [c] above from the date of judgment until full payment.
 - vi. Cost of this suit plus interest.
2. Upon being served with summons to enter appearance, the Respondents did enter the appearance on the 28th August 2017 and filed a response dated the 17th September 2017, to the Memorandum of Claim.



3. At the close of pleadings, the matter got destined for hearing inter partes on merit. The Claimant's case was heard on the 19th July 2022, while the Respondent's was on the 14th February 2022.
4. At the full hearing of the parties' respective cases this Court directed the filing of written submissions within specific timelines, at the time of retiring to write the judgment, all the parties had filed their submissions.

The Claimant's Case

5. The Claimant averred that he was employed by the Respondent on the 1st November 2009, as a Messenger where he performed his duties continuously with due diligence and to the Respondent's satisfaction. At the time of separation with the Respondent, his salary was Kshs 27,749.00 per month. The Claimant further stated that in the course of his employment, he used to report to work at 7 a.m. and leave at 5 p.m. However, he was never compensated for the overtime worked.
6. It was the Claimant's case that in the month of March 2014, while lawfully going about his daily duties, the Respondent's Manager Mr. Fourcart, accused him of stealing cheque leaves. This startled him as he had no knowledge of the existence of such cheques in the first place.
7. The Claimant further contended that the following day, the Respondent's Security Manager called police officers into the Company's premises. On the Security Manager's instructions, the police officers arrested and held him in cells. Later, he was charged and arraigned in court with the offence of stealing by servant. After securing his release on bail, he reported back to his place of work only to be issued with a suspension letter.
8. The Claimant further stated that the Criminal Case, Makadara Court Criminal Case No. 1776/2014 was eventually adjudged in his favour. He was acquitted on 27th April 2017.
9. He further stated that while the Criminal matter was pending hearing and determination, the Respondent without issuing him with any notice to show cause, called him and simply questioned him on the events leading to the alleged stolen cheque leaves. He was dismissed from employment on the 6th August 2014.
10. It was the Claimant's contention that in the course of his employment, he was never a custodian of any cheques. He was not given the cheques that were allegedly stolen for delivery. Therefore, the allegation against him of theft of the cheques was completely false and fabricated. The termination of his services was totally without justification.
11. Lastly the Claimant contended that the Respondent's action to dismiss him from employment was illegal, unlawful and unfair and contravened the basic tenets of the fair labour practices, the [Employment Act](#) and the principles of natural justice in that; he had done nothing wrong to warrant his dismissal from employment, the entire proceedings leading to his dismissal disguised as a termination was false and a stratagem, the truth and the factual state of matters were ignored in the premeditated haste to dismiss him even before the instituted court process had been concluded and the decision to summarily dismiss him was extremely harsh, inhumane, demeaning, unwarranted and unjustified.
12. When cross-examined, he testified that he had some disciplinary cases prior to this one that led to his dismissal. He had been issued with two show cause letters in the month of November 2012 and after being taken through a disciplinary process, he was cautioned. The subject matter of the process and the caution was late coming to work. The 2nd show cause notice was dated 10th December 2012. Again, it related to late coming. After responding to the same, he issued with a warning letter.



13. The Claimant further confirmed that he was issued with a 3rd show cause letter dated 4th December 2014 and the ground was failure to dispatch documents properly. This subsequently earned him another warning letter.
14. It was his testimony that the matter in issue was the lost cheques. It was his duty to receive and convey mail. He used to deliver several mails to Lucy and cannot be sure of having delivered the specific one.
15. The Claimant further testified that he received the document and delivered but unfortunately, she was not at her desk. Her Manager received it. It was his responsibility to ensure that the intended recipient received the envelope.
16. He further told the court that during the disciplinary proceedings, he had stated that he had given the envelope to her. Further, whenever he would not find her when delivering the mail, he used to place them on her desk. He didn't know what was inside the envelope that he delivered. It was alleged that under the envelope was a cheque of Kshs 764,470.60.
17. Cross-examined on the alleged investigations following the investigatory suspension, the Claimant testified that he didn't know the breadth of the investigations. He was not given a chance to give his statement to the investigators. He was only informed that investigations were carried out. Further, even at the police station, he didn't give his statement to the officers.
18. The Claimant acknowledged receipt of the letter dated 16th June 2014, to which he responded. He was invited for a disciplinary hearing on 31st July 2014. At the hearing, the Respondent had only Lucy as a witness. Mr. Charles Mumo and John Munyioki were not in the meeting. The presence of their names on the minutes was suspicious. The names must have been placed thereon after he had signed the document.
19. The Claimant further testified that he was taken through a disciplinary hearing, and subsequently, the Respondent decided to terminate his employment. The decision by the Respondent was communicated to him through a letter dated 6th August 2014. However, the letter did not put forth his terminal benefits. The Respondent paid him a sum of Kshs 26,097.00. Upon receipt of the sum, he executed a discharge voucher. He was also a member of the National Social Security Fund [NSSF].
20. The Claimant further testified that he was not paid service pay or overtime. The termination was unfair and unlawful and thus he ought to be compensated.
21. On re-exam, he clarified by stating that the prior warning letters were not in relation to the latest subject or incident. In all the incidents, he was not subjected to any disciplinary hearing.
22. Upon his termination, he was given only Kshs 26,000.00 which according to him was his salary for that month. The said amount was not broken down.

The Respondent's Case

23. Elizabeth Wambui, the Respondent's Human Resource Manager in charge of Nairobi, presented the Respondent's case. The witness confirmed that the Claimant was an employee of the Respondent at all material times up until 6th August 2014 when his services were terminated. Further, during the course of his employment, the Claimant was involved in numerous cases of indiscipline and did not perform his duties with due diligence. Furthermore, the Claimant never worked overtime as he has contended.
24. The witness contended that the Claimant at the material time, the Claimant had possession of the cheque leaves, and acknowledged having received the same. However, he failed to give a sufficient



- explanation of where he had delivered them after receipt. All evidence pointed to the fact that the cheques were received by him.
25. The Respondent further contended that the Claimant having been reasonably suspected of having stolen and or diverted the cheques hence exposing the Respondent to possible loss, the Respondent had as a law-abiding citizen, to report a crime to the authorities and for the authorities to undertake investigations thereafter.
 26. The fact that the Respondent had made a report to the police concerning the theft, didn't in any manner curtail its authority to initiate internal disciplinary proceedings and punish the Claimant. After taking the Claimant through a disciplinary process, it found him culpable. It rightfully dismissed him, therefore.
 27. The witness admitted that the Claimant was not the custodian of the cheques at the Respondent's. However, he was the person who received the cheques in the mail-room and having so received the same, failed to deliver them as expected relevant office. Further, the Claimant attempted to assert that he delivered them as expected.
 28. The police had the authority and duty to undertake investigations on the matter. The investigatory process by the police was one outside the control of the Respondent.
 29. Lastly, it was contended that the Claimant was validly dismissed from employment and thus not entitled to the amounts claimed. Furthermore, the Respondent didn't instigate his arrest and prosecution. He was arrested in the normal course of things pursuant to a lawful complaint and the prosecution was a matter within the direction and control of the relevant authorities as contemplated by the law. The Claimant's Claim, therefore, should be dismissed with costs.
 30. When cross-examined, she testified that the Claimant's duty was to collect, deliver and distribute the letters in all the offices. He was further expected to keep the records of issued and received documents and provide internal dispatches. The Respondent had one internal messenger and two from an external Company.
 31. The Claimant was dispatching the cheques from the mailroom to the staff internally. The Respondent procured from its members of staff who confirmed that the envelope containing the cheques was received by the Claimant. However, apart from the witness statements, it didn't have a document showing that he had received the cheques.
 32. It was her further testimony that the Claimant confirmed that he had received the envelope. As to whether the cheques were enveloped thereunder, the Respondent didn't establish. The witness further stated that this wasn't the first time the Respondent had lost cheques dispatched to it.
 33. It was her testimony that investigations were not conducted to confirm whether the Claimant was involved in the incorporation of the companies with names similar to the Respondent's for purposes of fraudulently cashing cheques belonging to the Respondent.
 34. The witness testified that though the Respondent asserted that it carried out investigations, it did not file an investigation report in Court. It was further testified that prior to the hearing, no report or witness statements were supplied to the Claimant.
 35. RW1 told the Court that during the hearing, the Claimant was given a chance to cross-examine witnesses. At the hearing, he was accompanied by Union representatives. The representatives were served with the Statements before the hearing.



36. The witness testified further that the Claimant was paid a net of Kshs 24,230.00. This was his rightful benefit after statutory deductions. The figures were explained to him. He didn't express any reservations on the same.
37. The Respondent had the right to carry out its internal processes concurrently with the Criminal Process.

The Claimant's Submissions

38. The Claimant filed his submissions on the 24th of April 2023, setting out three issues for determination:
- i. Whether the Claimant's termination was justified.
 - ii. Was fair procedure applied before disengaging the Claimant from employment?
 - iii. Whether the Claimant is entitled to the reliefs sought.
39. The Claimant submitted that the termination of the Claimant from employment was unjustified and unfair. The law imposed a duty upon the Respondent to demonstrate that the termination of the Claimant's employment was both procedurally and substantively fair. To support this submission reliance was placed on the decisions in Walter Anuro v Ther Teachers Service [2013] eKLR, and Pamela Nelima Lutta v Mumias Sugar Company Limited [2017] eKLR.
40. The Claimant also placed reliance on the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR cited with approval by the court in the case of National Bank of Kenya v Anthorny Njue John [2019] eKLR where it was held:

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.”

41. It was the Claimant's submission that he was accused of the disappearance of the Respondent's cheques for Kshs 764,470.60. However, during the hearing, the Respondent failed to place before the Court any document from which it can be discerned that the cheques were received at its offices. The client, the issuer of the alleged cheques was not called to present evidence in support of the fact that it dispatched cheques to the Respondent. In the course of his duties, the Claimant was not charged with the Responsibility of opening mail, it wouldn't therefore be logical for one to accuse him of stealing cheques that were in an enclosed envelope or expect an explanation from him of the lost cheques.
42. The Claimant was charged with a criminal offence of stealing the cheques. However, he was acquitted as the Respondent failed to tender evidence satisfying evidence before the court.



43. Considering all the circumstances of this matter, the only safe conclusion should be that the Respondent did have a valid reason to terminate the Claimant's employment.
44. On whether there was procedural fairness in the process leading to the decision to terminate the Claimant's employment, it was submitted that section 41 of the *Employment Act* speaks to procedural fairness. The provisions thereunder are mandatory. To buttress this, reliance was placed on the case of *Dominic Otieno Odeny v Kenya Kazi Services Limited* [2021] eKLR.
45. Further reliance was placed on the holding in the case of *Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR where the court held:
- “Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.”
46. The Respondent didn't adhere to the mandatory procedure set out in the above-stated provision of the law. Therefore, the discharge of the Claimant was procedurally unfair.
47. On the reliefs sought it was submitted that having demonstrated that he was summarily dismissed unfairly and unlawfully, he is entitled to the reliefs enumerated in his memorandum of claim. The Claimant confirmed receipt of Kshs 26, 097.00 that was paid without him being given the breakdown. However, this amount was much less, than he ought to have received considering he used to earn a monthly salary of Kshs 27, 749.00.

The Respondent's Submissions

48. The Respondent filed its written submissions on the 5th May 2023 distilling four issues for determination thus:
- i. Whether the Claimant was wrongfully and unfairly terminated.
 - ii. Whether the procedure was followed prior to the termination.
 - iii. Whether the Claimant is entitled to the remedies sought.
 - iv. Cost of the suit.
49. It was submitted that section 47 [5] of the *Employment Act* placed a duty upon the Claimant as an employee to prove unfair termination. He didn't discharge this legal burden. Reliance was placed on the case of *Mesback Auta Ongeru v Nyamache Tea Factory Company Limited* [2019] eKLR in fortification these points.
50. The Claimant was issued with a notice to show cause. The same was clear, he had been implicated in the theft of cheques. He was called upon to render an explanation. In his explanation, he denied knowledge of the said cheques. He maintained this position all along, however, during the disciplinary hearing, he confirmed having received the envelope containing the cheques. This was corroborated by the statements of Lucy Nderitu and Raymond.
51. The Respondent further submitted that the fact that the Claimant; declined to write a statement at the investigations stage; declined knowledge of the cheques only to later admit having received the envelope; and claimed that he handed over the envelope to a third party whom in turn disputed the position, are circumstances that point to the fact that the Respondent had a valid reason to terminate the employment of the Claimant.



52. On procedural fairness, it was submitted that the Respondent followed the due process in terminating the Claimant's employment. It conducted investigations, which revealed that indeed the Claimant may have been involved in the disappearance of the cheques, the Claimant was issued with the show cause notice pointing out that position, and later called to write an explanation which did. The Claimant was put to a disciplinary hearing. In his testimony, he confirmed that at the disciplinary hearing, he was accompanied by two union members. He executed the minutes that flowed from the hearing. It is clear that procedural fairness was present in the circumstances. Reliance was placed on the case of *George Musamali v G4S Security Services Kenya Limited* [2016] eKLR where it was held:

“ However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

53. For the last issue, the Respondent submitted that the Claimant had failed to prove its case on a balance of probability and thus is not entitled to the remedies sought. Further, he executed a discharge upon receiving his terminal dues. The Claimant's Claim should be dismissed with costs to the Respondent.

Analysis And Determination.

54. From the pleading, the evidence on record as well as the submissions by the counsel for the parties, the following issues present themselves for determination thus:

- i. Whether the termination of the Claimant employment was both procedurally and substantively fair.
- ii. Whether the Claimant is entitled to the reliefs sought.
- iii. Who should bear the cost of the suit?

Whether The Termination Was Both Procedurally And Substantive Fair.

55. In addressing the presence of fairness or otherwise in termination of an employee's employment or summary dismissal of an employee, a court must consider two elements, the substantive justification and the procedural fairness. The two form the total unit of fairness in termination and absence of any or both of them shall render the termination or summary dismissal unfair.

56. Section 41 of *Employment Act* 2007, provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee from employment. The procedure is mandatory, it embodies three components, the information/notification component- the employer must notify the employee of his or her intention to take action against him or her, and the grounds attracting the intention. Second, the hearing component- the employer must accord the employee an adequate opportunity to prepare and make a representation on the grounds. This Component also avails the employee the right to accompaniment, by either a colleague, where he or she is not a member of a trade union or a union representative, where he or she is a member. Lastly the consideration component, the employer must consider the representations made by the employee and or the colleague or union representative as the case may be before making a decision.

57. 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 his 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.”

58. In the case of *Loice Otieno v the Kenya Commercial Bank Limited* [2011] eKLR it was held, and I agree:

“Whether an employee has been given previous warnings in the past or not, when an employer is contemplating terminating the services of the employee, it must expressly and unambiguously inform the employee of the contemplated action. That is my understanding of *section 41 of the Employment Act*. I say so on the strength of *section 41(2) of the Employment Act*. Summary dismissal even in the face of a fundamental breach of the employment contract/obligations or gross misconduct must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling foul of *section 41(2) of the Employment Act*.”

59. By dint of the provision of section 45 (2), the duty to prove that there was procedural fairness in the termination or summary dismissal lies with the employer.
60. It is not in dispute that at all the material times, the Claimant herein was an employee of the Respondent having been employed as a Messenger on 1st November 2009 until March 2014 when his services were terminated on the alleged ground of stealing cheque leaves from the Respondent. The Claimant contends that his termination was both procedurally and substantively unfair, the position which was adversely contested by the Respondent, which took the position that the procedure was fair and the reason justified.
61. From the evidence on record, the Claimant was issued with a notice to show cause dated the 16th of June 2014. The notice indicated the accusation levelled against him, involvement in the disappearance of the Company cheques amounting to Kshs 764, 470. 60. The Claimant responded to the show cause letter on 17th June 2014 giving an explanation to the show cause letter. He was subsequently invited to a disciplinary hearing. His right to accompaniment was expressed. The Claimant attended the hearing that was held on the 31st of July 2014 at 2.00 pm in the Operation Boardroom in the company of two Union Members. Up to here, one can easily conclude that procedural fairness was achieved.
62. However, this Court has not lost sight of the fact that the Respondent heavily placed reliance on alleged internal investigations for its decision to dismiss the Claimant from employment. From the onset, the Claimant maintained that the investigators didn't involve him, they never took any statement from him, and that he was not supplied with any report flowing from the investigations. Further, the failure on the part of the Respondent to supply him with the alleged investigation report, to enable him to adequately prepare for his defence, was an affront to procedural fairness. In her evidence under cross-examination, RW1 told the Court that the Claimant was neither supplied with the investigation report nor Witness Statements prior to the Disciplinary hearing. The investigation report was served on the Union Representatives only during the disciplinary hearing.
63. Where the employer contends that his or her ground[s] for the termination of his or her employee's employment springs from an investigation report and or certain documents, the canons of procedural



fairness, the tenets of natural justice, and the constitutional right to a fair hearing, enjoins the employer to supply the employee with the report and or document[s] to facilitate an adequate preparation for his or her defence. The supply shouldn't be cosmetically done. It must be done with the sole purpose of aiding the preparation and attainment of procedural fairness. In my view, it cannot be a defence that the employee didn't ask for them, ensuring procedural fairness is a statutory obligation on the part of the employer.

64. By reason of this premise, I hold that the Respondent didn't fully adhere to the edicts of procedural fairness as contemplated under the law. The termination was procedurally unfair, therefore.
65. 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.
66. 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. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination.”
67. In judging substantive fairness this Court will give the matter an interventionist approach and not an abstentionist approach, for there is nothing in the constitutional scheme and the post-2008 employment and labour relations statutory scheme that suggest that in determining the fairness of a dismissal the court should approach the matter from an employer's perspective. In fact, all indicators are to the contrary. An unconstrained reading of all the relevant provisions compels the conclusion that the Court is to determine the dismissal/termination dispute as an impartial adjudicator. Therefore, my view is opposed to what counsel and litigants often posit, that the Court in adjudging fairness must accord a differential approach. The Court must take into the totality of the circumstances.
68. The Respondent firmly maintained that the Claimant was the culpable person for the loss of the said cheque leaves as he was the person charged with the responsibility of ensuring the mails were distributed to all the intended persons or officers. The Respondent's witness asserted that the Claimant was placed under an investigatory suspension. The Respondent didn't place any investigation report before this Court to enable it to discern whether or not out of the investigations any reasonable employer would have extracted a valid and fair reason therefrom to be the basis for commencement of disciplinary against, and eventual dismissal of, its employee.
69. The Respondent contended that in the course of the investigatory process, some of its employees recorded witness statements. The statements were placed before the Court as evidence. None of those witnesses was called to testify before this Court for the Respondent. Further, I have carefully considered the witness statements, none reveals that the Claimant actually unsealed any envelope and took away the alleged cheques or an envelope containing the cheques. The Respondent didn't place forth any details of the alleged stolen cheques. The issuers of the cheques did not give any evidence before the disciplinary panel or this court to fortify the allegation they issued the cheques and that the same were received at the Respondent's. Nothing would have been easier for the Respondent than to tender evidence that upon the cheques being stolen, there was a correspondence to the issuer's bank to prevent the cashing.



70. It has not escaped this Court's sight that the Claimant's assertion that he was acquitted in the Criminal matter for lack of evidence was not rebutted.
71. In the upshot, I come to an inevitable conclusion that the Respondent failed to demonstrate that it had a valid and fair reason to dismiss the Claimant from employment. It didn't discharge the legal burden under section 45[2] of the *Employment Act*.
72. By reason of the foregoing premises, it is my considered view and holding that the Claimant's termination was both procedurally and substantively unfair.

Whether The Claimant Is Entitled To The Reliefs Sought.

i. 12 Months' Salary Compensation For The Unfair Termination

73. The Claimant sought compensation for the unfair termination amounting to Kshs 332, 988.00. This Court is alive of the fact that 12 months' gross wages or salary is the maximum awardable compensation provided under section 49 [1] [c] of the *Employment Act* 2007. Granting of the relief is discretionary. Whether maximum compensation or not depends on the circumstances of each case.
74. I have considered the period the Claimant was engaged by the Respondent as a Messenger, the prior warnings and cautionary letters on record and the fact that his termination was both procedurally and substantively unfair, I am inclined to award the Claimant the compensatory relief at the extent of five [5] months gross salary. Kshs 137, 745.00.

ii. One Month's Salary In Lieu Of Notice

75. The Claimant sought salary in lieu of notice of Kshs 27, 749.00. The Respondent resisted this claim on the reason that having been summarily dismissed, he was not entitled to the relief. Having found that the Claim's termination was both procedurally and substantively unfair, and cognizant of the fact that the employment was terminable by a one month notice or payment of an equivalent of one months' salary in lieu of such notice, I am convinced that he is entitled to salary in lieu of notice pursuant to the provisions of section 35 of the *Employment Act* as read with section 36 thereof.
76. By reason of the foregoing, I hereby award the Claimant Kshs 27, 749.00, salary in lieu of notice.

iii. Overtime.

77. He further sought to be awarded compensation for overtime worked in the sum of Kshs 261, 534.00. In the case of *Rogoli Ole Manadiengi v General Cargo Services Ltd* (2016) eKLR the Court held as follows:

“The Employee, in claiming overtime pay, however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee.”
78. The Claimant did not place before this Court evidence to prove that he worked overtime. Without evidence, there isn't a basis upon which this Court can make an award in favour of the Claimant.

Who Should Bear The Cost Of The Claim?

79. The cost of this Claim to be borne by the Respondent.



80. The upshot, judgment is hereby entered in favour of 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. One month salary *in lieu* of notice.....Kshs 27, 749.00.
 - c. 5 [five] months' gross salary, compensation pursuant to the provisions of section 49[1] [c] of the *Employment Act*Kshs 138, 745.00.
 - d. Cost of the suit & interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Omamo for Claimant

Mr. Maondo for 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

