



**Okutoyi v Eveready Security Guards Co. Limited (Cause 1699 of 2017)  
[2023] KEELRC 3420 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3420 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1699 OF 2017  
K OCHARO, J  
DECEMBER 20, 2023**

**BETWEEN**

**SALIM JUMA OKUTOYI ..... CLAIMANT**

**AND**

**EVEREADY SECURITY GUARDS CO. LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a Statement of Claim dated 26<sup>th</sup> April 2017, the Claimant instituted a Claim against the Respondent, seeking the following reliefs:
  - a. A declaration that the Claimant’s termination was wrongful and unfair.
  - b. Unpaid dues totalling to.....KShs. 268,332.24.
  - c. One month’s salary in lieu of notice..... KShs. 12,270.
  - d. 12 months’ compensation for the wrongful termination.
  - e. Punitive and aggravated damages for breach of the Claimant’s Constitutional rights.
  - f. The costs of the suit and interest.
2. The Statement of Claim was filed together with the Claimant’s Witness Statement dated 26<sup>th</sup> April 2017 and documents under a list of the same date.
3. Upon being served with the summons to enter appearance, the Respondent filed a memorandum of appearance on the 13<sup>th</sup> of April 2018 and filed a Memorandum of reply on the 20<sup>th</sup> of April 2017. In the Response, the Respondent denied the claim and the Claimant’s entitlement to the reliefs sought.



4. The matter was heard inter-partes on merit. The Claimant's case was heard on 6<sup>th</sup> June 2022 while the Respondent's was on 26<sup>th</sup> September 2022.
5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

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

6. It was the Claimant's case that he first came into the employment of the Respondent on 8<sup>th</sup> January 2011 as a Security Guard at a monthly salary of KShs. 12, 270.
7. The Claimant contended that on the 1<sup>st</sup> of September 2016, the Respondent unfairly and unlawfully terminated his employment by forcing him into early retirement. The termination was not preceded by any notice. Further, at the termination, the Respondent failed to pay him payment in lieu of notice, outstanding wages owed to him and severance.
8. He further stated that due to the said unfair termination, he suffered emotional distress. It is his position that he had legitimately expected the Respondent to maintain employment with him and in the event of termination, the same to be done in conformity with the contract and the law.
9. The Claimant contended that he was just given a termination letter without being given any reasons for the said termination.
10. The Claimant contended further that throughout his tenure, he never proceeded for annual leave. He was never paid a house allowance. Further, he is entitled to service pay.
11. Cross-examine by Counsel for the Respondent, he testified that he was born in 1947. Further, his employment was terminated without notice. However, upon being pressed further, he admitted that he was issued with a "retirement notice" dated the 11<sup>th</sup> of August 2016, and a further notice dated the 1<sup>st</sup> of September 2016.
12. It was his testimony that in the 1<sup>st</sup> two years of his employment, he never proceeded for leave.
13. The Claimant further testified that on a few occasions, he was warned about his conduct of absenteeism.
14. CW1 testified that he never wrote the letter dated the 21<sup>st</sup> of August 2014. It was his further testimony that Respondent did not at any time inform him that his salary was consolidated. Further, from the onset, the Respondent was not giving them a house allowance.
15. He further testified that while in employment he was a member of a Sacco, from whom he had taken a loan. When he applied for the loan, he undertook that in the event of defaulting in repaying the same, the employer [Respondent] was to deduct the unpaid amounts from his salary and channel the same towards making good the default. At the time of separation, he had a loan balance of KShs. 43,000.
16. He further testified that in the document dated the 1<sup>st</sup> of September 2016, there is an indication that his August salary was factored in.
17. In re-exam, he clarified by stating that he never received any money out of the amounts put forth in the letter dated the 11<sup>th</sup> September 2016.



## The Respondent's case

18. The Respondent's case was presented by Benson Musonge, the Respondent's Human Resource Manager. The witness confirmed that the Claimant was employed by the Respondent on the 8<sup>th</sup> of January 2011 at a monthly salary of Ksh. 12,270. The salary was inclusive of a house allowance.
19. The witness testified that the Claimant's employment was terminated because he was unable to discharge his duties as was expected of him. He had developed a habit of reporting to work late resulting in inconveniencing his colleagues. On several occasions, he was found sleeping while on duty. He was regularly absent from duty without authority. For these incidents, he was issued with warning letters.
20. The witness further testified that the Claimant took leave of 24 days and was supposed to resume duty on the 8<sup>th</sup> of August 2010. However, he didn't until the 10<sup>th</sup> of August 2016. This prompted the Respondent to issue him with an invitation letter for a disciplinary hearing. The Claimant attended the meeting on the 10<sup>th</sup> of August 2016.
21. Considering that he had so many warning letters and his advanced age [69 years], the Respondent decided to terminate his employment. He was issued with one month's notice. At the lapse of the notice period his employment came to a termination. He was paid all his terminal dues. He was paid for the 30 days worked in August 2016, prorated leave days, Kshs. 3,272. The Respondent used to remit NSSF contributions duly.
22. The Respondent further contended that it ensured that the Claimant took four off-duty days a month. He always proceeded with his annual leaves. Whenever he worked during public holidays compensation for the same was paid alongside his salary.
23. The Claimant was paid KShs. 4,976/-, an amount which was arrived at after he had been deducted salary advances that he had received from the Respondent and the loan sum that he owed the Sacco.
24. The witness asserted that the Claimant's salary was a consolidated salary that was inclusive of a house allowance. Therefore, he cannot be heard to claim the same separately. Further, overtime compensation was part of the consolidated salary. The agreement between the Respondent and him was that he worked from 6.00 am to 6.00 pm.
25. When cross-examined, he testified that they retired the Claimant on the 30<sup>th</sup> of August 2016 and this was his last day of work. The notice issued to him was dated the 11<sup>th</sup> of August 2016. The notice period was less than a month, therefore.
26. The Claimant worked from Monday to Sunday and the overtime payment was included in his salary. For public holidays worked he was compensated and the payments were made through his bank.
27. It was his testimony that the ground for the termination of the Claimant's employment was his under-performance. However, the termination notice that was issued to him, dated 11<sup>th</sup> August 2016 didn't mention this issue.
28. RW1 further told the court that though in his witness statement he had mentioned there were many disciplinary meetings concerning the Claimant, he had not presented any minutes to demonstrate that indeed there were. The only minutes tendered by the Respondent are those dated 10<sup>th</sup> August 2016. The minutes are unsigned by the Claimant and they do not indicate what representations he made during the alleged hearing.
29. The disciplinary hearing was held on the same day he returned from leave. The termination letter was issued on the 11<sup>th</sup> of August 2016.



30. His age was confirmed from the Identification Card. He picked up his dues on the 1<sup>st</sup> of September 2016. Gratuity was paid as an appreciation.
31. The Claimant belonged to Eveready Sacco. The loan contract was between him and the Sacco. They furnished the Respondent with a loan statement indicating how much he owed the Sacco at the time of his termination and the deductions were pursuant to the Sacco Act.
32. When re-examined, he told the Court that the Claimant never worked overtime as they had agreed that he was supposed to work from 6.00 a.m. to 6.00 p.m.
33. There was no need to issue him with a notice to show cause. The Claimant was born in 1947.

### **The Claimant's Submissions.**

34. The Claimant filed his submissions on 30<sup>th</sup> November 2022. He posed two issues for determination thus:
  - i. Whether the Claimant was unfairly and unlawfully terminated.
  - ii. Whether the Claimant is entitled to terminal dues.
35. On the first issue the Claimant's counsel submitted in interrogating whether termination of an employee's employment was unfair, regard must be given to the provisions of the [Employment Act](#) specifically sections 45 [2], 43, 47 [5] and 41. Further, for termination of an employee's employment to pass as fair, the employer must demonstrate that the same was substantively justified, and procedurally fair. In fortification of these submissions, reliance was placed on the case of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR and the case of Walter Anuro vs the Teachers Service Commission [2013] eKLR.
36. It was further submitted that when the Claimant was first joining the Respondent's employment he was past the retirement age of 55. His employment was terminated because of his age. In the circumstances of this matter, the reason of age therefore would not be a valid and fair reason for the termination.
37. Counsel urged the Court to note that the letter dated 8<sup>th</sup> August 2016 was a warning letter to the Claimant for his absence from work for two days without authority. Besides the warning, the Claimant was condemned to forfeit two days' salary as a punishment. Having punished him as such, the absenteeism for the two days couldn't again be made a ground for the termination. The Respondent's witness testified that the two days' absence from duty was one of the reasons for the termination. The Claimant was therefore subjected to double jeopardy.
38. On procedural fairness, Counsel submitted that Section 45[2] of the [Employment Act](#) requires that any termination of employment be preceded by adherence to fair procedure. In the absence of fair procedure, the termination shall be deemed unfair. Section 41 of the Act provides an elaborate procedure that any employer intending to terminate an employee's employment must follow. No notice to show cause was issued to the Claimant, he was not notified of any grounds, the basis for the Respondent's intention to terminate his employment, he was not invited to the purported disciplinary hearing, and there was no hearing at all. The termination was not procedurally fair.
39. Further, the Claimant's employment was terminable under the provisions of section 35 of the [Employment Act](#) by twenty-eight days' notice. The notice that was issued to him was a twenty-days' notice. This ran counter to his legitimate expectation that his employment could be terminated by notice as contemplated by the law. The expectation was breached. Counsel urged to note and apply



the principle of legitimate expectation as was aptly captured in the case of Republic vs The Principal Secretary Ministry of Mining Ex-Parte Airbus Helicopters Southern Africa [PTY] Ltd [2017] where it was held:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

40. For the last issue, the Claimant submitted that having proved his case, all the reliefs sought in his statement of claim should be availed to him.

### **The Respondent’s Submissions.**

41. The Respondent’s Counsel filed his written submissions on the 6<sup>th</sup> of February 2022 identifying three issues for determination thus;
- i. Whether the Claimant was unlawfully and unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the costs of the claim?
42. Submitting on the first posed issue, Counsel submitted that the Claimant did not prove that the termination of his employment was unfair. The evidence on record is ample, he was unable to discharge his duties as expected as a result of old age. Retiring the Claimant on account of old age and underperformance does not amount to unfair or unlawful termination account of old age and under-performance did not amount to unlawful termination. To support these submissions reliance was placed on the case of Sylvester Odhiambo Nyakanga vs Kenya Plantation & Agricultural Workers Union & 3 others [2019] eKLR.
43. On the reliefs sought Counsel submitted that the Claimant is not entitled to the same. Having failed to prove that his retirement was unlawful, the compensatory relief of 12 months gross salary cannot be availed to him.
44. It was further submitted that the Claimant’s claim for salary in lieu of notice is untenable, he was given a month’s notice of retirement and paid his salary for August 2016. He acknowledged receipt of the notice.
45. The Respondent submitted that the Claimant’s salary was consolidated. It was inclusive of a house allowance, and thus he cannot be heard to claim for the house allowance.
46. The Claimant was entitled to four off days per month. He fully utilized the days, contrary to what he asserts. He never worked during public holidays. Consequently, he is not entitled to these reliefs.
47. On the Claim for overtime compensation, it was submitted that the Claimant failed to demonstrate that he had worked extra hours for which the Respondent didn’t compensate him for. Further, whenever he worked overtime, payments were made. It was the onus of the Claimant to prove that he worked overtime and that he was not compensated for the same. This, considering that the Respondent



had vehemently denied his claim. To buttress this point reliance was placed on the case of Patrick Lumumba Kimuyu vs Prime Fuels [K] Limited [2018] eKLR where it was held:

“Whereas we appreciate that the *Employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent’s categorical denial that the appellant had worked on the days claimed. It behoved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked. On the other hand, we note that the respondent produced before court several receipts for allowances paid to the appellant, which given the paucity of evidence in support of the appellant’s claim could as well have been payments for public holidays and/or Sundays worked.”

48. Submitting on the relief of the unpaid salary, Counsel stated that the evidence on record shows that the same was paid and the Claimant acknowledged receipt of the same. Further, he cannot be availed of service pay as he was a member of the NSSF. To bolster these submissions the decision in the case of Hassanath Wanjiku vs Vanela House of Coffee [2018] eKLR was cited.
49. On the last relief of the payment of the final dues, it was submitted that the Claimant was paid all that was due to him after the deduction an equivalent of the loan sum that was outstanding on his loan account with the Sacco. He had authorized the action. The deduction of the amount and remittance of the same for settlement of the liability was an act it was entitled. To support these submissions, reliance was placed on the case of Javan Were Mbango vs H. Young & CO [EA] Ltd [2012] eKLR where it was held:

“Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, they are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty, he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.”

#### **Analysis and determination.**

50. From the pleadings, the evidence on the record as well as the submissions by the parties herein, the following issues present themselves for determination thus:
  - i. Whether the Claimant’s termination was procedurally and substantively fair.
  - ii. Whether the Claimant is entitled to the reliefs sought or any one of them.
  - iii. Who should shoulder the costs of this Claim?

#### **Whether the Claimant’s termination was procedurally and substantively fair.**

51. Whenever a court is invited to interrogate fairness in an employee’s dismissal or termination of an employee’s employment, the Court has to consider two statutory aspects, procedural and substantive fairness. The two constitute the total unit of fairness in matters termination of employment. Absence



of both or any of them deprives the termination of the character of fairness, and the ability to pass the fairness test.

52. The *Employment Act* provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee. The procedure is mandatory and any deviation from it renders the termination unfair even if there is substantive justification. The procedure embodies three components, the information or notification component - the employer must notify the employee of his or her intention to terminate the employee's employment and the grounds attracting the intention. Second, the hearing component - the employer must accord the employee an adequate opportunity to make a representation on the grounds. This component also avails the Claimant the right of accompaniment, either by a colleague, where he or she is not a member of a Trade Union or a Union representative. Lastly the consideration component, the employer must consider the representations made by the employee, and the colleague or representative of the union as the case may be, before making the decision.
53. In the case of *Walter Anuro Ogal vs Teachers Service Commission* [2013] eKLR it was held:
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
54. The burden of proving that the fair procedure was adopted or adhered to before terminating an employee from his or her employment rests with the Employer [Respondent].
55. RW1 contended that a fair and elaborate procedure was adopted when terminating the Claimant's employment. A disciplinary hearing was conducted on the 10th of August 2016. The Court hasn't lost sight of the fact that it emerged in the evidence of the Respondent's witness that the purported disciplinary hearing is said to have taken place on the same date when the Claimant resumed duty from leave.
56. The witness had alleged in his witness statement turned evidence in chief that the Claimant was issued with a notice to show cause and invitation to the disciplinary hearing. However, during cross examination, he testified that there was no notice to show cause issued. Further, he was not clear on how the invitation to attend the purported hearing was extended to the Claimant. By reason of this premise and those in paragraph 55, above, I have no doubt in my mind that contrary to the stipulations of section 41 of the *Employment Act*, the Claimant was not; notified of the grounds that were stirring the Respondent's contemplation and; give an adequate opportunity to prepare and defend himself against accusations against him, if there was a disciplinary hearing. However, shortly hereinafter I will demonstrate that there was none.
57. The Respondent placed before this Court, Minutes purportedly for the disciplinary hearing. I find it imperative to quote in extenso the contents of therefrom a revelation emerges that they are a sham. The minutes read;

“Minutes of a Disciplinary meeting held at the Eveready Guards Head Office on the 10th August 2016 starting at 1400 Hrs. concerning Salim Okutoyi of PF NO: 013883.

Present

1. Edwin Machira.
2. Benson Musonge.
3. Paul Muriuki.



4. Salim Okutoyi.

Agenda: Absenteeism from duties.

The above employee absented himself from his duties from the 8th August 2016-9th August 2016. As a result, he was invited to attend a disciplinary meeting on the 10th of August 2016 at 1400 hrs.

Resolution

After listening to his explanation, we were not convinced that he had a good reason to fail to report at his assignment after the completion of his annual leave. However, upon perusing his file, it was discovered that he had previous warning letters of the same mistakes which clearly portrays his lack of commitment to his duties. The committee recommended that since he had reached the age of retirement and indeed a senior citizen of Kenya, we resolved to issue him with one month's notice of retirement from 1<sup>st</sup> to 30<sup>th</sup> August 2016."

58. Undeniably, the minutes do not indicate that; accusations against the Claimant were put forth to him; he was given an opportunity to make representations on the accusations; he made representations and how; he signed the minutes and; he was accompanied by a colleague of his own choice. I am not convinced that there was a hearing as alleged by the Respondent.

60. As a result, it is my conclusion and holding that the Claimant's termination was procedurally unfair and in total disregard of the provisions of section 41 of the *Employment Act* 2007.

61. Now I turn to the substantive justification aspect. Section 43 of the *Employment Act* 2007 places a duty on the employer to prove the reasons for the termination of an employee's employment in dispute as is herein. Section 45 of the Act imposes a further burden on the employer, to prove that the reason [s] for the termination was fair and valid. Where the employer fails to discharge the first burden, no doubt, it isn't possible for him or her to discharge the second one.

62. In the case of Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, the Court aptly summarized it t: -

"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."

63. The main reason advanced by the Respondent as the basis for the termination of his employment was absenteeism from duty after he completed the annual leave. It was the Claimant's position as evidenced by the explanation letter dated 10<sup>th</sup> August 2016 that the reason that made him extend his annual leave for two days was the demise of his step-mother, an inevitable circumstance. Section 47(5) of the *Employment Act*, 2007 provides that -

"For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred



shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

64. The Respondent tendered in evidence a letter dated 10<sup>th</sup> August 2016, that was written by the Claimant. The letter contained his apology and an explanation of why he failed to report back to work on the date he was supposed to after his leave. The Court notes that upon receipt of the letter, the Respondent decided to have him reprimanded and made to suffer a loss of two days’ salary as a punishment. As can be discerned from the letter, the decision was made on the 10<sup>th</sup> of August 2016. The question that needs to be answered then is, how could the ground be made a subject of a disciplinary hearing purportedly held on the same day? Why was it necessary for the Respondent to discipline the Claimant again? I find considerable difficulty in fathoming why. The only reasonable conclusion that one can make is that the Respondent acted in bad faith, and breach of their duty of trust and that the decision to terminate his employment was characterised by a lack of substantive justification
67. The upshot, the Claimant’s termination by the Respondent was both procedurally and substantively unfair.

### **Whether the Claimant is entitled to the reliefs sought**

#### **i. One month’s salary in lieu of notice.**

68. The Claimant sought salary in lieu of notice of Ksh. 12, 270. The Respondent vehemently denied the Claimant’s entitlement to this relief contending that the Claimant was given one month’s retirement notice. The said retirement notice was dated 11th August 2016 and was to take effect from 1st August to 31<sup>st</sup> August 2016. No doubt there was an unexplained backdating. Why backdate the effective date? the Respondent had the onus to explain. Unfortunately, deliberately or otherwise, it didn’t. I could definitely disagree with the Respondent that the notice issued conformed with provisions of section 35 [1] of the *Employment Act* 2007. The notice was shorter. Technically reasoning, it made the exit of the Claimant from employment a summary dismissal. See section 43[3] of the *Employment Act*. Having found as I have hereinabove that the retirement notice did not conform with the law, I am impelled to hereby award the Claimant Ksh. 12, 270 as salary in lieu of notice.

#### **ii. 12 months’ compensation for the unfair termination**

69. The Claimant sought to be awarded Ksh. 147, 240 as compensation for the unfair termination. This court is aware of the fact that 12 months gross 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. I have considered the fact that the Claimant’s termination was procedurally and substantively unfair, the fact that the Respondent purported to have had a disciplinary hearing while in real fact, it didn’t; the fact that the Claimant was subjected to double jeopardy and that the Claimant could not secure another employment opportunity, and I am inclined to award the Claimant the compensatory relief and to an extent of 10 [ten] months gross salary. Ksh. 122, 700.

#### **iii. Unpaid house allowance**

70. Payment of a house allowance is an employee’s statutory right. requirement Employers are bound by Section 31(1) of the *Employment Act*, 2007, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.



71. The Respondent asserted that the Claimant's salary was a consolidated one. It included a housing allowance. Section 31(2) of the *Employment Act*, 2007, envisioned consolidation of salary. In this situation, the employer could not be expected to pay house allowance as a separate item. The question that emerges then is whether, from the material presented, it can be discerned that the parties' intention was a consolidated salary., I have had a look at the copies of the Claimant's payslips for the various months. They clearly indicate that the Claimant's salary was consolidated. Consequently, I decline to make any award under this head in favour of the Claimant.

#### **iv. Unpaid overtime**

72. The Claimant sought overtime compensation in the sum of Kshs. 113, 865.60. In the case of *Rogoli Ole Manadiegi vs General Cargo Services Ltd* [2016] eKLR cited by the counsel for the Respondent the court held:

“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.”

73. The Claimant has not presented before this court any evidence to demonstrate his entitlement to the claim under this head despite pleading the above figures. The Court is at a loss on how the said figures or calculations were arrived at. As a result, I hereby decline to make any award under this head.

#### **v. Unpaid worked rest/off days and unpaid worked public holidays.**

74. Although the Claimant has lodged other claims including pay in lieu of rest days and pay for public holidays worked, he has provided no cogent evidence to support them. He did not justify the figures claimed by showing specifically how they were arrived at, applying the Regulation of Wages [Protective Security Services] Order 1998. The Claimant though correct in his argument that a claim for public holidays worked but not compensated for can be anchored on the Order, totally failed to discount the Respondent's claim that whenever he worked during public holidays he was paid as reflected by the payslips presented in evidence. The claim is for rejection, therefore. I reject the same.

#### **vi. Leave prorata**

75. The Claimant further urged this court to award him Ksh 3,272 being compensation for leave unpaid. Indeed, the same was not in dispute as it was included in the Respondent's computation of the Claimant's dues vide a letter dated 1st September 2016. I hereby award the Claimant Ksh. 3,272 as leave prorata.

#### **vii. Uniform refund**

76. The Claimant is hereby awarded Ksh. 3000 being a uniform deposit as it is part of the items identified in the letter dated 1<sup>st</sup> September 2016.

#### **vii. Service Gratuity**

77. Section 35 of the *Employment Act*, 2007, expressly provides for the instances where employees are not entitled to service pay. The Claimant was a registered member of the National Social Security Fund to which monthly contributions of Kenya Shillings two hundred (Ksh. 200) were made on his account.



He falls under the excluded category. Gratuity is only payable where there is a contractual basis for it. There Claimant establish any such basis. Consequently, I decline the prayer under this head.

**x. Punitive Aggravated damages for breach of the Constitutional rights.**

78. The Claimant further urged the court to award him aggravated damages/punitive damages for breach of his Constitutional rights. As held in the celebrated case of *Rookes vs Bernard* [1964] 1 ALL ER 367, an award of exemplary/punitive damages is granted in exceptional cases, thus in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in case where the defendant's action or conduct had been calculated to make profit for himself which might exceed the compensation payable to the Plaintiff/Claimant. The Claimant failed to provide evidence to demonstrate that the ingredients exist in the instant matter. before this court. For this reason, the prayer under this head is declined.

**Who should bear the cost of the suit?**

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

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

- a. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- b. One month's salary in lieu of notice.....Kshs. 12,270.
- c. 6 [six] months' gross salary as compensation for unfair termination pursuant to the provisions of section 49[1][c] of the *Employment Act*.....Kshs. 73,620.
- d. Prorated compensation for unutilized leave days.....KShs. 3,272.00
- e. Refund of Uniform deposit.....Ksh.3000.00.
- f. Cost of the suit.
- g. Interest on the awarded sums above at court rates from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**OCHARO KEBIRA**

**JUDGE.**

**In the presence of:**

**Mr. Kiptanui for Mr. Wachira for the Claimant.**

**Mr. Waiyaki 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 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

