REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 876 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

LYDIA LIMBE **CLAIMANT**

VERSUS

AKILI DADA **RESPONDENT**

JUDGMENT

1. Vide his memorandum of claim dated 10th May 2017, the Claimant avers that she was unlawfully/unfairly terminated from employment by the Respondent and prays for orders against the Respondent as follows –

(a) A declaration that the Respondents conduct, acts and or omissions are unlawful, illegal and/or unfair.

(b) Damages for wrongful/unfair termination at

150,000 x 12 months Kshs.1,800,000

(c) An order compelling the Respondent to issue the Claimant his certificate of service within 14 days from the date of delivery of the judgment one months' notice pay in lieu of termination Kshs.150,000

(d) House allowance at 22,500 x 12 Kshs.270,000

(e) Certificate of service

(f) Interest on b, c and d above

(g) Cost of the suit

2. The Respondent filed a statement of response dated 2nd June 2017 in which it denies the contents and facts of the claim and states that the Claimant has failed to particularize the constitutional provisions infringed

3. The matter proceeded for hearing on the 4th November 2021 and directions were given for parties to file written submissions.

4. The Claimant testified in support of her claim while the Respondent while the Respondent called Joy Zawadi the Deputy Director of the Respondent who testified in defence of the claim.

Claimant's Case

5. The Claimant avers that she was employed by the Respondent as a Communications Manager but when she first reported to work on the 8th February 2016 the contractual document was not ready and on the 15th of February 2016 she received the document. It was the position Programme and Administration Assistant on a one year fixed term contract from 8th February 2016 to 31st January 2017. The Claimant states that after complaints she was given a contract for the position of communications manager with a salary of Kshs.150,000/- per month but was asked by the Respondent to backdate the same and was not offered a house allowance.

6. The Claimant avers that she was a hardworking employee who surpassed her targets and was never subjected to any disciplinary procedures for the period she worked for the Respondent.

7. The Claimant states that on the 10th May 2016 she received a call from the Respondent that she was scheduled to have a meeting with the Executive Director of the Respondent. The agenda of the meeting was not communicated and complied. During the said meeting she was given a termination letter with a two weeks' notice which indicated the termination was due to "*a general lack of synergy, teamwork and solidarity between yourself and the rest of Akili Dada staff*".

8. The Claimant states that she was never informed, warned or notified of the reasons for her termination nor given an opportunity to defend herself before the termination.

9. The Claimant avers that the Respondent's actions to terminate her employment were malicious for;

(i) Employing the Claimant without a written contract

(ii) Giving the Claimant a contract for junior position against the agreement.

(iii) Constantly asking the Claimant to resign from her position

(iv) Terminating the Claimant's employment without giving her a chance to defend herself from the accusations.

10. The Claimant further states that the Respondent failed to conform to the provisions of the employment law and the rules of natural justice in the following respects:

(a) The Respondent did no afford the Claimant an opportunity to be heard or consulted before terminating her services

(b) The Respondent failed to give a termination notice as required by the law

(c) There was no substantive or justifiable reasons for termination

(d) Dismissing the Claimant unprocedurally

(e) Failing to respond to the demand issued by the Claimant.

11. The Claimant avers that the Respondents conduct, acts and/or omissions are unconstitutional unlawful, illegal and /or unfair.

Respondent's Case

12. The Respondent avers that there was no employer-employee relationship between the Claimant and the Respondent.

13. The Respondent further states that at the time of hiring the Claimant it was on its final stages of preparing the consultancy agreement.

14. The Respondent contends that the consultancy agreement issued to the Claimant on the 15th February had erroneously indicted a lower rank and period which was rectified and the Claimant issued with a corrected version that parties mutually agreed to backdate to 8th February 2015.

15. The Respondent also avers that the Claimant was paid a consultancy fee of Kshs.150,000/- gross of 5% withholding tax.

16. The Respondent states that the Claimant was not entitled to house allowance since the Claimant was not an employee and had been contracted to provide consultancy services.

17. The Respondent affirms that it gave the Claimant a termination letter on the 10th May 2016 for the reasons stated herein.

18. The Respondent avers that it is not bound by the provisions of the Employment Act as there was no employer/employee relationship between the Claimant and the Respondent.

19. Finally, the Respondent avers that the Claimant failed to particularize the constitutional provisions infringed and the manner in which the Respondent infringed them.

Claimant's Submissions

20. The Claimant submits that she was an employee of the Respondent at a monthly salary of Kshs.150,000/-. She states that when she joined the Respondent, she was introduced to other staff as a new staff member, she also states that she was given a business card and participated in staff activities such as Dental check-up. She also states that she was given the tools of trade such as laptop, camera, office key and internet services and that she was required to clock in and out like the other employees of the Respondent.

21. The Claimant relies on the holding in **Edward Ngarega Gacheru v Nation Media Group Limited [2019] eKLR**

where the Court stated that –

> *"The Courts findings follow and are in line with the Claimants submissions on provisions of the ILO Employment Relationship Recommendation, 2006 (No. 198), Recommendation on part II- determination of an Employment Relationship Recommendation 9 thus 9 for purposes of the national policy of protection for workers in an employment relationship the determination of the existence of such relationship should be guided primarily by the facts relating to the performance of work and remuneration of the worker, notwithstanding how the relationship is characterized in any contract arrangement, contractual or otherwise."*

22. The Claimant submits that her contract was constantly and unfairly changed after her employment. She submits that when she was offered a job as a Communication Manager it was masked as a consultancy and having resigned from her previous employment, she had no bargaining power. The Claimant cited the case of **Ziporah Gathuya v Registered Trustee of Getrudes Garden t/a Getrudes Children Hospital (2019) eKLR** where the Court while citing several decisions with approval held that

> *"In **Maurice Odour Oketch v Chequered Flag Limited [2013] eKLR** relied upon by the Claimant, L. Ndolo J held that the Court is expected to go beyond mere terminologies employed by the parties in determining the existence of an employment relationship hence mere reference to a person being a consultant without a conclusive determination of the test set out in **Everest Aviation Limited case** cannot determine the nature of the party's relationship"*

23. The Claimant submits that she was employed as a Communication Manager and was supervised by the Executive Director and worked from the Respondents office, had an official email address, official phone numbers and worked on a full time basis and therefore was an employee and not an independent contractor or consultant.

24. The Claimant states that the fact that the Respondent was deducting withholding tax as opposed to income tax is not a determinative of the nature of the employment contract between the parties. Reliance is made on the holding in **Kollengode Venkatachala Laksminarayan v Intex Construction Limited [2020] eKLR** where the Court held:

"The fact the Respondent paid withholding tax as opposed to PAYE alone does not automatically make the Claimant an independent contractor…."

25. The Claimant further submits that she was an employee of the Respondent and rightly deserved all the rights of employment. The Claimant states that she was paid a monthly salary of Kshs.150,000/- and never issued any invoices to the Respondent for payment as consultants typically do.

26. The Claimant contends that the Respondent had failed to prove any valid reason to justify her termination as required by Section 43 and 45 of the Employment Act 2007. That she merits to be treated as a regular employee under Section 37 of the Employment Act.

27. The Claimant further submits that she was not accorded a hearing and her rights under Sections 41 and 45 of the Employment Act were violated rendering the termination unfair and unlawful.

28. It is the Claimant's submission that she was neither provided with housing nor given a house allowance as provided by Section 31(1) of the Employment Act and prays for a total of Kshs.270,000/- as house allowance for the period worked.

29. The Claimant prays for maximum compensation of 12 months for unfair and unlawful termination the sum of Kshs.1,800,000/-.

30. The Claimant also prays for pay in lieu of notice as provided under Section 36 of the Employment Act.

31. Finally, Claimant prays for costs and interests at Court rate.

Respondent's Submissions

32. The Respondent submits that it did not have an employment relationship with the Claimant but had entered into a consultancy agreement dated 8th of February 2016. Reliance is made on the decision in **Kenneth Kimani Mburu v Kibe Muigai Holdings Limited [2014] eKLR** to urge that the Claimant's tax obligations and scope of duties and showed that she was a consultant since the duties were peripheral to the business of the Respondent and the provisions of Section 35, 40, 41 and 45 of the Employment Act were inapplicable.

33. Further reliance is made on the decision in **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** where the Court of Appeal agreed with the decision in **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR** where the Court held –

> *"We are alive to the hallowed legal Maxim that it is not the business of Court to rewrite contracts between parties. They are bound by the terms of their contracts unless coercion, fraud and undue influence are pleaded and proved."*

34. The Respondent submits that since the Claimant has not pleaded that the contract she entered into is vitiated by coercion, fraud or undue influence, she was a consultant and not an employee of the Respondent.

35. The Respondent further submits that the Claimant enjoyed the fruits of the contract as a consultant and not as an employee paying 5%

withholding tax as opposed to 30% PAYE payable by employees and did not protest. That the Claimant did not protest non-payment of statutory deductions from her pay.

36. The Respondent submits that if the Court declared the contract to be one of employment, it would be upholding an illegality.

37. The Respondents submits that the Claimant was an independent contractor and not an employee and relies on the holding in **Kenneth Kimani Mburu v Kibe Muigai Holdings Limited (supra)** which was in agreement with the decision in **Everest Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) 2013 eKLR** where it held

> *"There are various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business."*

38. It is the Respondent's submission that the Claimant was employed as a Communications Manager/consultant and her work was not an integral part of the Respondents business.

39. The Respondent further states that the contract period was 1 year which begun on 8th February 2016 and was slated to end on the 31st January 2017 and the termination was in accordance with the provisions of the contract which both parties had signed.

40. The Respondent urges that for termination of employment to pass the test of fairness it must be both substantively justifiable and procedural fairness. It is the Respondent's case that the Claimant was terminated due to poor performance in breach of her contract with the Respondent.

41. The Respondent submits that the Claimant had a meeting with the Executive director of the Respondent organization on the 10th May 2016 here she was issued with a termination notice stating the reason for termination and was given a 2 weeks' notice as per the contract.

42. The Respondent further states that the termination was in accordance with section 41 of the Employment Act and since the Claimant signed the termination notice due process was followed and an oral meeting was not necessary.

43. The Respondent states that the Claimant was not unfairly terminated therefore urges the Court to dismiss the claim.

44. The Respondent further states that since the contract period was 1 year and it was terminated after 4 months, if any claim was to arise, the Claimant would only be entitled to the remaining duration of 7 months and not 12 months as claimed.

45. Finally, the Respondent submits that it had sufficient reasons to terminate the Claimants employment contract for misconduct.

Analysis and determination

46. After careful consideration of the pleadings, documentary and oral evidence and submissions by Counsel, the issues for determination are: -

> a) Whether the Claimant was an employee or a consultant of the Respondent;
>
> Depending on the outcome in (a) above;
>
> b) Whether the Claimant was unfairly terminated
>
> c) Whether the claimant is entitled to the reliefs sought.

Whether the Claimant was an employee or Consultant

47. The Claimant herein was engaged by the Respondent as a Communications Manager under a Consultancy Agreement dated 8th February 2016 which provided that the Claimant would render services to the Respondent from 8th February 2016 to 31st January 2017. The deliverables of the contract were captured on pages 3 and 4 of the contractual document and included production of a monthly newsletter with input from the rest of staff, bringing data to life and share stories from Akili Dada scholars and staff via blog at least once a week, publicise these on Akili Dada's Twitter and Facebook accounts, manage the Respondent's social media accounts including updating events across all of social medical platforms including online events calendar, engage the Respondent's communities through at least 2-3 daily twitter posts, maintain and update the Respondent's website on a regular basis, including uploading the photos used in the home page slideshow and through the entire site, create a comprehensive communication strategy, take photos during the Respondent's events and share on various platforms within 2-3 days of the event happening, accompany the Program Directors during site/filed visits to document activities outreach; develop and maintain relationships with media outlets, represent the Respondent at events, conferences and other related activities, arrange interviews for the Executive Director, apply for awards on behalf of the Respondent and the Executive Director among others.

48. The contract provides that it is a contract for services and the provisions of the Employment Act are therefore inapplicable. It has a termination clause, as well as clauses on confidentiality of information and assignment of duties.

49. The Claimant submits that she was an employee of the Respondent while the Respondent submits that there was no employer/employee

relationship between the parties. That the Claimant was an independent contract. That the duty of the Court is to interpret the contract entered into by the parties not to rewrite it.

50. The issue of whether an employer/employee relationship existed between the parties has been addressed in regions of decisions. However, the starting point is the Employment Act, 2007.

51. Section 2 of the Act provides that –

> **"employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;**

52. A contract of service is defined as **an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;**

53. According to **Blacks Law Dictionary, 8th Edition, Page 564,** an employee is a "*person who works in the service of another (the employer) under an express or implied contract of hire under which the employer has the right to control the details of work performance*."

54. In **Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR** G. K. Kimondo J. stated that –

> *There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business. See **Beloff vs Preddram Limited [1973] ALL ER 241.** The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. See **Simmons Vs Heath Laudry Company [1910] 1 KB 543, O' Kelly Vs Trusthouse Forte [1983] 3 ALL ER 456**. That test is however not conclusive. The passage cited by the appellant in **Halsbury's Laws of England Vol I 26, 4th edition** paragraph 3 is instructive:*
>
> *"There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration".*

55. In **Kenneth Kimani Mburu v Kibe Muigai Holdings Limited (supra)** Rika J. expressed himself as follows –

> *"In answering the first question, the Court must attempt to evaluate these two agreements, and make a finding whether they are employment contracts, or consultancy contracts. The Respondent testified that the agreements were drawn by the Parties, without the involvement of their Lawyers. This is apparent from the wording of the two documents, which adopts the language common to employment contracts as well as language that is characteristic of consultancy/independent contracts. They for instance adopt the word 'salary' which is a feature of the employment contract, while the Respondent is referred to as 'the Client' which is a terminology relating to consultancy/independent contracts.*
>
> *A closer look into both agreements leads the Court to find these were not intended to be consultancy/ independent contracts, but employment contracts. A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another's control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention."*

56. The Court is in agreement with these sentiments.

57. Similar sentiments were expressed by Wasilwa J. in **David Odwori Namuhisa v Magnate Ventures Limited [2017] eKLR**.

58. Significantly, Section 10 of the Employment Act exemplifies the employment particulars including but not limited to name of employer, job description date of commencement, from and duration of contract, remuneration and intervals of remuneration, etc.

59. Applying the foregoing principles to the instant case, it is not in dispute that the Respondent engaged the Claimant under a contract styled as consultancy agreement, from 8th February 2016 to 31st January 2017 at a total fee of Kshs.150,000/- per month subject to 5% withholding tax. The Claimant was liable for statutory deductions, health insurance.

60. However, the agreement made provisions for confidentially of information, and noncontracting or assignment of right or obligations without written consent of the Respondent and had a comprehensive job description and/a termination clause.

61. Intriguingly, the contract makes no provision of how and where the consultant would operate from. In addition, the deliverables were on a day-to-day basis.

62. The Claimant testified that she reported to work daily, had been given an office computer, camera and other forms of facilitation. Relatedly, she participated in staff activities including and staff day, staff and board retreats, staff dental check up and staff meetings. Copies of emails attest to this. For instance one email dated 8th February 2016 from Joy Zawadi inviting the Claimant to a staff meeting.

63. The Claimant was introduced by the Executive Director to all staff as *"our newest staff member"* and was enlisted in the Respondent's email system, could communicate to all staff and received emails sent to all staff. It is not in dispute that the Claimant's department where she was the only employee was critical to the organisation. This is also evident from the job description of the Claimant. The Respondent's argument that the department's activities were peripheral to its business remain unsubstantiated since it led no evidence of the core objectives of the Respondent.

64. Similarly, on Wednesday, 18th May 2016, the Executive Director wrote an email to the Claimant stating as follows –

> *"I have also noticed that lately you are leaving the office quite early with no explanation. While I am quite flexible on that, I think some form of accountability is necessary …."*

65. It is implicit from this email that the Claimant had specified reporting and leaving time.

66. After termination on 10th May 2016, the Claimant was given a staff exit questionnaire for completion and had to prepare hand over notes and return the Respondent's property including office keys, camera and laptop.

67. In determining the issue at hand, the Court is guided by the sentiments of Rika J. in **Kenneth Kimani Mburu v Kibe Muigai Holdings Limited (supra)** that –

> *"Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the Court these were employer-employee relationships …"*

68. The decision in **Zipporah Gathuya v Registered Trustees of Gertrude's Garden t/a Gertrude Children's Hospital [2019] eKLR** relied upon by the Claimant is instructive on the terminologies employed by the parties. They are non-conclusive.

69. The totality of the evidence adduced before the Court by the parties leads the Court to the conclusion that there was an employer/employee relationship between the Claimant and the Respondent.

70. As observed by Onyango J. in **Kollengode Venkatachala Laksminarayan v Intex Construction Limited [2020] eKLR**

> *"The fact that the Respondent paid withholding tax as opposed to PAYE alone does not automatically make the Claimant an independent Contractor…"*

71. From the emails' correspondence on record, it is evident that the Claimant's docket was not only an integral part of the Respondent's business but a critical one. Relatedly the Claimant operated under the control of the Respondent. Her uncontroverted evidence is that she was reporting to the Executive Director.

72. In a similar vein, the deliverables were so extensive and involving such as the monthly newsletter with input from the rest of the staff. Needless to emphasise, the uploads, photos, updates on the Respondent's twitter, Facebook, home page and other social media platforms including the outreach duties were essential for the Respondent's profile. The Claimant's role was key to the Respondent.

73. Finally, the termination letter stated that –

> *"The termination is due to a general lack of the expected synergy, team work and solidarity between yourself and the rest of Akili Dada staff. The specifics that led to this decision are:*
>
> > *· It has taken sometime for you to get the tempo of the organisation and the communications department right and the robustness of our communication with our audience is waning and we need to rectify this sooner rather than later.*
> >
> > *· During the 3 months' period I have received complaints from the rest of the staff about your interpersonal skills and feedback from colleagues on having difficulties working withy you. While this is a personality issue that takes time to work on/change, I feel as an organisation we have limited time to deal with this issue and work efficiently as a team …"*

74. The contents of this letter demonstrate *inter alia* the centrality of the communications department to the business of the Respondent. In a similar vein, they demonstrate that the Claimant's department and her role were an integral part of the Respondent's business. In other words, the Claimant was an employee of the Respondent.

75. Before delving into the question of whether the Claimant's termination was unfair and unlawful, it is imperative to dispose of the issue of

illegality submitted by the Respondent. The Respondent submits that the Claimant enjoyed the fruits of the contract as a consultant and not as an employee in that she paid withholding tax of 5% as opposed to PAYE at 30% and made no statutory remittances namely NHIF and NSSF. That by declaring the contract one of employment, the same would perpetuate an illegality.

76. The Court of Appeal decision in **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** as well as **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** are relied upon. In the latter case, the Court formulated the guiding principles when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such contract.

77. The above decision is distinguishable in that in the instant case, the Respondent has not pleaded that the contract between itself and the Claimant was illegal as formed or as performed nor has it demonstrated that the contract was illegal.

78. Relatedly the contention that the Respondent deducted 5% withholding tax as opposed to 30% in the case of PAYE and statutory deductions were not remitted would render the employment contract illegal is not elucidated.

79. Under the general law of contract, a contract may be rendered illegal by statue or at common law. In the case of the former, a contract may be illegal as formed or as performed. This distinction implicates the consequences of the illegality.

80. At common law on the other hand a contract may be declared illegal if it is contrary to public policy for instance, a contract to commit a crime, a tort or fraud.

81. In the instant case, the Respondent has not demonstrated under what law the contract between the Claimant and the Respondent is illegal or should be declared illegal.

Whether the Claimant was unfairly terminated

82. Having found that there was an employer/employee relationship between the Claimant and the Respondent, I now proceed to determine the issue as to whether the Claimant's termination was unfair.

83. The uncontroverted evidence of the Claimant is that the was invited for a meeting with the Executive Director on 10th May 2016 and when she arrived for the meeting, she was given a termination notice.

84. Although the Respondent submits that the Claimant's dismissal passed the fairness test and complied with the relevant provisions of the Employment Act, it led no evidence to sustain the submission.

85. Under Section 45(2) of the Employment Act for a termination to pass the fairness test, the employer must prove that it had a valid and fair reason(s) for termination and the procedure employed must be fair. Section 41 of the Act provides the procedural aspects of termination including notice and hearing. See **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, CMC Aviation Limited v Mohammed Noor [2013] eKLR** and **Walter Ogal Anuro v Teachers Service Commission** on substantive and procedural aspects of termination and the relevant provisions of the Employment Act.

Reasons(s) for Termination

86. The termination letter dated 10th May 2016 identified two reasons for termination of the Claimant namely; poor performance and incompatibility. Both are captured by Section 45(2) of the Employment Act.

87. The issue of poor performance was addressed in **Agnes Yahuma Digo v PJ Petroleum Equipment Limited [2013] eKLR** and **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR**. The employer must demonstrate that it had a robust performance evaluation/appraisal system including the measures taken to address poor performance, including giving the employee an opportunity to defend his/her performance or address the weaknesses.

88. In the instant case, the Respondent adduced no evidence of an appraisal system or whether the Claimant was evaluated against the deliverables enumerated in the contract of engagement or other agreed targets with specific timelines. There were no evidence or reports of any performance appraisals.

89. The Respondent submits that the Claimant was terminated due to her poor performance. That the Claimant consistently underperformed. However, there is no evidence to substantiate the submission. The Claimant had worked for a very short time a performance appraisal was imperative to determine her performance.

90. On incompatibility, the sentiments of Rika J. in **Eunice Adhiambo Okumu v Pharmakem Limited [2016] eKLR** are instructive. The Learned Judge observed that –

> *"The Court has held that Employers have the right to dismiss incompatible Employees. In Industrial Court at Nairobi case between* ***Dede Esi Annie Amanor Wilks v. Action Aid International [2014] e-KLR*** *it was held the Employer has the right to terminate the contracts of Employees who fail to fit in the corporate culture of the Employers. Section 45[2] [b] of the Employment Act 2007 lists lack compatibility as a fair termination ground. Incompatibility however, is not to be read from every complaint an Employee makes; incompatibility stems from persistent and irrational inability of the Employee to work with her workmates."*

91. In the instant case although the termination letter adverts to "*complaints from the rest of the staff about your interpersonal skills and*

feedback form colleagues on having difficulties working with you". No evidence about the nature or character of the complaints alleged by the termination letter or who made them and how many they were. Without such evidence, the allegation remains unsubstantiated as a reason for termination. In a similar vein, there is no evidence no record that the Respondent adduced on record that the Respondent had brought these concerns to the Claimant for remedial action.

92. For the above reasons, the Court is satisfied that the Respondent has not discharged the burden of proof imposed by Section 43(1) of the Employment Act. Section 43(1) provides that:

> **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.**

Procedure

93. On procedural fairness, Section 45(2)(c) of the Employment Act provides that the employer must prove that the employment was terminated in accordance with fair procedure. Section 41 on the other hand provides the steps to be complied with by the employer in carrying out the termination. The steps were succinctly captured by Radido J. in **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**.

94. The consequences of non-compliance with Section 41 of the Employment Act were explained in **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR** as follows: -

> "*Where this procedure as set out under section 41 of the Employment Act is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular…"*

95. The Respondent submits that the Claimant was subjected to a disciplinary process as required by Section 41 of the Employment Act in that she was accorded a meeting with the Executive Director on 10th May 2016 the termination letter stated the reason(s) for termination and the Claimant signed the termination notice without any question.

96. Regrettably, the above submission is not supported by evidence of what had transpired before the meeting. For instance, notice to show cause, whether the Claimant had been evaluated and her performance and compatibility found wanting and had been given an opportunity to defend herself, minutes of the proceedings including her representations if any

or the person chosen by the Claimant.

97. It is important to note from the Claimant's evidence that she was neither informed, warned or notified that the question of her termination had come under consideration nor given an opportunity to defend herself is uncontroverted.

98. For these reasons, the Court is satisfied that the Respondent has on a balance of probabilities, failed to prove that the Claimant's termination on 10th May 2016 was conducted in accordance with the procedure prescribed by the Employment Act and thus fair.

99. Having reached these findings, the Court proceeds as follows in respect of the specific prayers:

(a) A declaration that the Respondent's conduct acts and or omissions are unlawful, illegal and/or unfair

100. The declaration sought herein lacks specificity and is **disallowed.**

(b) Damages for wrongful/unfair termination at (150,000 x 12 months) = Kshs.1,800,000

101. Having found that termination of the Claimant's contract of service with the Respondent was unfair, the Claimant is eligible for the discretionary reliefs provided by Section 49(1) of the Employment Act, 2007. In determining the quantum of compensation, the Court has taken the following into consideration: -

> i) The Claimant worked for the Respondent for only three (3) months and two days and wished to continue.
>
> ii) The Claimant did not contribute to the termination of the contract of employment with the Respondent.
>
> iii) The Claimant expected to serve for one (1) year only.

102. In the circumstances, the equivalent of three (3) month's salary is fair, the sum of **Kshs.450,000/-.**

(c) One month's salary in lieu of notice

103. The Claimant is awarded **Ksh.150,000/-** in lieu of notice.

(d) House allowance at 15% (22,500 x 12) = Kshs.270,000

104. The Claimant led no evidence of entitlement to house allowance, that the sum of Kshs.150,000/- monthly pay did not include house allowance. The claim is not proved and is **disallowed.**

(e) Certificate of service

105. The Respondent to issue certificate of service to the Claimant within 30 days of this judgment.

Conclusion

106. **In conclusion, judgment is entered in favour of the Claimant for the sum of Kshs.600,000/- with costs and interest at Court rates from the date of judgment till payment in full.**

107. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

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 **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE