



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 699 OF 2017**

*(Before Hon. Justice Ocharo Kebira)*

**PETER MURIITHI NJOKA..... 1<sup>ST</sup> CLAIMANT**

**PANCRAS OBWOGO OGUTA..... 2<sup>ND</sup> CLAIMANT**

**ALFRED OBUYA SALAMU..... 3<sup>RD</sup> CLAIMANT**

**MARK MOKUA OKONG'O..... 4<sup>TH</sup> CLAIMANT**

**FREDRICK ONGERI ATANDI..... 5<sup>TH</sup> CLAIMANT**

**-VERSUS-**

**STYLE INDUSTRIES LIMITED.....RESPONDENT**

**JUDGEMENT**

**Procedural History and pleadings**

1. The Claimants impleaded the Respondent through a memorandum of claim herein dated 10<sup>th</sup> April 2017, alleging that they were at the material times employees of the latter, whose employment it terminated wrongfully and unfairly. The memorandum of claim was filed on the 12<sup>th</sup> April 2017, contemporaneously with a list of documents of the even date under which the documents the Claimants were intending to put reliance on in fortification of their claims were filed, and their respective witness statements.

2. Upon being served with summons to enter appearance, the Respondent did enter appearance on the 1<sup>st</sup> November 2017 and subsequently filed a memorandum of defence on the 2<sup>nd</sup> November 2017.

3. At the close of pleadings, this matter got destined for hearing *inter-partes* on merit as there was a joinder of issues.

4. When this matter came up for hearing on the 21<sup>st</sup> September 2021 Mr. Njuru for the Claimants indicated that the 2<sup>nd</sup> Claimant was to testify on behalf of herself and that of the others. The Respondent did not contest, this suggested manner of proceeding. The counsel further indicated that the Claimants desired that the Respondent produces in evidence, the original disciplinary hearing minutes. The reason for the insistence being that the Claimants were disputing the signatures that were thereon purported to be theirs. The Court got constrained to adjourn the matter for an open Court hearing for the 10<sup>th</sup> November 2021, to enable the Respondent's witness to avail the document to the Claimant before their testimony, and subsequently tender the same in evidence and be cross-examined on it.

5. The 10<sup>th</sup> October 2021, turned out to be a public holiday. Consequently, the matter got re-slated for hearing for the 19<sup>th</sup> October 2021. On this day, counsel for the Claimant sought to be indulged further, as her client was making frantic efforts to trace the document. For the wider interest of justice, this Court extended the indulgence to the Respondent on the following terms:

*a) That the original documents must be availed during the next hearing.*

*b) That in the defaulting, an adverse inference shall be made against the Respondent as regards their existence.*

*c) That the Respondent pay Kshs. 5,000 to the Claimant, today's costs of Kshs. 3,000 to counsel for the Claimant, and Court adjournment fee of Kshs. 2,000 all to be paid before the next hearing date.*

d) That in default, the Respondent to lose audience in this matter.

e) That hearing on 1<sup>st</sup> December 2022.

6. On the 1<sup>st</sup> December 2021, the 2<sup>nd</sup> Claimant testified in the capacity hereinabove stated and one Dancan Lumati on behalf of the Respondent. At the close of the parties' respective cases, the Court gave directions on the filing of submissions which directions they have complied with.

### **The Claimants' case**

7. It was the Claimants' case that on or about the 29<sup>th</sup> October 2012, the Respondent employed them in its factory based at Lunga Lunga Road, Industrial Area as general workers.

8. That with due diligence, devotion and loyalty they rendered service in their said employment to the Respondent until the 22<sup>nd</sup> February 2017 when the Respondent summarily dismissed them from employment allegedly on grounds of failure to meet targets.

9. It was their case that the termination was communicated to them through letters dated 22<sup>nd</sup> February 2017. They contended that the letters were only intended to sanitize a termination that was without a valid reason, as there had been no performance appraisal done on their performance.

10. They asserted that contrary to the allegation by the Respondent, they were not subjected to any disciplinary proceedings, and that they are strangers to the alleged disciplinary hearing purportedly held on the 17<sup>th</sup> February 2017.

11. The Claimants contended that their employment was being terminated on account of poor performance came as a surprise to them as there were no set targets and any warnings that they were not meeting the targets.

12. The Claimants contended that there was no just and good cause for the termination of their employment. Prior to the termination, the Respondent had not exhausted all the other disciplinary mechanisms.

13. The Claimants stated that their notice pay was wrongly calculated as the Respondent based the computation thereof on the basic pay and not the gross pay as provided by law.

14. The Claimants entitlement to:

### **1<sup>st</sup> Claimant – Peter Muriithi Njoka**

a) Underpaid Notice pay due to wrongful computation based on basic pay instead of case gross pay – Kshs. 6,542.

b) Service pay for the 5 years worked – Kshs. 44,835.00.

c) Compensation for wrongful and unfair termination of employment calculated at 12 months' gross pay – Kshs. 215,208.

### **2<sup>nd</sup> Claimant – Pancras Obwonga**

a) Underpaid Notice pay as a result of wrongful computation based on basic pay instead of gross pay – Kshs. 5,433.00.

b) Service pay for 5 years worked – Kshs. 40,972.00.

c) Compensation for wrongful and unfair termination – Kshs. 196,688.00.

### **3<sup>rd</sup> Claimant – Alfred Obuya Salamu**

a) Underpaid Notice pay – Kshs. 4,709.00

b) Service pay for 5 years worked – Kshs. 39,162.20.

c) Compensation for wrongful and unfair termination – Kshs. 187,988.00.

### **4<sup>th</sup> Claimant – Mark Ochongo**

a) Underpaid Notice pay Kshs. 9,413.00.

b) Service pay for 5 years worked – Kshs. 59,010.

c) *Compensation for wrongful and unfair termination – Kshs. 249,648.00.*

**5<sup>th</sup> Claimant – Fredrick Onari Atanoi**

a) *Underpaid Notice pay due to wrongful computation based on basic pay instead of last gross pay – Kshs. 6,542.*

b) *Service pay for 5 years worked – Kshs. 6,542.*

c) *Compensation for wrongful and unfair termination Kshs. 215,208.*

15. It was the Claimants' case that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> last gross salary was Kshs. 15,655, Kshs. 16389.00, Kshs. 15,665, Kshs. 20,840 and Kshs. 17,934, respectively.

16. The Claimants tendered as their documentary evidence, pay slips, employment contracts, work identity cards, termination letters dated 22<sup>nd</sup> February 2017, and a demand letter dated 13<sup>th</sup> March 2017.

17. Cross examined by counsel for the Respondent, the witness (2<sup>nd</sup> Claimant) stated that they were general workers, who were not working in a specific department. Further that they had no specific targets to achieve as there were none set by the Respondent.

18. The witness further stated that there were those occasions when there would be waste hair. In such occasions, there was a person tasked to pick the waste and weigh the same. He equated this to a quality assurance process.

19. The employees like the Claimants would comb up to 150 (one hundred and fifty) bundles of hair pieces a day.

20. In his evidence under re-examination by counsel, the 2<sup>nd</sup> Claimant stated that at no time did he ever go below the average of 150 bundles.

**The Respondent's case**

21. The Respondent's case is discernible from its pleadings, the witness statement of Dancan Lumati which he adopted as part of his evidence in chief and his oral testimony in Court.

22. The Respondent stated that indeed the Claimants were its employees all of whom were employed as general workers in its factory.

23. It was further stated that at the time of separation the Claimants were earning the following salaries:

a) *The 1<sup>st</sup> Claimant – basic salary of Kshs. 11,392 plus house allowance of Kshs. 1,709.*

b) *The 2<sup>nd</sup> Claimant – a basic salary of Kshs. 10,956 and house allowance of Kshs. 1,643.*

c) *The 3<sup>rd</sup> Claimant – basic salary of Kshs. 10,956 plus house allowance of Kshs. 1,643.*

d) *4<sup>th</sup> Claimant – a basic salary of Kshs. 11,391 plus house allowance of Kshs. 1,709.*

e) *5<sup>th</sup> Claimant – a basic salary of Kshs. 11,392, plus house allowance of 1,709.*

24. The Respondent's witness stated that the Claimants' employment was terminated upon valid reasons, in accordance with the law and that fair procedure was adhered to. The services were terminated on account of poor performance.

25. The witness further stated that prior to the termination each of the Claimants was given an opportunity to respond to the charge of poor performance and issued with a notice to show cause why disciplinary action could not be taken against them, which notices they failed to respond to.

26. He asserted that the Respondent did pay the Claimants their terminal dues and this is evidenced in the payment records that the Respondent placed before Court.

27. The witness stated that in addition, the Claimants were duly invited to attend a disciplinary hearing to make representations and accorded an opportunity to invite fellow colleagues to be present in accordance with the law. That the minutes of the disciplinary hearing are testament of this.

28. The Respondent gave each of the Claimants several verbal warnings on their performance but their attitude and performance did not improve.

29. The witness contended that as a consequence of the Claimants' conduct and failure to address the issues raised in the respective show cause letters and at the disciplinary hearing, the Respondent got constrained to terminate their employment.

30. He asserted that the Claimants were paid terminal dues as evidenced by the payment vouchers that the Respondent placed before Court.
31. The witness took a position that there was no underpayment of the notice pay since what was paid to each of the Claimant was basic pay plus house allowance. He contended that overtime pay and bonuses are never an element when computing notice pay.
32. The witness testified that none of the Claimants is entitled to service pay as all of them were members of National Social Security fund.
33. As regards the certificate of service. The witness asserted that the Respondent duly prepared each Claimant's certificate in accordance with section 51 of the Employment Act and invited the Claimants to collect the same after going through a clearance process. They never did.
34. In his testimony in Court, the witness stated the performance concern regarding the five Claimants was in regard to targets, wastage and quality. Further that despite them being trained fully on- job by their supervisors and product manager, they failed to improve. This largely affected the Respondent negatively in terms of profitability, retaining the Claimants as employees was not sustainable.
35. Under cross examination by counsel for the Claimants, the witness reiterated that the Claimants' employment was terminated on account of poor performance.
36. That the notice to show cause did not mention the aspect of targets. However, the Claimants were aware of them. Despite the fact that the schedule referred to in the show cause letter is filed in Court, the same does not embody targets. There is no documentary evidence, from which the Court can discern the targets, therefore.
37. Asked whether there was a performance appraisal done on the Claimants' performance, he answered in the negative, further stating that they were not placed on any performance improvement plan.
38. Under cross examination, the witness further stated that the Respondent did not place forth any letter that would demonstrate that through it, the Claimants were invited to the disciplinary hearing.
39. The witness stated further that there was no document to demonstrate that the Claimants attended the disciplinary hearing.

#### **The Claimants' submissions**

40. Counsel for the Claimant submitted that the Claimants never got a chance to respond to the show cause letters, since after receiving them at Lunga Lunga Road branch, they were advised to see Daniel, a Human Resource officer, at Likoni Road branch. At Likoni branch they met the said Daniel who told them that the matter was a Lunga Lunga matter and they should get back there. At the Lunga Lunga Road branch they were denied access.
41. That on the 22<sup>nd</sup> February 2017 they were issued with termination letters in which there was an allegation that a disciplinary meeting had been held on 17<sup>th</sup> February 2017. No such meeting had been held and no records were produced in Court to prove such a meeting. Further, the Respondent produced no letter inviting the Claimants for a disciplinary meeting on the said date.
42. It was further submitted that the Respondent in its bundle of documents did file forged minutes and declaration forms. According to counsel, the Respondent's action of filing forged documents to justify a wrongful termination was in blatant disregard of the sanctity of Court and ought to be sanctioned by the Court by an award of punitive and exemplary damages. He argued that exemplary damages may be awarded in such a situation where there is a need to vindicate the sanctity and strength of the law. The award of exemplary damages can be made under prayer (1) of the claim.
43. That in the circumstances an award of punitive and exemplary damages is justified, counsel placed reliance on the decision in **ABDULHAMED EBRAHIM AHMED vs MUNICIPAL COUNCIL OF MOMBASA [2004] eKLR** where Maraga J. (as he then was) stated:
- “Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of law ..... The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are authorized by statute.”*
- Counsel proposed an award of Kshs. 2,000,000 (two million shillings) as exemplary damages.
44. In his submissions, counsel sought to answer the question whether the termination of the Claimants' employment was unfair. He submitted that section 43 and 45 of the Employment Act, 2007 requires the employer to be fair, just and equitable in terminating an employee's employment and places the burden of proving that the termination was fair on the employer.
45. The termination was supposed to be substantively and procedurally fair.
46. On substantial fairness it was submitted that as regards prove that a termination on account of poor performance was fair, an employer must demonstrate presence of a couple of aspects in the termination process. Counsel placed reliance in the decisions in **Jane Samba Mukala vs Oitukai Lodge Limited [2010] LLR 255 and Cause No. 273 of 2010, Kenya Science Research International Technical and Allied Institutions Workers Union (KSRTAWU) vs Stanley Kinyanjui and Magnate Venture Limited.**

47. He summed up the submissions on substantive unfairness by stating that the targets that the Claimants allegedly failed to meet were not established, and that there is no evidence to show how the targets were not met. There was no evidence concerning any appraisal of the Claimants' performance that was placed before Court, and that the Claimants were guilty of poor performance.

48. It was submitted further that there was no performance improvement plan presented to Court to demonstrate that the Claimants were given a chance to improve on their performance.

49. In conclusion, it was submitted that the termination was substantively unfair.

50. On procedural fairness, it was argued that the termination was unprocedural. The Claimants were not given an opportunity to respond to the show cause letter as they were tossed from one branch of the Respondent to the other, only to be given termination letters.

51. It was further submitted that the Respondent failed to demonstrate that there was any disciplinary hearing conducted prior to the termination.

52. It was argued that the Claimants should, in the circumstances of the matter be granted a compensatory relief to the fullest extent contemplated under the Employment Act, 12 months' gross salary, each.

### **The Respondents' submissions**

53. In her written submissions, counsel for the Respondent identified three issues for determination in this matter thus:

- a) *Whether the Respondent had a valid reason to terminate the Claimants.*
- b) *Whether the Claimants were put through a fair procedure prior to termination; and*
- c) *Whether the Claimants were entitled to the prayers sought.*

54. On the first issue Counsel submitted that section 43(c) of the Act is emphatic that the reason for termination are a matter that the employer genuinely believed to exist and which caused the termination. Upon strength of the provision, the standard of proof is on a balance of probabilities.

55. It was further submitted that it is an implied term of every contract that an employee is obligated to carry out his tasks and achieve a standard, skill and competence that can reasonably be expected of someone with experience and training.

56. That an employer is entitled to discipline its employees on account of poor performance as the capability of employees to perform their assigned duties is an essential requirement of an employment contract.

57. It was contended that the evidence before Court clearly reveals that the Respondent had a genuine reason to terminate the Claimants' contracts of service. That the Claimant's witness in his evidence did confirm that the position of general workers required an exercise of due diligence and any deviation therefrom would lead to loss in quality considering that they were dealing with hair.

58. Counsel asserted that in his evidence, the 2<sup>nd</sup> Claimant admitted that every day there would be set targets on the number of bundles each worker would be expected to produce.

59. That in considering whether or not the termination was fair, this Court ought not substitute its views with those of the employer but instead should view the circumstances of the matter from the lens of a reasonable employer. That in the circumstances of this matter, any reasonable employer would be justified to hold that there was breach of trust, that led to the termination.

60. On the second issue, counsel submitted that there is sufficient evidence on record to demonstrate that the Claimants were aware of the charges they were facing. That they were issued with warning letters receipt of which they failed to acknowledge.

61. The holding in the Court of Appeal case – **Kenya Ports Authority vs Fadhil Juma Kisuwa [2017 eKLR]**, thus

*“..... The duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated an opportunity for the employee to make representations.”*

was cited. The Claimants were given an opportunity to defend themselves at the disciplinary hearing.

62. As regards the last issue, it was submitted that the Claimants are not entitled to any of the reliefs sought as it is clear that the termination was on account of a valid reason. The termination was procedurally sound.

### **Analysis and Determination**

63. Some vital aspects of this matter are not in contestation, namely, that the Claimants were at all material times employees of the

Respondent, that their employment was terminated on 22<sup>nd</sup> February 2017, and the reason therefore.

64. Before I delve into the issues that I consider issues for determination in this matter, I consider it imperative to state the role of the Court in matters like the instant one, where parties have taken positions that are diametrically opposed on principal issues. On this, this Court stated in the case of **Lydia Moraa Obara vs Tusker Mattresses Limited [2021] eKLR** thus:

*“41. In determining the appropriateness of a dismissal this Court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of fairness of the dismissal rests with the employer. In the persuasive decision, in **Thewaterskloof Municipality vs Jaiga [2010] 10 BLLR 1216 [LC] 1223, South Africa Labour Court, TIP AJ aptly sums this as follows:-***

*“The core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee’s challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer’s decision was fair.”*

65. From the material placed before this Court, the following broad issues emerge for determination, thus:

- a) Was the termination of the Claimants’ employment substantively fair?
- b) Was the termination of the Claimants’ employment procedurally fair?
- c) Are the Claimants entitled to the reliefs sought or any of them?
- d) Who should bear the costs of this suit?

**Was the termination of the Claimants’ employment substantively fair?**

66. Section 43 of the Employment Act postulates that where there is a controversy as regards the termination of an employee’s employment, it is duty upon the employer to demonstrate the reason or reasons for the termination. It is not in dispute that the termination of the Claimants’ employment was done and communicated by the Respondent through the termination letters, dated 22<sup>nd</sup> February 2017. The letters, which were coached in a similar manner, did bring forth the reason for the termination as poor performance.

67. The Respondent argued that it did discharge the burden of proving the reason(s) for the termination. That may be so, but section 45 of the Act imposed a further legal burden on the Respondent, the burden of proving that the reason was valid and fair. A failure to discharge this burden normally entitled an employee to one or more of those reliefs contemplated under section 49 of the Act.

68. The jurisprudence is now firm, in order for the reason of poor performance as a reason for the termination of an employee’s employment to be considered valid and fair in terms of section 45 of the Employment Act, the employer must demonstrate existence of a number of aspects at the time prior to the termination.

69. In **Peter Kamau and Another vs National Bank of Kenya Justice Makau** citing the decision in **Jane Samba Mukala vs Ole Tukai Lodge Limited [2010] KLR 225** observed:

*“Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5(8) (c) further outlines the policy and practice guidelines that include having a performance, evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are charged of poor performance.”*

70. In **Jane Samba Mukala vs Ole Tukai Lodge Limited Industrial cause number 823 of 2010; (2010) LLR 225** quoted with approval by the Court of Appeal in the case of **National Bank of Kenya vs Samuel Nguni Matonya [2010] eKLR**, the Court observed:

*“(a) where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, there had been put in practice an employment policy or practice on how to measure good performance as against poor performance.*

*(b) It is imperative on the part of the employer to show what measures were in place to enable them access the performance of each employee, and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say one has been terminated for poor performance as the effort leading to this decision must be established.*

*(c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would, in essence, be allowed to defend themselves or given an opportunity to address their weakness.*

*(d) In the event a decision is made to terminate an employee on the reasons for poor performance, the employer must be called*

*again and in the presence of an employee of their choice, the reasons for termination shared with the employee .....*”

71. Therefore, in order for an employer to successfully establish that in terminating an employee’s employment on account of poor performance he was in accord with the provisions of section 45 of the Act, he must demonstrate that at the work place there was at the material time, a performance policy or practice (a product of the employer-employee participatory process), known to all employees and there inbuilt was, a performance evaluation criteria: performance evaluation duration intervals: manner and extent of the employee’s involvement in the evaluation process; manner of communication of the evaluation result to the employee: the avenue for the employee to challenge the result, if need be: and performance improvement plan, for employees whose performance is rated to be below the specific, known standards.

72. I have carefully analysed the evidence that was placed before me by the Respondent on the account on which the Claimants’ employment was terminated, and the explanations thereon that were geared towards establishing that the termination on that account was in accord with the law, I conclude that the same insufficiently addresses the aspects hereinabove brought forth.

73. The Respondent claimed that each of the Claimants had specific set targets that he or she had to meet. From the evidence by the Respondent’s witness and the documents it tendered before Court, one cannot with certainty discern what the targets were. I conclude, there were not any.

74. The Respondent contended that the termination was in accord with section 43 (2) of the Employment Act. One struggles to understand how the Respondent connects this to the ground on which the terminations occurred and what was expected of the Respondent to demonstrate. Besides, one cannot choose to read the provision in isolation from the other provisions of the Act like section 41 and 45 of the Act.

75. In the upshot I find that the termination was without substantive fairness.

#### **Was the termination procedurally fair?**

76. Like in where an employer has terminated an employee’s employment on account of the employee’s conduct, compatibility or its operational requirements, the employer is required to demonstrate that the termination or ground of poor performance was procedurally fair.

77. Section 41 of the Employment Act 2007, provides for the structure and texture of procedural fairness in matters termination of an employee’s employment. The fair procedure contemplated in the provision entails three components, information, hearing and consideration.

78. Related to this matter, the information component required the Respondent to, upon noting that the performance of the Claimants was not equal to what was expected of them, to with clarity and specificity bring it to their attention that the performance was such that there was need to improve within a specific period and in default a sanction would befall them. The hearing component would entail the Respondent giving an explanation to the Claimants of the contemplation to terminate their employment if they had failed to improve, give them an opportunity to defend themselves in company of colleagues of their choice. Lastly, the consideration component, representations by the Claimants and those of the colleague (if any) could be considered before the decision to terminate is made.

79. The Respondent asserted that the Claimants were warned of their poor performance on a number of occasions and that they did not improve despite on- job trainings by their supervisor and production manager. Nothing was placed before this Court to demonstrate that indeed there were such warnings, and that the trainings were done and their nature. I hold that it was not enough in the circumstances of this matter for the Respondent to just state that there were warnings and trainings. The inevitable conclusion being that I am not convinced that the Claimants were informed of their alleged poor performance and that there weren’t any trainings that were geared to aid an improvement in performance.

80. The Respondent contended that the Claimants were issued with show cause letters. That the Claimants despite receiving the letters, failed to respond in writing to the same. The Claimants did not deny receipt of the letters. They contended that they were to show cause through a physical explanation not in written. They asserted that they were sent to one Daniel, a Human Resource officer for that purpose. That the officer did not receive their representations. He declined to on an account that the matter did not belong to his branch.

81. Here one has to be clear on how the Claimants were expected to show cause. The letter dated 15<sup>th</sup> February 2017 read in part:

*“..... You are reminded that this consistent poor performance can no longer be tolerated as it seriously impacts on profitability of the company.*

*Consequently, you are hereby required to show cause within 24 hours why a disciplinary action should not be taken against you for this poor performance.”*

It is not difficult to discern that from these contents, that the Claimants were not expressly informed on how they were to show cause. It was therefore necessary on the part of the Respondent to avail the officer, Daniel to disabuse the Claimants’ assertion that they were required to show cause by making an explanation to him, and that he refused to give them audience.

82. Consequently, I hold that the Claimants were not accorded an opportunity to receive explanation on their alleged poor performance, and make their representations thereon.

83. The Respondent further contended that a disciplinary hearing on the Claimants' poor performance was held on the 17<sup>th</sup> February 2017. The Claimants discounted this. They challenged the authenticity of the minutes that the Respondent had filled in Court. They demanded for production of the original document. For reasons that this Court has struggled to understand and despite a warning by it that non-production of the original document an adverse inference shall be made on the document, the original of which the Respondent would not produce.

84. In the circumstance, I cannot help but agree with the Claimants and make an adverse inference that production of the original document would have revealed that the signatures on copy documents were not theirs. Therefore, production of the document would have been prejudicial to its case.

85. By reason of the premise, I further conclude that there were no disciplinary proceedings conducted as purported by the Respondent.

86. In sum, I find that the termination was a product of non-adherence to the statutory procedure contemplated under section 41 of the Employment Act.

**What reliefs are available to the Claimants, if any?**

87. The Claimants have sought for a compensatory award for wrongful and unfair termination. Having found that the termination of the Claimants' employment was procedurally and substantively unfair, I am convinced that they are entitled to the relief. I am conscious of the fact that section 49(1) (c) of the Employment Act allows such an award, and that a grant of the same and its extent will normally depend on the circumstances of each case.

88. The Claimants have urged this Court to compute any grant that it should make under this head upon basis of the last paid gross salary. The Respondents argued that if the Court has to make any award, then the same has to be computed on the basic salary and house allowance sums. I have carefully considered the bundles of pay slips for the various months, exhibited herein by the Respondent. One common thread emerges, that the slips embody inter alia amounts for overtime and bonuses, which items are not consistent over the months. Certainty and fairness would therefore dictate this Court to employ the consistent figures, basic salary and house allowance.

89. As regards the extent of the award, considering that termination was procedurally and substantively unfair, the impression that this Court has had on the purported disciplinary hearing minutes, as fabricated to subvert the cause of justice, and the length of period the Claimants were in the employment of the Respondent, I hold that an award of compensation to each of the Claimants to an extent of 9 [nine] months' gross salary, shall suffice.

90. Consequently, an award is made to each of the Claimants as hereunder, as compensation for unlawful termination:

a) Peter Muriithi Njoka ----- Kshs. 117,909

b) Pancras Obwogo Oguta ----- Kshs. 113,391

c) Alfred Obuya Salamu ----- Kshs. 113,391

d) Mark Mokua Okoyo ----- Kshs. 117,909

e) Fredrick Onger Atandi ----- Kshs. 117,909

91. The Claimants contended that each of them was given a less notice pay, courtesy of the reason hereinabove stated. For the reason I have given herein before, I am unable to agree with the Claimants that they were entitled to a notice pay based on their last gross salary. Consequently, I decline to award any sum on the alleged underpayment.

92. The Claimants sought that the Respondent be directed to pay service pay for the 5 years they were its employees. The Respondent asserted that they are not entitled to, as they fall under the exception contemplated under section 35 of the Employment Act. They contended that the Claimants were members of NSSF and that it dutifully remitted all deductions it made from their salaries to the relevant authority. It tendered a statement of account to demonstrate this.

93. I am convinced that the Claimants were such members and therefore not entitled to service pay under section 35 of the Act.

**Of costs**

94. It is trite law that costs follow the event unless there are exceptional circumstances that will dictate otherwise. No exceptional circumstance obtains here. Costs of this suit shall be to the Claimants.

95. In the upshot, Judgment is hereby entered in favour of the Claimants as hereunder.

a) A declaration that the termination of their employment was both procedurally and substantively unfair.

b) Compensation pursuant to section 49 (1) (c) of the Employment Act for each of them as hereunder:

1<sup>st</sup> Claimant ----- Kshs. 117,909.

2<sup>nd</sup> Claimant ----- Kshs. 113,391.

3<sup>rd</sup> Claimant ----- Kshs. 113,391.

4<sup>th</sup> Claimant ----- Kshs. 117,909.

5<sup>th</sup> Claimant ----- Kshs. 117,909.

c) Interest on the awarded figures from the date of this Judgment till full payment.

d) Costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of

No appearance for the Claimant.

Ms Obonyo 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**