



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 906 OF 2017**

**(Before Hon. Justice Dr. Jacob Gakeri)**

**PIETRO LUNGHI.....CLAIMANT**

**VERSUS**

**SIMBA HOSPITALITY SERVICES LIMITED T/A VILLA ROSA KEMPINSKI.....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim by way of a statement of claim dated 15<sup>th</sup> May 2017 alleging that he was unfairly and unlawfully constructively dismissed by the Respondent on 17<sup>th</sup> March 2017 and prays for –

- a. USD 24,000 being the accrued salary since November 2016
- b. USD 28,000 being loss of anticipated income for the remainder of the consultancy contract.
- c. Damages for unlawful dismissal
- d. Special damages
- e. Interest on (a) above at Court rates from 30<sup>th</sup> November 2016 to the date of payment in full
- f. Costs of the claim

2. The Respondent responded by a statement of response filed in Court on 20<sup>th</sup> June 2017 and prayed for dismissal of the claim with costs.

**Claimant's Case**

3. The Claimant's case is pleaded as follows. That the Respondent employed the Claimant on 9<sup>th</sup> November 2015 as a Chef De Cuisine (Italian) under a contract styled as “*consultancy contract*” for a period of two years with possibility of extension by mutual consent. His monthly fee was USD 4,000 subject to withholding tax and terminable by two (2) months' notice of either party.

4. That sometime in November 2016, the Claimant was involved in an accident which exacerbated the injuries sustained in an earlier motor cycle accident in May 2016. That the injury was in the course of employment. That the Respondent did not report the injury to the Director of Health and Safety Services as required by law and the Claimant sought treatment at the Aga Khan Hospital at his personal expense. That the Physician recommended total temporary incapacity from all work duties from 30<sup>th</sup> November 2016 to facilitate recovery and the Respondent was aware of the treatment and progress.

5. It is averred that the Respondent did not pay the November fees yet the Claimant had worked for the entire month.

6. That the Claimant was cleared to resume work on 2<sup>nd</sup> March 2017 and did so on 3<sup>rd</sup> March 2017 but the Respondent barred him from doing so without any lawful excuse or explanation allegedly to await clearance of the Respondent's advocate.

7. That in the absence of directions from the Human Resource Manager since 3<sup>rd</sup> March 2017, the Claimant wrote a protest letter to the

General Manager of the Respondent on 17<sup>th</sup> March 2017 and no communication from the Respondent was forthcoming thereafter.

8. It is further averred that the Claimant was constructively dismissed by the Respondent's inaction.

9. That he was dismissed for taking medical leave, a legal entitlement and the dismissal was unjustified. That despite demand, the Respondent did not clear the status of his employment after sending him away on 3<sup>rd</sup> March 2017 and prays for the reliefs as per the memorandum of claim.

### **Respondent's Case**

10. The Respondent avers that the agreement between the parties was a consultancy agreement in that the consultancy fee was payable on submission of invoice as opposed to payslip in employment contracts as well as payment of withholding tax and no statutory deductions. The agreement was explicit that it was a consultancy contract.

11. That the Claimant had no work permit to work in Kenya, the contract made no provision for leave days and invoices were issued through a form named First Call Hospitality and the work permit indicated that he would work under the firm.

12. The Respondent version of facts is as follows. That in mid-2016, the Claimant suffered a knee injury from an accident and was attended to by Doctor Owinga but the injury persisted and on 30<sup>th</sup> November 2016 he indicated via email that arising from a surgery performed on the knee, he was unable to continue offering service to the Respondent. That the contents of paragraphs 7 and 8 of the statement of claim were untrue and false.

13. It is further averred that on 2<sup>nd</sup> December 2016, the Claimant presented a sick sheet indicating that he would be off duty for 91 days and was advised to treat 14 days as days off work since he was a consultant and he did not offer services of the period June 2016 to September 2016 and November 2016 and the Respondent conducted that he had terminated the contract.

14. That on 5<sup>th</sup> December 2016 E. M. Washer & Associates Advocates demanded the Claimant's consultancy fee for November 2016 but did not seek reinstatement.

15. Finally, it is averred that the Claimant by his actions and conduct voluntarily terminated the contract and there was no further relationship between the parties and the allegations of constructive dismissal were untrue.

### **Evidence**

16. The Claimant adopted the written statement and testified that he was given sick off by the Aga Khan Hospital from 30<sup>th</sup> November 2016 and reported on 3<sup>rd</sup> March 2017 to resume duty but the Respondent declined.

17. That he could not delegate his job to another person. That the marginal note of the consultancy agreement indicated he was earning a salary and the employer provided uniform, laundry, meals and shoes and he worked for six days per week reporting at 10.00 am every day.

18. He testified that the agreement provided a probationary period of six months. That he resigned on 17<sup>th</sup> March 2017 after the Respondent refused to have him back as it awaited a response from its advocate.

19. On cross examination, the Claimant confirmed that the contract was styled as a consultancy contract and had no provision for statutory deductions or annual leave and could not work for any other person. That he worked under the Executive Chef. He confirmed that he had a motor cycle accident in May 2016 but returned to work (not sure when). That in November 2016 he slid on the floor at the work place and notified his superior and the Respondent but had no evidence of this accident or report.

20. That he had a work permit but did not file the same. That he had no work permit to work in Kenya. That he resigned on his own violation.

21. On re-examination, he testified that he had two accidents and resigned out of frustration by the employer by its refusal to accept him back after the long sick off.

22. He finally stated that he went on annual in 2016 (a couple of weeks).

23. The Respondent's witness Mr. Bethwel Nguai adopted his statement and testified that the Claimant was engaged as a consultant and did not report the alleged accident at the work place. He was supposed to report to the immediate supervisor, Human Resource Department, and the hotel clinic for first aid. The Human Resource Department would report the accident to the Director of Safety and Health on behalf of the Respondent.

24. On cross examination, the witness confirmed that from the available records the Claimant had an accident in 2016. That the Respondent operated a hotel and the Claimant's position as essential to the business. That the consultancy contract dated 9<sup>th</sup> October 2015 provided for probation for 6 months. That the Respondent provided the Claimant with the tools of trade and he could not delegate to any other person. That the Claimant was required to work for 48 hours per week for 6 days, 8 hours per day and could be summarily dismissed as per the agreement and worked under the control of the Respondent.

25. In addition, he worked under the Chief Chef but was the Head of the Italian Restaurant's menu.
26. That the contract prohibited the Claimant from working elsewhere and could not engage in private work without written permission of the Respondent.
27. The witness denied knowledge that the Claimant was injured at the workplace. That the Respondent was aware that the Claimant was sick.
28. The witness further confirmed that the Respondent received the Claimant's letter sometime on 30<sup>th</sup> November 2016 though not signed by the Claimant.
29. On re-examination, the witness stated that he was the custodian of Human Resource documents at the Respondent's office and the alleged accident at the work place had not been reported to the Respondent and he had no record that the Claimant had proceeded on leave at any point in 2016.
30. Finally, he testified that the advocates had advised the Respondent that the agreement between the parties was a consultancy agreement.

### Submissions

31. The Claimant isolated several issues for determination namely –

- (i) Whether the Claimant was an employee of the Respondent and;
- (ii) Whether the Claimant was constructively dismissed;
- (iii) Whether the Claimant is entitled to the reliefs sought;
- (iv) Costs.

32. On whether there was a contract of employment between the Claimant and the Respondent, the Claimants submitted that although the contract was styled as a consultancy contract, the Claimant was in fact engaged as an employee. Reliance was made on Section 2 of the Employment Act on the definition of "employer" and "employee". The definitions in Black's Law Dictionary, 8<sup>th</sup> Edition are also relied upon in support of the submission.

33. That the Claimant reported to the Chief Chef yet a consultant has no reporting lines other than the deliverables under the contract. To demonstrate that the Claimant was an employee of the Respondent, the Claimant submits that the various clauses of the contract were explicit that –

- a) The Claimant's position as the Chef De Cuisine was essential and critical to the Respondent's business.
- b) The contract had a probationary period of 6 months.
- c) The Claimant had a monthly pay of USD 4,000
- d) The Respondent provided the Claimant with the tools of trade such as uniform, laundry, meals and shoes.
- e) The Claimant was not allowed to delegate his duties to another person
- f) The Claimant worked for 8 hours a day for 6 days a week reporting at 10.00 am
- g) The Respondent could summarily terminate the Claimant's employment
- h) The Claimant worked under the control and directions of the Chief Chef
- i) The Claimant could not engage in any other employment or consultancy whether paid or unpaid without written permission of the Respondent.

34. The Claimant relies on the decision of Rika J. in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** on the determination whether a Claimant was contracted as an employee or consultant.

35. The decision of Wasilwa J. in **David Odwori Namohisa v Magnate Ventures Limited [2017] eKLR** was also relied upon to reinforce the submission that the Claimant was an employee. It is contended that the authorities above leave no doubt that the Claimant fitted the description of an employee of the Respondent and the Court is urged to so find.

36. As to whether the Claimant was constructively dismissed, it is submitted that he was cleared by Dr. Owinga to resume work on 2<sup>nd</sup> March 2017, he did so on 3<sup>rd</sup> March 2017 but was barred by the Respondent and there was no further communication from the Respondent

on the matter. The decision in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited (supra)** is cited in support as is the decision in **Coca Cola East & Central Limited v Maria Kagai Ligaga [2015] eKLR**.

37. That the instant case meets the test for constructive dismissal as expounded by Rika J. in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited (supra)**, the Respondent breached the contract when it barred the Claimant from resuming duty. That the breach was fundamental because the Claimant was not paid the salary for November 2016. That the Claimant resigned on 17<sup>th</sup> March 2017 in response to the breach and there was no delay.

38. As regards reliefs, the Claimant submits that the Claimant had on a balance of probabilities demonstrated that he was employed as the Chef De Cuisine by the Respondent and was constructively dismissed and was thus entitled to the reliefs as claimed.

39. The Respondent on the other had submits that the Claimant's service was engaged through a consultancy contract dated 9<sup>th</sup> October 2015. The contract states inter alia "*we are delighted to engage you on consultancy basis as a Chef De Cuisine (Italian) on the following terms and conditions ...*" That it was evident that the Claimant was engaged as a consultant (independent contractor) and not an employee and this was the intention of the parties. Reliance was made on the decision in **Lorna Adhiambo Aling v Safi International AS [2017] eKLR**

40. It is submitted that it was trite law that a court of law cannot purport to rewrite a contract between the parties who are bound by its terms. That the relationship between the parties was a consultancy relationship.

41. It is also submitted that the Claimant received a monthly fee less withholding tax.

42. The contract had no provision for statutory deductions. That the essential elements of a contract of employment under Section 10(3) of the Act are not requirements in a consultancy contract. That the parties did not intend to create an employment relationship with the Respondent and the Claimant was in control of his department since he prepared the menu.

43. Further reliance is made on the decision in **Lorna Adhiambo Aling v Safi International AS (supra)** for the proposition that the question whether a person is an employee or consultant is one of fact and law.

44. That the parties entered into the contract willingly. That in the instant case there was a consultancy agreement.

45. It is submitted that engaging the Claimant as an employee would have been against the law. That should the Court find that the Claimant was an employee, the contract should be applied strictly as was held in **Kollengode Venkatachala Lakshminarayan v Intex Construction Limited [2020] eKLR** where the Court observed that –

*"He cannot decide to pick clauses of the contract that should bind him and go out of the contract where in his view the contract was not favourable to him. If he wants to plead illegality, then the contract should be looked at as a whole and not piecemeal. I find that the contract although having clauses that offend the statutory provisions, is binding on the claimant having signed it. For this reason, he cannot use the contract and then make claims outside the contract. He cannot approbate and reprobate at the same time."*

46. That the contract had a termination clause and the Claimant resigned on 17<sup>th</sup> March 2017 and had forwarded a tentative resignation and 29<sup>th</sup> November 2016 allegedly on health grounds and purported to waive the two months' notice period.

47. That the claim for medical costs be dismissed since the Claimant led no evidence of injury at the work place. The only accident reported was the one involving the motor cycle he was riding. The medical costs were not proved.

48. On constructive dismissal, the Respondent relies on the decision in **Robert Indiazi v Tembo Sacco Limited [2018] eKLR** to demonstrate that the Claimant had not proved that the employer's behaviour was intolerable since he was cleared on 2<sup>nd</sup> March 2017 reported to the office on 3<sup>rd</sup> March 2017 and resigned on 17<sup>th</sup> March 2017. The Respondent's policies and procedures had to be complied with.

49. Finally, it is submitted that the Claimant harboured an intention to resign from as early as November 2016 and succeeded in March 2017 and is thus not entitled to damages as there was no unfair termination.

### **Determination**

50. After careful consideration of the pleadings, documents on record, submissions and the law, the issues that commend themselves for determination are:-

- (i) Whether the Claimant was engaged as an employee or a consultant;
- (ii) Whether the Claimant was constructively dismissed;
- (iii) Whether the Claimant is entitled to the reliefs sought.

51. As to whether the Claimant was an employee, Section 2 of the Employment Act defines the terms "*employee*" and "*employer*" as follows

–

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

**“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;**

52. According to **Black’s Law Dictionary 8<sup>th</sup> 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.”

53. At page 1314, an employer-employee relationship is defined as “The association between a person employed to perform services in the affairs of another, who in turn has the right to control the person’s physical conduct in the course of that service. At common law, the relationship was termed master servant.”

54. These definitions underline the centrality of control in an employee-employee relationship, which is one of the defining characteristics of a contract of service which in turn justifies the principle of vicarious liability on the part of the employer.

55. A consultancy or employer and independent contractor relationship is underpinned by a contract for services whose fulcrum is the independence of the consultant or contractor.

56. Before delving into the Kenyan context, it is important to highlight that the question of whether a contract of service exists between parties has been problematic and different tests have been developed from control to the more recent ones.

57. Although the judgment of Mackenna J. in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497** has been cited as one of the best shots, it did not streamline the law. The Judge held that a contract of service exists if –

(i) *The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*

(ii) *He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.*

(iii) *The other provisions of the contract are consistent with its being a contract of service.*

58. According to **Clerk & Lindsell on Torts, 13<sup>th</sup> Edition, 1969** at page 123 –

*“Some of the tests which have been suggested in the cases are considered below, but ultimately the decision in each individual case will turn upon the view taken by the Court of the relationship between the parties considered as a whole.”*

59. In **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited (supra)**, Rika J. addressed the issue at hand and held that –

*“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 ... They for instance adopt the word ‘salary’ which is a feature of the employment contract ... 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 ... A Consultant is paid a fee ... not a salary. A Consultant would not normally be provided with the tools of work ... A Consultant would have the latitude to discharge his obligation according to his own processes and methods, which would include the ability to subcontract or hire own assistants ... It is the obligation of an employer to enforce statutory deductions such as P.A.Y.E, N.S.S.F and N.H.I.F contributions. By paying ‘net salary’ the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship ... It was not necessary that the words ‘employer’ and ‘employee’ be expressed on the face of the agreements, for them to be deemed to be valid employment contracts ... Consultancies/independent contracts are based on the periphery of the employer’s business. They are not integral to the business ... The absence of a termination clause and leave clause in the agreements does not invalidate or make them any less binding employment contracts. Section 10 of the Employment Act 2007 provides some of the characteristics of an employment contract such as pay; basic job description; personal details of the employer and the employee; date of commencement; terms and duration ...”*

60. The Learned Judge concluded as follows –

*“Most of these are captured in the agreements ... and the leaving out of some item would not invalidate the contracts. The items mentioned by the Respondent as lacking in the agreements are not the essentialia negotii of an employment contract ... The agreements are not made invalid by not expressing terms and conditions which are implied by the law ... The Court agrees with the Claimants that they were employed by the Respondents.”*

61. The Court is in agreement with these sentiments.

62. Similar sentiments were expressed by Wasilwa J. in **David Odwori Namohisa v Magnate Ventures Limited (supra)**.

63. Applying these principles to the instant case, it is not in dispute that the principles apply on all fours. As the Claimant submitted, the consultancy contract between the parties made provision for “salary” per month, the Claimant’s position was essential and critical to the Respondent’s business. He was an integral part of the business. He made the menu of the Italian restaurant under the directions of the Chief Chef. The contract had a probationary period of 6 months, tools of trade such as uniform, shoes, meals, laundry, non-delegation of duties, working hours per day and week up to 48 hours, termination clause and non-engagement in any other employment or consultancy, whether paid or not without written permission of the Respondent are key elements of a contract of service.

64. Although the Respondent urges that the agreement is explicit that it is a consultancy contract and the parties entered into it willingly, and that was their intention, neither the intention of the parties nor the express designation of the agreement as a consultancy contract is conclusive. See **Winfield and Jolowicz on Tort, 13<sup>th</sup> Edition, 1989 page 562** and the sentiments by Rika J. in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited (supra)**.

65. On the fee payable to the Claimant, the marginal note refers to it as salary. But more significantly, it was paid monthly which is a feature of employment contracts.

66. On non-provision for statutory deductions such as P.A.Y.E, NSSF and NHIF as well as annual leave, public holidays and incapacity, the sentiments of Rika J. **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited (supra)** are instructive.

67. Finally, the fact that the Claimant did not have a work permit cannot camouflage the fact that he worked for the Respondent on a daily basis, 6 days a week.

68. A holistic evaluation of the provisions of the consultancy contract date on 9<sup>th</sup> October 2015, the context in which it was entered into and the judicial authorities cited above, lead to the inescapable conclusion that the consultancy contract in question was in fact a contract of employment and the Claimant was an employee of the Respondent. The Court so finds.

69. As to whether the Claimant was constructively dismissed, although the Employment Act does not define the doctrine of constructive dismissal, the Court of Appeal has domesticated the principle. In the words of Lord Denning in **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344**

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”*

70. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** the Court of Appeal catalogued the legal principles relevant to the determination of constructive dismissal to include –

(a) *What are the fundamental or essential terms of the contract of employment?*

(b) *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*

(c) *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

(d) *An objective test is to be applied in evaluating the employer’s conduct.*

(e) *There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e. causation must be proved.*

(f) *An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.*

(g) *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*

(h) *The burden to prove repudiatory breach or constructive dismissal is on the employee.*

(i) *Facts giving rise to repudiatory breach or constructive dismissal are varied.”*

71. The Court also stated that –

*“For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive*

*dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment.”*

72. In the instant case, it is not in dispute that the Claimant was on sick off from 30<sup>th</sup> November to 2<sup>nd</sup> March 2017 when his doctor confirmed that he was now recovered to resume duty and did so on 3<sup>rd</sup> March 2017 but the Respondent barred him from doing so on the ground that it was awaiting the lawyer’s advice on the issue. The Claimant resigned two weeks later on 17<sup>th</sup> March 2017.

73. Noteworthy, the instruction by the Human Resource Manager to the Claimant not to resume duty was verbal and the Claimant abided by it, although it had no time frame. But no written communication or other explanation was sent to the Claimant who having been away on sick off for over three months was eager to resume duty. Sight should not be lost of the fact that within the three months, the Respondent had not officially written to the Claimant on the consultancy contract, his inability to render services notwithstanding.

74. It is intriguing that the Respondent did not react to the Doctor’s medical report dated 22<sup>nd</sup> December 2016 which was unequivocal that the Claimant should discontinue the present job for a lighter job and could only resume duty after “*many months of rehabilitation and therapy.*”

75. This report comforted or assured the Claimant that he would resume duty as soon as he was certified ready to do so. The Claimant gave the Respondent over two weeks to communicate its decision and could not wait any longer. The resignation was a direct consequence of the Respondent’s refusal of the Claimant to resume duty. More significantly, the Respondent’s directive which was not supported by any written evidence amounted to a repudiatory breach of the fundamental term of the contract. The Respondent’s conduct created the impression of ambivalence in what to do yet it had about three (3) months to evaluate the circumstances and communicate its proposal or decision to the Claimant.

76. The resignation letter styled as “*constructive dismissal*” concluded as follows –

*“I am therefore tendering my resignation under protest with immediate effect to allow me to move on and instructing my lawyers to pursue this matter as constructive dismissal, unless I hear from you instructions countermanning the order of the Human Resource Manager.”*

77. Regrettably, this letter elicited no response from the Respondent. It would appear that the Respondent may have wanted to terminate the consultancy contract with the Claimant but its indecisiveness worked in favour of the Claimant and to its own detriment.

78. Granted that constructive dismissal occurs where the employee initiates the termination and the proximate cause is the employer’s conduct and the employee does so within a reasonable time of the conduct complained of, it is the finding of the Court that the Claimant was constructively dismissed by the Respondent.

79. On reliefs the Claimant prays for –

**(a) Damages for unfair dismissal**

80. Having found that the Claimant was constructively dismissed, he becomes eligible for the discretionary remedies under Section 49(1) of the Employment Act. The Court has taken into account the following –

- (i) The Claimant worked for the Respondent for about one (1) year and wished to continue.
- (ii) The Respondent accommodated the Claimant’s indisposition and resultant sick offs for many months.
- (iii) The Claimant had reasonable prospects of securing comparable engagement or stable employment elsewhere.
- (iv) Circumstances in which termination took place.

81. In the circumstances, the equivalent of one (1) month’s salary is fair **USD 4,000.**

**(b) Accrued salary since November 2016**

82. Having found that the Claimant was an employee of the Respondent at USD 4,000 per month and had not been paid since November 2016, the Claimant is entitled to payment for November 2016, December 2016, January 2017, and February 2017 for all the days for which sick leave sheets were notified to the Respondent.

83. For the avoidance of doubt, days for which sick leave sheets were not provided by the Claimant must not be compensated.

**(c) Loss of anticipated income for the remainder of the consultancy contract USD 24,000**

84. Since the consultancy contract had a provision for termination by either party, by notice, a claim for anticipatory earnings is not sustainable. The prayer is **disallowed.**

**(d) Medical costs**

85. Although the Claimant alleged that he was injured at the workplace in November 2016, he disclosed neither the nature of the injury in his pleadings nor the date and led no evidence to demonstrate the injury. He only alleged that it exacerbated the injury occasioned by the motor cycle accident sometime in May 2016. Relatedly, the Claimant tendered no evidence that he reported the accident to the immediate supervisor, Human Resource Department and the hotel nurse as required. Finally, he did not puncture the Respondent's evidence that he did not report the alleged accident. The alleged injury at the workplace was unproven.

86. The Court is in agreement with the Respondent's submissions that medical costs are special damages which must be strictly proved by evidence. The Claimant led no evidence to prove the costs.

87. The prayer is **disallowed**.

88. In conclusion, judgment is entered for the Claimant in the terms above.

89. Since the Claimant is partially successful, he is awarded 50% of the costs.

90. For the avoidance of doubt, the total sum awarded is subject to all statutory deductions as applicable.

91. Interest at Court rates from the date of judgment till payment in full.

92. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</sup> 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 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 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**