



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 952 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

ALEXANDER MBUGUA GITEHI.....CLAIMANT

VERSUS

JACARANDA HOTELS LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 3rd June 2015 and filed on 4th June 2015, the Claimant sued the Respondent alleging that he was “construct” dismissed on 28th September 2013. The Claimant prays for –

(a) Declaration that the Respondent’s refusal to reinstate him after acquittal in the criminal case amounted to unlawful and unfair dismissal.

(b) Declaration that the Claimant is entitled to payment of all unpaid dues, salaries and allowances during the entire period of suspension, terminal dues and compensatory damages.

(c) An order for the Claimant to be paid all his claim totalling Kshs.1,868,536 as pleaded comprising of the following: -

(i) Untaken 84 off days $(24,343/30) = 811 \times 84 \text{ days} \times 2 \text{ (double rate)}$ Kshs.136,332

(ii) Service charge for the suspension period May 2009 to September 2013 (53 months) at Kshs.4,158 Kshs.220,374

(iii) Untaken leave for 2 years before suspension at 24,345 Kshs.48,690

(iv) Unpaid net salary for the entire period of suspension May 2009 to September 2013 (53 months) at Kshs.21,635 Kshs.1,146,665

(v) One month salary in lieu of notice Kshs.24,345

(vi) Compensatory damages at 12 months $(24,345 \times 12)$ Kshs.292,140

Total Kshs.1,868,536

(d) Costs and interest

2. The Respondent filed its statement of response and counter claim and/or set off on 14th June 2015 and prayed for dismissal of the Claimant’s suit with costs to the Respondent and allow the counter claim and/or set off.

Claimant’s Case

3. The Claimant’s case is pleaded as follows: the Claimant avers that at all material times from 1st October 2007 to 29th September 2013, he was an employee of the Respondent as an Accounts Assistant. That on or about 18th May 2009, he was suspended from work on allegations of lost funds of the company and was thereafter arrested by the police and charged at the Kiambu Law Courts for stealing by servant in

Criminal Case No. 1151 of 2009.

4. It is further averred that upon release from remand, he reported back to the office on or about 31st August 2009 but was advised and instructed by the Human Resource Manager one Winnie Kiriuki that he was to remain on suspension until conclusion of the criminal case and would resume duty only if acquitted and exonerated of the charges. That the criminal case was concluded on 27th September 2013 when he was acquitted of the charges.

5. The Claimant avers that he reported to the workplace on 28th September 2013 to resume duty but was instructed by the Human Resource Manager that his position was not available and had been filled up. That the Claimant considered this declaration as “construct” dismissal on the said date.

6. That when he demanded outstanding dues, he was advised that the same would be computed and would be invited to collect the same but the invitation did not come. It is averred that the Respondent violated mandatory provisions of the Constitution, Employment Act, rules of natural justice and tenets of good labour practices by its decision of 28th September 2013 in that –

- a) It declined to reinstate the Claimant even after he had been acquitted of the charge of stealing.
- b) It dismissed him without cause and exposed him to double jeopardy.
- c) It was unfair for the Claimant to be taken through criminal proceedings and dismissal without compensation.

7. It is also averred that the Claimant is entitled to the following –

- i) Service charge per month from May 2009 to September 2013 at Kshs.4,158 per month
- ii) Since he used to work during all public holidays and Sundays, he was entitled to compensation for 84 days.
- iii) Untaken leave for two years at 30 days per year.
- iv) Notice pay and damages for the abrupt and unlawful dismissal after acquittal.

Respondent’s Case

8. The Respondent avers that contrary to the allegation that the Claimant was the Respondent’s employee from 1st October 2007 to 29th September 2013, the Claimant was employed on fixed term contracts of employment of six (6) months as follows –

- a) 2nd October 2007 to 28th February 2008
- b) 1st March 2008 to 31st August 2008
- c) 1st September 2008 to 31st December 2008
- d) 1st January 2009 to 30th June 2009.

9. That the Claimant ceased to be an employee of the Respondent on 30th June 2009.

10. It is also averred that the Claimant’s contract of employment was governed by and/or subject to a collective bargaining agreement between KUDHEIHA Workers Union, Kenya Association of Hotel Keepers and the Respondent.

11. That on 18th May 2009 the Claimant was suspended from duty for two weeks for investigation over a shortfall of cash receipts apparent from the under-banking of Kshs.536,056/-, a sum that could not be accounted for. That the Claimant did not report back to work on 2nd June 2009 and remained absent until 30th June 2009 when his contract lapsed.

12. The Respondent reported the matter to the police and the Claimant was arrested on 14th June 2009 and charge in Criminal Case no. 1151 of 2009.

13. That the allegation that he reported on 31st August 2009 was untrue since his contract had already lapsed. That the allegation that he was told to remain on suspension even after the duration of the contract was untrue.

14. That the Claimant designated witnesses for the case.

15. It is averred that since the Claimant’s fixed term contract lapsed on 30th June 2009, the issue of reporting to work did not arise and at any rate he did not report on 28th September 2013 as alleged or any other time after 18th May 2009. That the Claimant did not demand any terminal dues.

16. The Respondent denies the contents of paragraph 12 of the memorandum of claim and avers that the Claimant took all his leave days and received service charge due to him as well as the salary for the period worked.

17. That the claim is statute barred by virtue of Section 90 of the Employment Act.

18. As regards on the counter claim and/or set off, the Respondent avers that it is entitled to the equivalent of one month's salary in lieu of notice.

Evidence

19. The Claimant adopted the written statement and testified that he had worked for the Respondent since 1st October 2007 under successive six months contracts and his salary was Kshs.25,695.00. That he was suspended on 18th May 2009 charged for stealing by servant and acquitted on 27th September 2013.

20. That when he reported thereafter, he was told that his services had been terminated and he did not receive any notice to that effect or notice to show cause letter for absconding duty. That on 2nd June 2009, he was informed by the Human Resource Manager to await the outcome of the criminal case and was not taken through any disciplinary hearing.

21. The Claimant further testified that he used to work on Sundays and public holidays and did not take leave from 2009 to 2013 and received no pay during suspension.

22. On cross examination, he confirmed that he signed different contracts between 1st October 2007 and 30th June 2009. That the last one was dated 2nd June 2009 and stated that: *"This employment will automatically terminate on 30th June 2009. No further notice to terminate will be required by either party subject to other requirements of the Employment Act."*

23. The Claimant also confirmed that he was not given another letter by the Respondent. That he was to report back on 2nd June 2009 and did so and reported again on 18th August 2009 but had no evidence on the reporting.

24. He confirmed that he was not informed about the lapsing of the contract on 30th June 2009 but had signed the letter of employment. That he had not demanded terminal dues before the demand letter dated 17th October 2013.

25. That the suspension ran from 18th May to 2nd June 2009 and the contract expired on 30th June 2009.

26. The witness also confirmed that he had no evidence to show that he worked every day including weekends and public holidays or that he did not proceed on leave.

27. On re-examination, the Claimant confirmed that he did not serve the entire contract because of the suspension.

28. RW1 testified that she joined the Respondent in 2003 as a business attendant and was in Human Resource. The witness testified that the Claimant was employed on fixed term contracts and the last one commenced on 1st January 2009 and lapsed on 30th June 2009. That the Claimant was suspended on 18th May 2009 because some monies could not be accounted for and the matter was subsequently reported to the police. That he was due to report back to work on 2nd June 2009 but did not.

29. RW1 confirmed that all employees had to take off days every seven days as a matter of policy.

30. On cross examination, the witness confirmed that the complaint to the police was made by one Peter Kiarie on behalf of Village in Restaurant. That investigations were conducted though the witness was unaware of the outcome. The witness also confirmed that the Claimant did not serve the entire contract due to the suspension. The witness was unaware whether the Claimant had been acquitted of the charges or was paid terminal dues or the character of the termination. That she neither followed up the absconding of duty by the Claimant from 2nd June 2009 nor issue a notice to show cause. The Claimant had no disciplinary matters before the suspension.

31. On re-examination, the RW1 testified that the last contract signed by the Claimant lapsed on 30th June 2009 and he did not sign another contract.

Claimant's Submissions

32. The Claimant identified three issues for determination namely; whether the procedure applied before dismissal was fair; whether the issues were substantively and factually proved as cause for dismissal and the reliefs sought.

33. As regards the procedure applied, reliance was made on Sections 45(2) and 41 of the Employment Act as are the decisions in **Justine Onwoyo Among'a v Mount Kenya University [2016] eKLR**, **Peter Wangai v Egerton University [2019] eKLR** and **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the principles of substantive and procedural fairness in termination of employment contracts.

34. It is submitted that the reason for termination was invalid that there was no substantive justification for dismissal since the allegation that

the Claimant absconded duty was not substantiated during trial.

35. As regards reliefs, it is submitted that the Claimant had proved his case to the required standard and was entitled to all the reliefs as claimed in the memorandum of claim.

Respondent's Submissions

36. The Respondent frames the issues for determination as follows;

- i) Whether power was the Claimant an employee of the Respondent?
- ii) Was the Claimant unlawfully and/or unfairly terminated from employment?
- iii) Is the Claimant entitled to the reliefs sought?

37. On the duration of employment of the Claimant, the Respondent submits that the Claimant was employed on fixed term contracts from 1st October 2007 and the last of the contracts automatically terminated on 30th June 2009. That the letter of the Claimant's Advocates dated 17th October 2013 deemed 31st August 2009 as the date of termination.

38. It is submitted that the Claimant on cross examination confirmed that he signed his last contract on 2nd January 2009 which is categorical on termination and the Claimant did not lead evidence of another contract thereafter.

39. As regard the alleged unlawful and/or unfair termination reliance is made on Section 45 of the Employment Act to urge that the Claimant was not unlawfully or unfairly terminated since his contract of employment automatically lapsed on 30th June 2009. That after discovery of anomalies of Kshs.593,156, the Claimant as the Respondent's Accountant was suspended for two weeks for further investigation by the Respondent and thereafter the matter was reported to the police. Subsequent to which the Claimant was arraigned at the Kiambu Law Courts in Criminal Case no. 1151 of 2009 which is a ground for summary dismissal under Section 44(4)(g) of the Employment Act, 2007.

40. The decision of Wasilwa J. in **Charles Njagi Nyaga v Air Connection Limited [2016] eKLR** is cited to reinforce the submission. As is the decision in **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** where Rika J. relied on Section 44(4)(g) and found that the Respondent had reasonable and sufficient grounds to dismiss the Claimant.

41. It is further submitted that the Respondent had reasons to suspend the Claimant who did not contest it as unlawful. That the Claimant's allegation that he reported to the office on 18th August 2009 was not supported by any evidence and the contract lapsed on 30th June 2009.

42. Reliance is made on the decision in **Josephat Rubia Oyangi v Kenya Education Management Institute (KEMI) [2018] eKLR** to buttress the submission on lapsing of the Claimant's contract as opposed to termination by the Respondent.

43. As regards the reliefs sought, it submitted that he provided no evidence in support of the 84 untaken off days. In addition, each contract entered into was distinct from the other and the Claimant utilised all his off days. At any rate he was alleges must prove as provided by Sections 107 and 109 of the Evidence Act.

44. The decision of Majanja J. in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** is cited to augment the preposition on the burden of proof. That the letter dated 7th October 2013 had no claim for untaken leave days, that the claim is an afterthought.

45. As regards service charge, the Respondent relies on Section 35 of the Employment Act on service pay and submits that the Claimant is not entitled to service pay since the contract under which he served ended automatically by effluxion of time.

46. That the claim for pay in lieu of untaken leave for two years before suspension was not proved.

47. As regards net pay from May 2009 to September 2013, it is submitted that since suspension commenced on 18th May and lapsed on 2nd June 2009 and the contract lapsed on 30th June 2009, the Claimant was not an employee of the Respondent thereafter and the claim should be disregarded.

48. The claim for one month's salary in lieu of notice is discounted on the ground that the Claimant was not terminated. The sentiments of Onyango J. in **Stephen M. Kitheka v Kevita International Limited [2018] eKLR** are relied upon in support of the proposition.

49. Finally, on compensation for unfair termination it is submitted that the Claimant is not entitled to compensation because he has not demonstrated that he was unfairly or unlawfully terminated and the claim lacked merit. That the reliefs sought by the Claimant have been exaggerated for purposes of unjust enrichment.

Determination

50. From the pleadings, evidence on record and submissions by the Counsel, the issues for determination are: -

- a) Whether the Claimant's employment contract was terminated by the Respondent or by operation of law;

b) Whether the Claimant is entitled to the reliefs sought.

51. As to whether the Claimant's employment contract lapsed or was terminated by the Respondent, it is not in dispute that the Claimant was employed by the Respondent on 1st October 2007 under a fixed term contract which lapsed on 28th February 2008. However, on 17th March 2008, the Claimant signed another contract effective 1st March 2008 to 31st August 2008.

52. Both contracts stated that the Claimant's terms and conditions of service were governed by the collective agreement between KUDHEIHA Workers Union and Kenya Association of Hotelkeepers are as follows: -

Job Title Accounts Assistant

Grade 8

Basic Salary Kshs.16,504/-

House Allowance Kshs.3,496/-

Service Charge 15th November 2007

53. The Claimant signed the second contract on 17th March 2008. The third contract dated 14th July 2008 effective 1st September 2008 to 31st December 2008 was signed on 8th August 2008. The fourth contract dated 2nd January 2009 effective 1st January 2009 to 30th June 2009 was signed on 20th January 2009 and had improved terms of service as follows –

Basic Salary Kshs.17,824/-

House Allowance Kshs.3,811/-

54. Unlike the previous contracts which had a termination clause by either party, this one did not and was explicit that it would automatically terminate on 30th June 2009 and no further notice of termination would be required from either party.

55. Both the Claimant and RW1 confirmed that the last contract of employment executed by the Claimant expired on 30th June 2009 on account of effluxion of time and the parties did not sign any other contract thereafter.

56. The Court of Appeal has expressed itself variously on the laws relating to fixed term contracts. For instance, in **Francis Chire Chachi v Amatsi Water Services Company Limited, [2012] eKLR** the Court stated that –

“This Court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract.”

57. These sentiments were echoed in **Oshwal Academy (Nairobi) & Another v Indu Vishwanath [2015] eKLR** where the Court cited with approval the words of Rika J. in **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR**, as follows: -

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

58. Subsequently in **The Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys' Secondary School v Julius D. M. Baini [2017] eKLR** the Court of Appeal stated that –

“In all probability, and we so find, there was no re-engagement of the appellant in employment after his yearly contract expired on 31st December, 2014.”

59. Finally in **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR**, the Court of Appeal observed that: -

“Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5th May, 2010. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”

60. The Court is in agreement with these sentiments.

61. However, it is also common ground that on 18th May 2009, the Claimant was suspended from duty by a letter dated 18th May 2009, on allegation of missing funds amounting to Kshs.536,156/-. The suspension was for two weeks to facilitate investigations. The letter indicated that the Claimant was expected back on 2nd June 2009 and was to report to the Office of the General Manager. It is at this point the parties part ways. Whereas the Claimant alleges that he reported on 2nd June 2009 and was informed by the Human Resource Manager to await the outcome of the criminal case, the Respondent's witness testified that the Claimant did not report back and actually absconded duty. To unravel this part of the case, it is essential to ascertain when the Claimant was arrested and charged in Court.

62. According to the Charge Sheet, the Claimant was arrested on 14th August 2009 and the memorandum of claims states that he reported to work on or about 31st August 2009 upon release from remand. Instructively, a handwritten note on the charge sheet states "*plea – 31st August 2009 consolidated*".

63. The Claimant testified that on 31st August 2009, he reported to the Human Resource Manager but was allegedly advised that he was to remain on suspension until the criminal case was concluded. The Respondent denies that the Claimant reported to the office on 31st August 2009 or at all after the suspension.

64. Paragraph 7 of the Respondent's statement of response states that the Claimant was arrested by the police on 14th June 2009 following police investigations after the alleged short fall was reported by the Respondent.

65. Similarly, although the Claimant testified that he saw the Human Resource Manager on 2nd June 2009 who allegedly told him to await the outcome of the case, he was supposed to report to the General Manager and his evidence makes no reference to having reported to him. In a similar vein the memorandum of claim makes no reference to the Claimant having reported to the office on 2nd June 2009. But more intriguing is the reference to the outcome of a case since he had neither been arrested nor charged in a court of law and admitted on cross examination that he had no evidence to confirm that he had in fact reported to the office on 2nd June 2009 or 18th August 2009.

66. The foregoing lends traction to the Respondent's submission that the Claimant did not report to the office on 2nd June 2009 or at any other time thereafter, that he absconded duty. I will revert to this issue later on in this judgment.

67. From the above analysis of the evidence and as confirmed by CW1 and RW1, the Claimant's last written contract of employment between him and the Respondent lapsed on 30th June 2009 and was not renewed. The assertion by the Claimant that he was not informed about the lapsing of the contract is of no consequence since he confirmed on cross examination that he had signed the document whose contents were unambiguous. Relatedly, the Claimant confirmed on cross examination that he was not given another letter by the company.

68. An essential question is whether the Claimant and the Respondent had an employer/employee relationship after 30th June 2009. Although the Claimant contends that he reported to work on or about 31st August 2009 upon release from remand, he tendered no evidence on how long he was in remand.

69. In addition, the Claimant does not allege and led no evidence that the contract to employment had been renewed. The allegation that the Human Resource Manager informed him that that suspension would remain in force until the criminal case was finalised was denied by the Respondent's witness and was not supported by evidence since the suspension lapsed on 2nd June 2009 and neither party led evidence that the issue was revisited thereafter.

70. But even assuming that the statement was made as alleged, did it revive the expired contract and for how long?

71. The Claimant's allegation that he was still an employee of the Respondent until 28th September 2013 is unsupported by evidence. It would overstretch imagination to accept that the Claimant was on suspension from 2nd June 2009 to 28th September 2013, a total of over four years.

72. The contention that the Respondent declined to reinstate him on 28th September 2013 is even more intriguing. Reinstatement is a remedy available in law consequent to a dismissal or termination. Is the Claimant implying that he was terminated before 28th September 2013 and summarily terminated on the same date? The averment that the Respondent declined to reinstate the Claimant on 28th September 2013 is difficult to contextualise and follow. At any rate the Claimant led no evidence of a termination or dismissal by the Respondent before 28th September 2013.

73. As regards termination, paragraph 8 of the Claimant's memorandum of claims states that –

"The Claimant did report to the company management on the 28th September 2013 to resume his duties but he was instructed by the Human Resource Manager that his position was not available and had already been filled up. The Claimant considered the defendant's declaration amounted to construct dismissal on the stated date."

74. Paragraph 10(b) provides that –

"The company dismissed him therefore without cause and therefore exposed him to double jeopardy."

75. It is unclear what the Claimant meant by the words “*construct dismissal*” If the intention was “*constructive dismissal*” the Claimant led no evidence of the conduct of the Respondent. More importantly, the Claimant led no evidence on when and how he was dismissed or terminated by the Respondent.

76. For the above reason, it is the finding and holding of the Court that the Claimant has no a balance of probabilities failed to establish that the Respondent terminated the contract of employment between itself and the Claimant.

77. The provisions of Sections 41 and 45 of the Employment Act and the decisions in **Justine Onwoyo Among’a v Mount Kenya University (supra)**, **Peter Wangai v Egerton University (supra)**, and **Walter Ogal Anuro v Teachers Service Commission (supra)** have no relevance to this case for the simple reason that it was neither a termination or dismissal.

78. It is the finding of the Court that the Claimant was not an employee of the Respondent after 30th June 2009, when the last fixed term contract with the Respondent terminated by reason of effluxion of time. The sentiments of Makau J. in **Josephat Rubia Oyangi v Kenya Education Management Institute (KEMI) (supra)** are instructive. The Learned Judge stated as follows:

“I have found that the Claimant’s contract of service was not unfairly terminated by the Respondent but it ended automatically by effluxion of time.”

79. The foregoing notwithstanding the closure of the Claimant’s employment with the Respondent is outstanding. It is common ground that the Claimant was suspended from duty on 18th May 2009 for a duration of two weeks and evidence on record show that he did not resume duty and his contract lapsed on 30th June 2009.

80. The Claimant testified that he was not paid during the suspension since he was still an employee of the Respondent. The Respondent neither denied the allegation nor lead evidence that it paid the Claimant salary for the months of May and June 2009.

81. If the Claimant absconded duty on 2nd June 2009 as alleged by the Respondent, the Respondent was duty bound to take reasonable steps to establish contact with its employee to understand why he had deserted the place of work and on establishing contact issue a notice to show cause, and if the Claimant does not respond to the notice to show cause within the prescribed duration issue a termination letter or notify the Labour Officer that the Claimant had absconded duty. See **Boniface Mwangi v B.O.G. Iyego Secondary School [2019] eKLR**, **Simon Mbithi Mbane v Intersecurity Services [2018] eKLR** and **Nzioka v Smart Coatings Limited [2017] eKLR**.

82. In this case the Respondent led no evidence that it made any effort to establish contact with the Claimant. RW1 confirmed on cross examination that she neither followed up the issue nor issued a notice to show cause when the Claimant failed to report on 2nd June 2009. Since the Respondent’s counter claim/set off is founded on the allegation that the Claimant absconded duty and no evidence was adduced to establish the fact of desertion, the counterclaim/set off **fails**.

Reliefs

83. On reliefs, the Court proceeds as follows –

(a) Untaken off days 84

84. The Claimant led no evidence on this claim not did he furnish the Court with the relevant particulars. Similarly, RW1 testified that all employees took off days every week as a matter of policy. The claim is **dismissed**.

(b) Service charge pay for the period of suspension May 2009 to September 2013 (53) months

85. The Respondent mistook service charge to service pay under Section 35(5) of the Employment Act. Service charge is a discretionary payment made to employees generally in the hospitality sector as part of the monthly earning and generally not fixed. Copies of the Claimant’s payslips for January, February, March and April 2009 show that the Respondent paid its employees service charge on a monthly basis.

86. Having found that the Claimant was not an employee of the Respondent after 30th June 2009 and therefore was not on suspension, service charge is only payable for the months May and June 2009. The claim for service charge after 30th June 2009 is unsustainable and is dismissed. The Claimant is awarded **Kshs.8,316/- as service charge**.

(c) Untaken leave for 2 years

87. Although the Claimant testified that he was working from Monday to Sundays and did not proceed on leave for the entire duration, he led no evidence on his leave entitlement and the relevant particulars. The claim is **dismissed**.

(d) Unpaid net salary for the entire suspension period May 2009 to September 2013 (53 months)

88. Having found that the Claimant was not in the Respondent’s employment after 30th June 2009 and therefore not on suspension, the claim is **dismissed**.

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

89. Having found that the Respondent did not terminate the Claimant's employment contract and that the contract terminated by operation of law, the claim for one month's salary under Section 49(1)(a) of the Employment Act is not sustainable. The Claimant having been on a fixed term date of expiry is not entitled to of termination. See **Stephen M. Kitheka v Kevita International Limited (supra)**. The claim is **dismissed**.

(f) Compensation for 12 months' salary

90. Under Section 49(1)(c) of the Employment Act, the discretionary remedy of compensation is only available in cases where the summary dismissal or termination of a contract of an employee is unjustified. In this case the Claimant was neither dismissed nor terminated by the Respondent as the Court found. Since the substratum of the claim for compensation has collapsed, the claim is **dismissed**.

91. The Claimant is nevertheless entitled to the gross salary for May and June 2009, the sum of **Kshs.48,690/-**.

92. Having found that the Claimant ceased to be an employee of the Respondent on 30th June 2009, refusal by the Respondent to employ him on 28th September 2013 could not amount to an unlawful and unfair dismissal and no declaration shall issue.

93. For reasons explained elsewhere in this judgment, the counter claim is dismissed with no order as to costs.

94. **In the final analysis, judgment is entered for the Claimant against the Respondent for the sum of Kshs.57,006/- with no order as to costs.**

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

96. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF FEBRUARY 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