



**Mbalasi v CMC Holdings Limited & another (Cause 78 of 2020)
[2022] KEELRC 155 (KLR) (22 April 2022) (Judgment)**

Herman Ihachi Mbalasi v CMC Holdings Limited & another [2022] eKLR

Neutral citation: [2022] KEELRC 155 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 78 OF 2020

ON MAKAU, J

APRIL 22, 2022

**IN THE MATTER OF: THE VIOLATION AND/OR
THREATENED VIOLATION OF ARTICLES 3, 22, 23 (3),**

28, 29, 41, 47, 50 AND 259 OF THE

CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF: SECTIONS 3, 4 AND 7 OF
THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

IN THE MATTER OF: SECTIONS 5, 31 AND 87 OF THE EMPLOYMENT ACT, 2007

BETWEEN

HERMAN IHACHI MBALASI PETITIONER

AND

CMC HOLDINGS LIMITED 1ST RESPONDENT

CMC MOTORS GROUP LIMITED 2ND RESPONDENT

JUDGMENT

1.

The Petitioner was employed by the Respondent on 5th February, 2003 as a Vehicles Stock Controller and rose through the ranks to the Position of Country Manager of Cooper Motor Corporation (Uganda) Limited following a transfer on 15th July, 2014.

2.

The Respondents are limited liability companies incorporated in the Republic of Kenya.



3.

The petitioner allegedly served the respondent diligently until 27th February 2010 when he served a resignation letter on the respondent. In response the respondent served him with suspension letter dated 27th February 2020 and thereafter invited him to a disciplinary hearing but the hearing was adjourned at the request of the petitioner until the particulars of the charges against him and the relevant supporting documents were availed to him.

4.

In a surprise turn of events, the respondents, through CMC Uganda limited wrote to the petitioner on 26th May 2020 informing him that his resignation had been accepted and that his last day of service was 27th May 2020. The letter also offered to pay him all his salary upto May 2020.

5.

The Petitioner was aggrieved and filed the instant petition and the notice of motion dated 12th May, 2020. The application was brought under a certificate of urgency and the Petitioner sought the following orders:

(i)

stay of any disciplinary proceedings pending hearing and determination of the application

(ii)

the Respondents be restrained and injuncted jointly and severally from terminating the lease in respect of residential apartment known as Apartment No. 2 South on plot No.23 Balikuddembe Road, Naguru, Kampala pending hearing and determination of the application and petition

(iii)

the Respondents be restrained and injuncted jointly and severally from recruiting, employing and hiring a Country Manager for Cooper Motor Corporation (Uganda) Limited pending hearing and determination of the application and petition.

6.

The Petitioner amended his petition on 1st October, 2020 to seek the following reliefs:

a)

A declaration that the suspension and the constructive termination of the Petitioner by the Respondents has jointly and severally violated the Petitioner's constitutional rights to fair labour practices, fair administrative action and fair hearing.

b)

A declaration that the disciplinary proceedings by the Respondents against the Petitioner are malicious, witch-hunt in bad faith and not for advancement of the rule of law and unconstitutional.

c)

A declaration that the Petitioner is entitled to legal representation at the disciplinary hearing in any event.



d)

A declaration that the Petitioner is entitled to be supplied with the charges and sufficient particulars and evidence to be relied upon by the Respondents at the disciplinary hearing in any event, to enable the Petitioner to adequately prepare for the hearing and guarantee a fair hearing as enshrined in the CMC Motors Holdings Ltd HR Manual Chapter 18 Disciplinary Policy and Procedure.

e)

A declaration that the suspension of the Petitioner by the Respondents be lifted, set aside and discharged.

f)

An order directed to the Respondents jointly and severally restraining the Respondents from declaring the Petitioner's position vacant or hiring, filling, employing and engaging any other person to take over the employment position of the Petitioner.

g)

An order for unconditional reinstatement of the Petitioner without loss of benefits or reengagement of the Petitioner in work comparable to that in which the Petitioner was employed prior to the suspension at the same wage.

h)

An order for damages against the Respondents jointly and severally for unlawful suspension and infringement of the petitioner's rights as set out in paragraph seven (7) of the amended petition.

i)

Costs of and incidental to this suit.

j)

A declaration that the Petitioner's Constitutional Rights were violated by the Respondent.

k)

A declaration that the Petitioner to be reinstated to his former position without loss of any benefits.

l)

A declaration that the Respondent had no Constitutional and/or Statutory right to unlawfully suspend and/or terminate the services of the Petitioner without proven valid reasons for so doing.

m)

A declaration that the Petitioner is entitled to damages for the Constitutional violations to be paid by the Respondents to be assessed by the Honourable Court as set out herein.



n)

Any other favourable order that the Court may grant.

7.

The Respondent filed grounds of opposition dated 24th May, 2020 in response to the application and petition. The Respondents stated that:

(i)

The petitioner was employed by CMC Motors (Uganda) Limited as a Country Manager, and there was no employment relationship between the Petitioner and the Respondents herein.

(ii)

The Petitioner's had not established a case for breach of constitutional rights further that the Petitioner's grievances were not of a constitutional nature.

(iii)

The order for stay of disciplinary proceedings had been overtaken by events as the Petitioner's three month notice of resignation was to lapse on 27th May, 2020. Further, that the disciplinary proceedings failed to take place on account of COVID-19 pandemic and the Petitioner's refusal to have the disciplinary proceedings by virtual means

(iv)

The order seeking to restrain the Respondents from terminating the tenancy agreement for the residential apartment was untenable because the Respondents were not parties to the agreement and further that it was unreasonable to expect the employer to provide the Petitioner with housing upon the end of his employment.

(v)

The order seeking to restrain the employer from recruiting his replacement was akin to the court interfering with the Respondents internal operations.

8.

After the Petitioner filed an amended petition with the leave of the court on 1st October, 2020 the Respondents filed grounds of opposition dated 12th February, 2021. In brief, the Respondents maintained that there was no employment relationship between the petitioner and them. They further contended that the Petitioner's grievances are not of a constitutional nature rather attempts by him to rescind his decision to resign after he frustrated efforts by the Respondents to convene disciplinary hearings to hear and determine allegations of fraud and forgery that were levelled against him.

9.

Finally the respondents maintained that the petition as drafted does not meet the competency threshold for a constitutional reference as formulated in the case of Anarita Karimi Njeru v Republic [1979] eKLR and affirmed by Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR .



10.

The respondents supported the grounds of opposition by the Affidavit sworn on 9th April 2021 by Ms. Brenda Wejuli, who is the Human Resource Business Partner, CMC Uganda Limited.

11.

The petition was canvassed through oral testimonies by witnesses and thereafter both parties filed written submissions.

Petitioner's case

12.

The Petitioner testified as Pw1 and he basically adopted the particulars of the petition dated 12th May, 2020 and the amended petition dated 1st October, 2020, the averments in the supporting affidavits attached thereto and produced annexed documents as exhibits.

13.

PW 1 testified that he was employed in 2003 by CMC Motors Group Limited as a Vehicle Stock Controller rising through the ranks until 2014 when he was promoted as the Acting Manager CMC Motors (Uganda) Limited vide transfer letter dated 15th July, 2014. He contended that CMC Holdings Limited is the parent company that owns the other companies in East Africa.

14.

1 testified that on 28th February, 2020 the HR Group Manager Ben Sifuna and Head of Internal Audit Mr. Kuria came to his office, and told him that he was being suspended for alleged forgery and handed him a suspension letter. PW 1 informed them that he had already put in a resignation letter dated 27th February, 2020 citing frustration, mistreatment and the fact that he had been denied a salary increment. The resignation letter was not accepted and instead he was sent on suspension, for six months ending on 28th August, 2020.

15.

PW 1 further testified that on 12th March, 2020 he was invited for a disciplinary hearing at CMC Motors Group Limited in Nairobi which he attended but the hearing did not proceed because the Respondent objected to him being accompanied by a lawyer. A new date was set for the disciplinary hearing but again it was postponed.

16.

PW 1 testified that instead of calling him for the disciplinary hearing, on 27th May 2020 the Respondents served him with a letter through his lawyer notifying him that his resignation letter had been accepted but that they were still investigating the forgery case. PW 1 was never served with a copy of the investigation report. He contended that he had availed himself for disciplinary hearing and denied the aspersion by the Respondents that he frustrated the disciplinary process.

17.

On cross examination he stated that he was accused of editing a ruling of the Uganda Public Procurement Authority and forging documents that were submitted to the procurement entity during the bidding process. He denied the alleged offences and maintained that the procurement authority investigated the matter and exonerated him.



18.

PW 1 also stated that he attended the disciplinary hearing scheduled for 12th March, 2020 which was adjourned because he sought a copy of the investigation report to enable him prepare his defence. A new date was set for 23rd March, 2020 however the disciplinary hearing did not take place because of the COVID-19 restrictions. He could not remember receiving any communication asking that the hearing be done virtually. He was in denial that he frustrated the disciplinary hearing and maintain that he was in Uganda which was under lockdown following the outbreak of the COVID-19 pandemic.

19.

PW 1 testified that he served a three month notice whilst on suspension and was on half salary in line with the HR Policy. He testified that his resignation was precipitated by a difficult working relationship with his supervisor and that he had raised complaints with the HR manager via e-mail.

20.

On re-examination he testified that after he had served the resignation letter, the Respondent issued him with a suspension letter. He contended that his resignation was because his relationship with the employer had broken down beyond repair. He maintained that he was not notified if the resignation was accepted or whether his suspension had been lifted until on 4th June, 2020 when he received a Resignation acceptance letter from HR Business Partner CMC Uganda Limited. The letter released him and directed him to clear with the company. He contended that the respondent company was liable for his unlawful exit.

Respondent's case

21.

Ms Brenda Wejuli is HR Business Partner for CMC Motors (Uganda) Limited testified as RW1 and she also adopted averments in the affidavit dated 9th April, 2021 as evidence in chief and produced annexed documents as exhibits.

22.

She confirmed that she knew the Petitioner who was appointed as the acting Country Manager, CMC Motors (Uganda) Limited on 1st August 2014. She used to report to the Petitioner and she was conversant with the events leading to the Petitioner's resignation. She admitted that she received a copy of the Petitioner's resignation letter dated 27th February, 2020.

23.

RW 1 further testified that she was aware that on 28th February, 2020 there was a meeting between the Group HR Manager, Head of Internal Audit from Nairobi, CMC Motors (Uganda) Limited Financial Controller and the Petitioner. The meeting was about CMC Motors (Uganda) Limited failed bid with the Ministry of Agriculture. They raised concern that the ruling by the procurement authority that was forwarded to the CEO had been altered and that the Petitioner forwarded a 3 pager ruling whilst it was a 5 pager ruling. The petitioner had omitted the adverse findings which faulted CMC Motors (Uganda) Limited for having submitted forged delivery note as part of the bidding process. The Petitioner refused to continue with the meeting and become uncontrollable, shouting that he had already resigned and given a three month notice. Thereafter the Petitioner was served with a suspension letter citing falsification of documents. The suspension letter also required the petitioner to show cause why disciplinary action should not be taken against him.



24.

RW 1 admitted that the Petitioner's resigned citing frustration and a bad work environment. However, she contended that the resignation was a tactic to avoid the disciplinary process. She further testified that the Petitioner attended the disciplinary hearing scheduled for 12th March, 2020 which was adjourned. A new date was set for 23rd March, 2020 but the disciplinary hearing did not proceed, as the Petitioner could not travel from Uganda following COVID-19 restrictions. Attempts to schedule a virtual disciplinary hearing were thwarted as the Petitioner said that it was not convenient and insisted on a face to face hearing,

25.

RW 1 testified that the resignation notice lapsed on 27th May, 2020 before the disciplinary process could be concluded. She further stated that the Petitioner was given his terminal dues upon the lapse of notice. She contended that the Petitioner could not be reinstated as the position had already been filled.

26.

On cross examination RW1 admitted that the petitioner was employee of employee of the 1st respondent. She reiterated that CMC Motors (Uganda) Limited lost a bid on the allegation of forgery of documents and that the claimant was in charge of the process of organizing documentation submitted for the bid. She admitted that the company wrote a letter protesting loss of the bid and after the procuring entity conducted investigations it issued a letter exonerating the respondent company.

27.

RW 1 stated that the three month notice was set to lapse on 27th May, 2020, but it was not accepted before the notice period lapsed. She further stated that the company opted to pursue the disciplinary process after suspending the Petitioner on 27th February, 2020 for altering the procurement authority ruling but the process was abandoned after the notice period lapsed.

28. RW 1 further stated that the Petitioner was entitled to pension and not gratuity and that upon lapse of notice the Petitioner was paid his terminal dues.

29. On re-examination RW 1 stated that the altered ruling was the basis of the disciplinary process, which was never concluded before the lapse of the resignation notice of three months on 27th May 2020.

Petitioner's submissions

30. The Petitioner submitted that the Respondents conduct to wit malicious allegations and false complaints raised against him forced him to resign on 27th February, 2020. He also alleged that he had a bad working relationship with his Line Manger. Further, he submitted that the failure to accept his resignation and the decision to force him to go on an indefinite suspension pending investigations which were neither conducted nor concluded was tantamount to constructive dismissal.

31. He maintained that his resignation was not voluntary but a forced one and as such amounting to a dismissal without any valid reason and without following a fair procedure. He further submitted that his constitutional rights to fair labour practices, fair administrative action and fair hearing after his resignation letter was ignored.

32. He cited the case of Milton M. Isanya vs. Aga Khan [2017] eKLR, Tom Frank Naliwa Osiro vs. KPLC Ltd [2021] eKLR, and John Kahara Timau Njihia vs. Xplico Insurance Co. Ltd [2017] eKLR to support of his case. The Petitioner set out particulars of the special damages occasioned by the constructive dismissal and additional reliefs.



Respondent's submissions

33. The Respondents submitted that the test of constructive dismissal namely the unreasonableness test and contractual test were laid out by the Court of Appeal in the case of Coca Cola East & Central Africa Limited vs. Marai Kagai Ligaga (2015) eKLR and that the onus of proving constructive dismissal is on the employee. The Respondents submitted that the Petitioner has failed to discharge the said burden by failing to provide credible evidence in support of his claim for constructive dismissal. They urged that all what the petitioner has done is only to allege that he had a difficult working relationship following a frosty relationship with his immediate supervisor.
34. The Respondents submitted that following a failed procurement process in which the claimant took lead, he had forwarded an altered version of the ruling of PPDA (procurement authority) to the company CEO. The Respondents further submitted that they initiated disciplinary proceedings in order to investigate the issue of the altered ruling but, the Petitioner who had opted to resign in order to avoid disciplinary action, frustrated the disciplinary process through adjournments and refusal to have the hearings proceed virtually. Owing to the Petitioner's uncooperative conduct his three months' resignation notice lapsed before the disciplinary hearing was concluded.
35. The Respondent submitted that the Petitioner has failed to prove that his employer acted unreasonably or that the employer breached his contract of employment which forced him to resign. Therefore they urged the court to dismiss the amended petition with costs.

Issues for determination

36. I have carefully considered the pleadings, evidence and submissions and I find no dispute in the fact that the petitioner was employed by the 1st respondent. Rw1 admitted during cross examination that the petitioner's employer was the 1st respondent and he had just been transferred to work in another country vide the letter dated 15th July 2014. The issues for determination in this suit are as follows:-
 - a) Whether the petition meets the competence threshold for a constitutional reference.
 - b) Whether the petitioner resigned voluntarily or he was constructively dismissed by the respondents.
 - c) Whether the respondents violated the constitutional rights of the petitioner during the termination.
 - d) Whether the petitioner is entitled to the reliefs sought.

Competence threshold for the petition

37. The respondents objected to the petition on the ground that it did not meet the competence threshold of a constitutional reference. In their view, the pleadings were not precise on the violation complained of as required by the celebrated case of Anarita Karimi Njeru case. In the said case the court held that:

“We would, however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”



38. The Court of Appeal upheld the above decision in *Mumo Matemu –v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and dismissed the petition on ground that it failed to plead the case with reasonable degree of precision. The court held that:
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.
- (43) The petition before the High court referred to Articles 1,2,3,4,10,19,20 and 73 of *the constitution* in the title. However, the petition provide little or no particulars as to the allegations and the manner of the infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the constitution*, again without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect to the spirit of *the Constitution* and the rule of law, again without any particulars.”
39. After the amendment of the petition herein, the respondents did not pursue their objection to the petition on ground of the competence threshold. It seems that any loophole that existed in the pleadings was cured by the amendment. The court is satisfied that the petitioner has pleaded with some degree of precision, the provisions of *the constitution* that he alleges were breached and the manner in which his rights were violated. Consequently, I find and hold that the petition meets the competence threshold required for a constitutional petition.
40. On the other hand, the court was asked to find that the petitioner should have used a normal suit and not to approach the court under *the constitution*. In the *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the Court of Appeal held that:
- “ ... where there is a clear procedure for the redress of any particular grievance prescribed by *the constitution* or an Act of parliament, that procedure should be strictly followed.”
41. Again in the case of *Uhuru Muigai Kenyatta vs. Nairobi Star Publication Limited* [2013] eKLR the High Court held that;
- “it is an established practice that where a matter can be disposed of without recourse to *the constitution, the constitution* should not be involved at all...the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights...”
42. I have carefully considered the facts of the instant petition and formed the view that the reliefs sought could best be sought through a normal suit and not by constitutional petition. The claim in my view is anchored on constructive dismissal despite reference being made to violation of his rights in the Bill of Rights under Article 41, 47 and 50 of *the constitution*. The primary reliefs sought is declaration that the petitioner was constructively dismissed and that the he is entitled to compensatory damages and unconditional reinstatement. I will therefore treat the petition as an ordinary suit and the responses by the respondent as defence to the suit.



Voluntary resignation or constructive dismissal

43. The resignation letter dated 27th February 2020 stated as follows:

“Re: Resignation as Country Manager - Uganda

I Hereby tender my resignation as Country manager Wef 27th February 2020.

Accordingly I give notice Of 3 months as Per contractual employment obligation...

It has been challenging working with my line manager (Mr Noel Mabuma) since he joined the company In 2018. he has not been supportive to my stewardship At Cmc (u) Ltd. This has caused demotivation/low morale despite my performance in the Company. I have tried to escalate the matter further, but the more i find myself in irredeemable situation. Hence thrown in the towel & hope to pursue my path in life...”

44. In the case of Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Limited Industrial [2013] e KLR the Court held that:

“Constructive dismissal has its root in the law of contract under the doctrine of ‘discharge by breach’. Under the doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer’s conduct was a significant breach going to the root of the contract. The termination would be due to the employer’s conduct. The termination may include unilateral reduction of pay or failure to pay the employee.”

45. In the case of Nathan Ogada Atiagaga vs. David Engineering Limited [2015] eKLR the court stated as follows:

“Constructive dismissal occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”

46. The test for constructive dismissal was set out in the Court of Appeal case of Coca Cola East & Central Africa Limited vs. Marai Kagai Ligaga (2015) eKLR when it held that

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

47. The Court of Appeal further held that one of the principles relevant in determining constructive termination is that the employee leaves with or without notice so long as the employer’s conduct is the effective reason for the termination. Another principle identified by the court is that the onus of proving constructive dismissal is on the employee. The question that begs for answer is whether the petitioner has discharged the said burden of proof.



48. Having considered the resignation letter, there is no doubt the resignation was not voluntary. The notice clearly identified the reason as poor working relationship between the petitioner and his Line Manager. He accused the Line Manager of being unsupportive and further the failure by the respondents to address the issues. Although the petitioner did not identify the specific issues, it clear that there, was among others, disquiet in the company after a bid for tender to supply tractors to the Government of Uganda was rejected. The employer did not initiate any disciplinary process against the petitioner until he tendered his resignation blaming his Line Manager.
49. The reason for not commencing disciplinary process was because there was no valid reason. As admitted by Rw1, by the letter dated 8th June 2020 from the Executive director of the PPDPA Authority, CMC Uganda Ltd was exonerated from fraudulent practices which would amount to breach of Code of Ethical Conduct by bidders and Providers. It follows that the claimant was just being blamed by his seniors for forgery of documents for tender application without any valid reason. Had the employer waited for the report from the PPDPA Authority, the claimant would not have felt unfairly targeted.
50. Another issue emerging from the documentary evidence produced relates to the failure to increase salary for the petitioner for alleged low performance ratings. The correspondences exchanged between the petitioner and his Line Manager portrays an employee is not happy with the manner in which he was being treated by his seniors.
51. As a result of the foregoing matters, the petitioner deemed his work environment unbearable and resigned especially after his grievances against his Line Manager was ignored. The Line Manager did not testify in this case to dispute the alleged poor relationship with the petitioner. I therefore find and hold that the resignation was forced on the petitioner by his employer and as such it amounted to constructive dismissal. It was immaterial for the employer to accept the resignation because unless the employee withdraws the resignation before the lapse of notice period, the unilateral decision by the employee is final. Consequently, the letter dated 4th June 2020 merely served the purpose of terminating disciplinary process that had been rendered superfluous by the lapse of the resignation notice period.
52. Constructive dismissal in whichever way one looks at it is unfair for lack of valid reason and fair procedure. The employee is simply bundled out of his employment without his will. Once the court forms the opinion that the separation was through constructive dismissal, the termination is unfair within the meaning of section 45 of the [Employment Act](#).

Whether the petitioner is entitled to the relief/remedies sought.

53.

In view of the observations and findings herein above, I make declaration that the petitioner was constructively dismissed from employment by the respondents. I make further declaration that the dismissal amounted to unfair termination within the meaning of section 45 of the [Employment Act](#).

54.

The rest of the declaratory orders sought are declined either because they are overtaken by events or because they are not merited. The order for injunction and reinstatement are also overtaken by events and they are declined.

55.

However, the petitioner is entitled to compensation for the unfair termination under section 49(1) of the Act. Considering his long service of 18 years and the admission by RW1 that the petitioner



had a clean record, I award him twelve months gross salary as compensatory damages. His gross salary was UGX 25,642,285.35 which according to the petitioner was Kshs.733, 745. The total award for 12 months equals to Kshs. 8,804,940.

56.

The claim for three months' salary in lieu of notice is declined because the petitioner was paid the full salary for the whole notice period although the employer opted to waive his services by suspending him. It is trite that employer has the right to waive the services of an employee during the notice period.

57.

The claim for anticipatory salary and benefits until the petitioner's normal retirement in 2026 is declined for lack any legal or contractual basis. The claim for gratuity is not well founded. The petitioner produced a letter dated 9th August 2016 showing that gratuity was payable to management staff in the union. The Petitioner has not proved that he was in the union and therefore the claim for gratuity is declined.

58.

The petitioner further pays for return Air ticket. There is no dispute that the letter transferring to Uganda entitled to two return air tickets to Nairobi every year. He did not prove that he was not given 2 return tickets every year before the dismissal. Therefore I award him only one way ticket to Nairobi for his return journey after the dismissal being \$400. The same is awarded at the prevailing Central Bank of Kenya exchange rate.

59.

The claim for accrued commission is granted because it was acknowledged by the management vide the email by Mr. Mark Kass dated 16th May 2015. The amount offered by the management was Kshs. 934,250 but the petitioner seeks Kshs. 932,250. Parties are bound by their pleadings and therefore, I award the amount pleaded.

60.

In conclusion, I enter judgment for the petitioner against the respondents, jointly and severally in the following terms:

Compensation Kshs.8,804,949

Commission Kshs. 932,250

Air ticket \$ 400 @ kshs. 115.35 Kshs. 46,140

Total Kshs. 9,783,339

61.

The above award is subject to statutory deductions. The petitioner is awarded costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

