



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ochiel v Ampathplus (Employment and Labour Relations Claim  
40 of 2018) [2022] KEELRC 1691 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1691 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 40 OF 2018**

**JW KELI, J**

**MAY 18, 2022**

**BETWEEN**

**DALMAS ODHIAMBO OCHIEL ..... CLAIMANT**

**AND**

**AMPATHPLUS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant following termination of his employment contract filed a Memorandum of Claim dated 14<sup>th</sup> May, 2018 and amended on the 19<sup>th</sup> November 2020 seeking the following reliefs against the Respondent:-
  - a. A declaration that the Claimant's termination of employment was both unlawful and unfair.
  - b. Conversation for wrongful and unfair termination
  - c. Claimant's gratuity for the entire 4 ½ years contract .
  - d. 54 unpaid Salary
  - e. Two ( 2) months salary in lieu of notice.
  - f. General damages
  - g. Cost of this suit
  - h. Interest.
  - i. Any other relief this Honourable court may deem fit to grant
2. The Claimant in addition filed his witness statement dated 14<sup>th</sup> May 2019, list of documents of even date and the bundle of documents.



3. The Respondent filed response to the amended statement of Claim dated 22<sup>nd</sup> July 2021 with a notice of Preliminary Objection dated 23<sup>rd</sup> July 2021 together with list of documents dated 4<sup>th</sup> June 2018 and bundle of the documents. The Respondent also filed witness statements of Andrew Burno dated 24<sup>th</sup> May 2019, Prof. S. Kimaiyo dated 24<sup>th</sup> May 2019, Doreen Wamalwa dated 4<sup>th</sup> June 2018, Edna Were dated 4<sup>th</sup> June 2018 and Patrick Ariya dated 4<sup>th</sup> June 2018. The Respondent further filed supplementary list of documents dated 29<sup>th</sup> October 2021.

### **The Hearing**

4. The Claimant's case was first heard by Justice Nderi Nduma on the 23<sup>rd</sup> July 2019. The Claimant was the only witness of fact in his case.
5. On the 28<sup>th</sup> September 2021 when matter was placed before court it was brought to my attention that the Respondent had since filed a preliminary objection dated 23<sup>rd</sup> July 2021. I directed that the Preliminary objection be addressed into the final submissions after the hearing.
6. By consent of parties it was agreed the case was to be heard *denovo* considering the longtime since hearing of the Claimant's case and enable the court appreciate the dispute.
7. The Claimant's case was heard afresh by this Court on the 10<sup>th</sup> November 2021 and on the 16<sup>th</sup> December 2021. The Claimant, Dalmas Odhiambo Ochiel was the only witness of fact for the Claimant for his case.
8. The Respondent's case was heard on the 16<sup>th</sup> December 2021 with the following persons called as witnesses of fact:-
  - a. Brian Kipsang, the Human Resources Manager of AMPATHplus.
  - b. Patrick Aria, In charge of Mukhobale Clinic
  - c. Edna Were, Clinical Officer at Bumala A health Centre and same day.
9. The parties filed final written submissions. The Claimant's written submissions are dated 28<sup>th</sup> February 2022 and drawn by M/S Hammerton Maloba & Company Advocates and received in court on the 1<sup>st</sup> February 2022. The Respondent's final written submissions dated 8<sup>th</sup> February 2022 drawn by Cheptinga & Co Advocates were received by court on the 16<sup>th</sup> February 2022.

### **The Claimant's Case**

10. The Claimant was employed by the Respondent on 5<sup>th</sup> December 2021 as a clinical officer with termination notice period of 2 months. The Claimant claims that his employment was terminated on the 26<sup>th</sup> July 2016 in unlawful and unfair manner and seeks compensation, gratuity for the entire 4 and 1/2 years contract period, 54 days unpaid salary, 2 months salary pay *in lieu* of notice , general damages, costs of the suit and interest.

### **The Respondent's Case**

11. The Claimant's employment was terminated on ground of absconding duty and that he failed to respond to notice of show cause dated 28<sup>th</sup> June, 2016 which it says was the opportunity to be heard. The Respondent says on termination it offered to pay the Claimant two month salary in lieu of notice with 54 days being deducted from the two months being the number of days he was absent. The Respondent says the case is bad for misjoinder.



## Determination

### Issues for determination.

12. The Claimant in his submissions identified the following issues for determination:-
  - a. Whether the AMPATH Plus can be sued.
  - b. Whether the reason or termination was valid/lawful.
  - c. Whether the procedure for termination was fair
  - d. Whether the Claimant is entitled to reliefs sought.
  - e. Who bears costs of this suit.
13. The Respondent identified the following as issues for determination in the suit:-
  - a. Whether the Respondent is a registered entity
  - b. Whether the Claimant was given an opportunity to be heard regarding the reason
  - c. Whether the Claimant was unlawfully terminated
  - d. Whether the Claimant is entitled to reliefs sought.
14. The court had directed the issues under the Notice of Preliminary Objection by the Respondent dated 23<sup>rd</sup> July 2021 be addressed by parties in their final written submissions hence the preliminary objection is determined in this judgement.
15. Consequently it is the considered view the issues placed before the court for determination of dispute between the parties for conclusive determination of the suit are as follows:-
  - a. Whether AMPATH Plus was capable of being sued as the employer by the Claimant. (The Preliminary Objection)
  - b. Whether the reason for termination of employment of the Claimant was valid and justified
  - c. Whether the procedure for termination of the Claimant's employment was fair
  - d. Whether the Claimant is entitled to reliefs sought.

#### **a. Whether AMPATHPlus is capable of being sued as the employer by the Claimant.**

16. This was an issue under the Notice of Preliminary Objection dated 23<sup>rd</sup> July, 2021 by the Respondent. The Respondent stated that, "The Respondent sued as AMPATHplus" is not a legal entity capable of being sued pursuant to order 15 Rule 1,2,3,4 and order 15 (2) of the *Civil Procedure Rules*. The Respondent /Objector submit that the AMPATHPlus is unregistered entity operating under the auspices of Moi Teaching and Referral Hospital. University and Indiana University as enumerated in the Huma Resources Policy and Procedures Manual February 2013. The AMPATHPlus is not a legal entity capable of being sued. That pursuant to order 15, Rule 1,2,3 & 4 of the *Civil Procedure Rules* 2010, this omission being misjoinder and non-joinder is incapable of being cured and relies on the authority in HCC at Malindi Civil case No. 76 of 2009 *Global Real Estate Ltd v Scorpio Villa Enterprises Ltd* where Hon. H.A Omondi struck out a suit for the Plaintiff had sued a defendant that was not capable of being sued. The defendant did not exist. The Objector submits that order 15 (2) of the *Civil Procedure Rules* states that, " Issues arise when a material preposition of a fact or law is



- affirmed by one party and denied by the other.”. The Objector further submits that the legal status of AMPATH Plus and AMPATH is a material preposition of law.
17. The court has considered all authorities relied on by the Objector. The Objector says the letterhead of letter of appointment had logos of three entities namely:- Moi Teaching & referral Hospital, Moi University and AMPATH Plus and questions why Claimant close AMPATH Plus and left out the others which are legally registered. The Objector submits the decision cited by the Claimant in [Republic v The Clerk County Assembly of Baringo and William Kassait Kamket](#) is not relevant since this case is distinguishable factually from the instant case since in the said case the exparte applicant was never afforded opportunity to make presentations before the plenary
  18. The Claimant in response to the preliminary objection on this ground submits that all material documents produced in the suit including the employment contract, payslips, Human Resources Manual termination letter, bear the name AMPATH Plus in addition that all the Respondent’s witnesses testified they were employees of the Respondent. The Memorandum of Appearance filed by the Advocates on record for the Respondent indicate that the firm of Advocates has been appointed by AMPATH Plus. That without producing any evidence the Respondent claims that AMPATH Plus is a partnership between Moi University, Moi Teaching and Referral Hospital and a consortium of USA medical schools led by Indiana University. That Rule 2 of the [Employment and Labour Relations Court \(procedures\) Rules](#) 2016 defines a Respondent to mean “ a person against whom a suit has been instituted in the court or who replies to any proceedings in court”.
  19. The Claimant further submits that misjoinder of a party in a suit is not fatal and relies on Rule 5 (b) of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 and Order 1 Rule 9 of the [Civil Procedure Rules](#) which states ‘ No suit shall be defeated by reason of misjoinder or non-joinder of parties .....’”. The Claimant further relies on the decision of Justice Radido in [R v Clerk County Assembly of Baringo exparte William Kassait Kamket](#) where court held that failure to join a party under both Civil Procedure regime and Judicial Review Framework is a failure which is an irregularity which is not fatal and can be cured.

### **Determination on the Preliminary Objection**

20. On record, is a letter of appointment of the Claimant dated 5<sup>th</sup> December 2012 signed by Chief of party AMPATH Plus to serve AMPATH Plus program in Mukhobola. The letter states in part, “AMPATH Plus program is pleased to inform you that you have been offered a 4 1/2 year contract”. The same Chief of Party AMPATH Plus signs the show cause letter dated 10<sup>th</sup> February 2016.
21. The [Employment Act](#), 2007, defines an employer to mean a 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.
22. The Respondent appointed the Advocates on record. In their Reply to statement of Claim there is no where the Respondent pleaded misjoinder or non-joinder. Indeed the Respondent defended the termination of employment of the Claimant as fair. After the hearing of the Claimants case in the first instance on 23<sup>rd</sup> July 2019 by Justice Nduma, the Respondent filed a notice of preliminary objection dated 23<sup>rd</sup> July 2021 and raised the issue of misjoinder.
23. The court agrees with the decision of Justice Radido in [Republic v The Clerk of County Assembly of Baringo and William Kassait Kanket](#) that misjoinder is not a fatal irregularity. Further the court finds the Respondent herein fits within the definition of employer under the [Employment Act](#) having issued the Claimant with the contract of service. The submissions on the partnership with other entities being within the knowledge of the Respondent ought to have been addressed the Respondent by taking out



third party notice to the party it thinks should be the defendant. The court is only concerned with who is the employer under the *Employment Act*. The court has established and determined the Respondent was the employer having issued the contract of service through its Chief of Party.

24. The court determines that the Notice of Preliminary Objection dated 23<sup>rd</sup> July 2021 is an after thought and without merit. It is dismissed with costs in the cause.

**Whether the reason for termination of employment of the Claimant was valid and justified.**

25. It is a considered position of the court that for termination of employment to be said to be lawful and fair it must comply with the requirements of Section 43,45 and 41 of the *Employment Act*. Section 43 of the Act requires proof of reason for termination. Section 43(2) guides the court on the prove of reasons by providing as follows, “43(2) the reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee”. The termination is unlawful if the reasons did not exist at time of termination of the employment.
26. Section 45 of the *Employment Act* further expounds on the reasons by providing as follows: -“(2)A termination of employment by an employer is unfair if the employer fails to prove:-
- a. That the reason for the termination is valid
  - b. That the reason for the termination is a fair reason - (i) related to the employee’s conduct, capacity and capability or (ii) based on the operational requirements of the employer
  - c. That the employment in termination is in accordance with fair procedure”.
27. The criteria of fair procedure is provided under Section 41 of the *Employment Act* and the court finds that three ingredients are to be met namely:-
- a. The employer, before the termination explains to the employee in a language they understand, the reason the employer is considering termination. The court considers issuance of a letter to show cause giving reasonable time and in a language the employee understands sufficient compliance with condition.
  - b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation. The court considers that this right must be reflected in the letter of invitation to the disciplinary hearing and in the minutes of the proceedings of the hearing.
  - c. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding. The court considers the minutes of the hearing meeting reflecting the hearing of the representatives and consideration of their representation to meet this condition.
28. The Respondent’s issued the Claimant with termination of employment letter dated 26<sup>th</sup> July 2016 which indicates that the termination was on grounds of absconding work on indicated dates and for failure to respond to show cause letter dated 28<sup>th</sup> June 2016. This was the second letter of show cause issued to the Claimant by the Respondent. During cross examination Brian Kipsang (DWI) confirmed in the 2<sup>nd</sup> Notice to Show Cause the Claimant was only required to account for absence in June 2016. The termination letter included absence in months of March, April and May. DWI confirmed that the termination letter referred to the show cause of 28<sup>th</sup> June 2016 only. DWI said he would be surprised if former Human resources Officer Andrew Baino had said he had received the Claimant’s response



to the show cause letter of June. ((Referred to witness statements filed and not produced). The court finds a filed statement that is not adopted by the deponent amounts to hearsay. It is not admissible as evidence and that applies to the said statement of Andrew Baino.

29. DW1 confirmed Prof. Kimaiyo was still the CEO of AMPATH Plus. DWI said the time sheets are the reports referred to in the show cause letter. DWI said the Claimant was absent for 21 days in March and according to the report the Claimant did not work entire month . DWI was referred to a patient attended at the Clinic on the 3<sup>rd</sup> March 2016 by the Claimant and another on 30<sup>th</sup> March 2016. ( Claimant's ) bundle. DWI could not confirm the record. DWI was also shown other dates 1<sup>st</sup> March to 4<sup>th</sup> March where Claimant was present (at page 14 of the time sheet). On 7<sup>th</sup> March to 14<sup>th</sup> March No.12 Claimant was absent. DWI agreed according to the those sheets the report by the CEO was incorrect.
30. DWI stated the Claimant never responded to show cause hence not invited to disciplinary hearing. DWI confirmed that Doreen Wamalwa was supposed to endorse the sick sheet and forward to employer and the endorsed sheet is retained by employer not employee. DWI confirmed the medical certificate form does not exist. DWI confirmed the Claimant ought to have duly filled such sheet. DWI told the court that the Human Resources is the originator of all letters.
31. DWI confirmed the Claimant responded to the Notice to Show Cause of 10<sup>th</sup> February 2016 and a letter issued rejecting the reason. DWI confirmed before the letter rejecting the reasons of 17<sup>th</sup> March 2016 Claimant was not called for a formal hearing . DWI denied it was the same procedure after letter of 28<sup>th</sup> June 2016. That the Claimant was informed and employer did not receive his response.
32. At page 22, the Human Resources having noted frequent absence asked the supervisor to write name of Claimant. DWI confirmed he had not supplied time sheets for week between 17<sup>th</sup> June to 27<sup>th</sup> June 2016 and also for 4<sup>th</sup> June to 12<sup>th</sup> June 2016. DWI said they rely on summary . DWI said the time sheets are there. DWI said the week of 27<sup>th</sup> June was produced and the Claimant was absent the entire week. DWI said he was not aware if Claimant had produced his response of 18<sup>th</sup> July 2016 giving reasons why he was absent.
33. DWI said relocation money was paid to Claimant end of June 2016. That he was transferred effective 1<sup>st</sup> April 2016. That relocation payment is done after confirmation of reporting date. DWI said the Claimant had not proved difficult in relocation.
34. DW2 Patrick Aria confirmed he handed the Claimant release letter and that the handover was one day. The Claimant did not tell him why he was absent from 1<sup>st</sup> to 14<sup>th</sup> April 2016.
35. DW3 Edina Were, Clinical Officer at Bumula B Health Center told the court on oath that for one to be on sick off he had to produce medical notes and sick sheet. That medical notes and medical certificate refer to same thing. DW3 told the court during cross examination that the Claimant was absent for 20 days not 21 days in June as 1<sup>st</sup> June was a Public holiday . The Notice to show cause indicated the Claimant worked for 3 days 6<sup>th</sup> ,15<sup>th</sup> and 16 . DW3 did not produce the timesheets for 15<sup>th</sup> and 16<sup>th</sup> June. DW3 relied on the summary for 6<sup>th</sup> to 10<sup>th</sup> June 2016 and 20<sup>th</sup> to 24<sup>th</sup> June 2016. DW3 said the Claimant reported on 9<sup>th</sup> June and did not work . The Notice to show cause said he worked on 6<sup>th</sup> June . DW3 denied relocation payment is to enable employee relocate on transfer, and was not surprised it was paid in June. DW3 said distance for previous work place was 60 Km and Claimant never complained of relocation difficulty.
36. During cross -examination of Claimant he confirmed the reason for the Notice to show cause of 10<sup>th</sup> February 2016 was absence from duty. Claimant ( DOC No. 5 of this list ) had been completed by



- a doctor and he had not called him as a witness . Claimant said he forwarded the form to his boss the County Coordinator and as per the form she did not endorse. Claimant confirmed that the form was not completely filed. The Claimant said he did not avail treatment notes and the same was not a requirement.
37. Claimant confirmed he was absent for 5 days as per his sick sheets and it was outpatient 10<sup>th</sup> January 2016 to 16<sup>th</sup> January 2016. He had no evidence of being on duty 1<sup>st</sup> to 9<sup>th</sup> January and said that is not the reason under the termination letter. Claimant confirmed reason for 2<sup>nd</sup> Notice to show cause was absenteeism. When asked how many days he was absent at Bumula B, he said he was accused for working only 3 days but no evidence to confirm that . The document said he worked on 6<sup>th</sup> and reported on 9<sup>th</sup>.
38. The Claimant told the court he was supposed to respond to the 2<sup>nd</sup> Notice to show cause in 7 days and he responded and said as per the termination letter it was indicated the response was not received. Claimant told the court he responded vide letter of 18<sup>th</sup> July giving reasons of absence as sickness and medical care. Claimant said in the absent days he had not been hospitalized. He said he was attended at Nambale Health Centre and the facility was not indicated in his response letter. It was a different facility from the previous treatment. Claimant said he had not obtained consent from the patients and hospital to produce treatment sheets in court. Claimant said the late Doreen Wamalwa was sight in charge who should have signed as such and not as Principal investigator. Claimant confirmed Doreen was alive when he completed the sick sheet and when reporting to duty he was to sign time sheet. Claimant said he did not have the time sheets for June as he had been transferred. Claimant denied the sheet at page 22 (Respondent’s documents)saying signature not his and his employment number was not indicated. Claimant confirmed the names of his colleagues stated in the time sheet were familiar and said he did not know their signatures.
39. The court has carefully weighed in the evidence of both parties. The standard of prove for reasons of termination is on balance of probability and not beyond reasonable doubt and the employer is only required to prove the reasons that “genuinely believed to exist” causing it to terminate the employees services. The court of Appeal in *Judicial Service Commission v Gladys Boss Sholei* Civil Appeal No. 50 of 2014 cited with Approval the Canadian supreme court decision in *MC Kinley v B.C Tel* (2001) 2 5CR 161 “ whether an employer is justified in dismissing an employee on grounds of dishonesty is a question that requires an assessment of the intext of the alleged misconduct . More specifically the test is whether the employee’s dishonesty gave rise to breakdown in employment relationship. The test can be expressed in different ways. One would say for example, that just case of dismissal exist where the dishonesty violates an essential condition of employment contract breaches the faith inherent to the work relationship or is fundamentally or indirectly inconsistent with the employees obligation to his or her employer”.
40. The evidence of the Claimant of being sick under outpatient for more than 5 days was not believable and more so considering the said doctor who was treating him was not called and the colleagues testified he was absent from work many times without notifying them of his whereabouts. The court notes that in his statement paragraph 11 the Claimant talks of being discharged from hospital contrary to his testimony he was never admitted. The Claimant attempt to justify missing from work due to lack of relocation transfer money of Kshs. 500/- was not credible as evidence was led that the practice was that the allowance was paid on reporting to new station and had not been raised with the employer.
41. The court has no reason not to believe the time sheet at page 22 of the Respondent’s documents indicating absence from duty as the Claimant did not object to production of the document or its



verification by DW3 who was not even questioned on the same. The Claimant had opportunity to challenge DW3 during the hearing but failed to do. The court inferred that the record was credible.

42. Applying the foregoing test by the Court of Appeal in Gladys Boss Shollei case (Supra) and the standard of proof of balance of probability the court is satisfied, having weighed the evidence outlined above under cross- examination that there existed valid and justified reason being absenteeism from duty and specifically in the month of June referred in the 2<sup>nd</sup> show cause letter by the Claimant to justify the termination of his contract of service.
43. The court find and determine the reason for termination of employment of the Claimant was valid and lawful.

#### **Whether the termination was unfair**

44. Section 41 of the [Employment Act](#) provides for the procedure to be complied with before termination of employment as outlined before. The Respondent said that it never received the letter of response dated 18<sup>th</sup> July, 2016 to the 2<sup>nd</sup> show cause letter purported to have been done by the Claimant. The Respondent denied receipt of the said response and submits that even if the Response was there it was not received in 7 days. The Claimant submits that the procedure was not fair. That the Claimant ought to have be charged and heard before the termination pursuant to Section 41 of the [Employment Act](#).
45. Section 41 (1) reads that “an Employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language he understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice during this explanation.” The court had earlier expounded on the procedure(supra).
46. It was not disputed that the procedure for termination of employment under Section 41 of the [Employment Act](#) was not complied with in dismissal of the Claimant from the employment of the Respondent. The Respondent proceeded to terminate the services of the Claimant after what it said, failure to respond to the show cause letter dated 28<sup>th</sup> June 2016. The court considered decision cited by Respondent of my brother Justice Radido in Eldoret ELRC *Boaz Isiibe v AMPATH ( Moi Teaching & Referral Hospital )*No. 33 of 2017 where the court said the Claimant having been accorded opportunity to be heard even though he never appeared face to face but had been afforded an opportunity to make written representation was sufficient. The court is not persuaded that the Claimant was afforded opportunity to be heard by the Respondent. The Notice to show case does not qualify as an opportunity to be heard under Section 41 of the [Employment Act](#). The Claimant must also be explained in a language they understand in the presence of witness of their choice the reason the employer intends to terminate their employment.
  1. The court has in various decisions held Section 41 of the [Employment Act](#) to be couched in mandatory terms. The court of Appeal in [Postal Corporation of Kenya v Andrew K. Tanui](#) (2019) the court pronounced itself on procedural fairness as herein under:-
    - i. Four elements must thus be discernable for the procedure to pass muster:-...
    - ii. The reason or which the employer is considering termination
    - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and
    - iv. Hearing and considering any representation made by the employee and the person chosen by the employee.’



47. The Court applying the above procedural test by the Court of Appeal finds and determines the termination of contract of service for the Claimant by the Respondent failed the procedural test under Section 41 of the *Employment Act* hence unfair.

#### **Whether the Claimant is entitled to reliefs sought**

48. The court found that the termination of the Claimant's contract of service failed the procedural test hence unfair.

#### **Compensation for unfair termination**

49. The Claimant seeks 12 months compensation. The court is guided by the criteria under Section 49 of the *Employment Act* being the wishes of the employees the circumstances in which the termination took place including the extend to which the employee caused or contributed to the termination, the employee's length of service with the employer the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination , the opportunities available to the employee for securing comparable or suitable employment with another employer and any other compensation.
50. The Claimant's contract of service was for 4 and ½ years effective 1<sup>st</sup> October 2012 to 16<sup>th</sup> March 2017. His services were terminated on the 26<sup>th</sup> July 2016. He had thus served over 3 years and had less than 8 months to end of contract. The Claimant told the court he was 38 years old and currently employed at Homabay County as a clinical officer with one of the Non Governmental organization working there. The Claimant contributed to his dismissal for service by conduct of absenteeism.
51. The court considered the authorities relied on by Claimant and found the circumstances different hence not persuasive. For example employment under TSC on permanent terms is not comparable to a contract of 4 and ½ years. This is because the type of contract, years of expected service are important factors.
52. The Court finds that reasons for termination of the Claimant's contract of absenteeism was valid. The Court finds that the Claimant must not be seen to be rewarded for this conduct with the former employer just because the procedure was unfair. The court finds and determines that, considering all the foregoing factors under section 49, one month salary compensation for unlawful termination is adequate compensation for procedural unfairness.
53. The Claimant is awarded compensation for procedural unfairness the equivalent of one month's gross salary for the sum of Kshs. 61,510/-

#### **Claim for gratuity for the entire 4 ½ years.**

54. The Claimant having been procedurally terminated for service is entitled to gratuity for the period serviced, thus 1<sup>st</sup> October 2012 to 16<sup>th</sup> March 2017 at 10% of basic salary as per contract of service. The court determines that the Claimant is not entitled to compensation for period not worked. The Respondent's DWI in his statement stated the Claimant is entitled to gratuity of Kshs.126,251/- . The Claimant submits the court to award kshs.126,251/- as admitted by the Respondent.
55. The court finds the parties are agreeable to payable gratuity and awards as submitted by Claimant gratuity for the sum of Kshs.126,251/-.



### **Claim for withheld salary**

56. The court having found procedural unfairness, the court finds, there is a justification to withhold salary addicted of 54 days . The Respondent is hereby ordered not to deduct any days from the dues of the Claimant as indicted in the termination letter. Since the dues had not been released the prayer for 54 days withheld salary is dismissed.

### **Claim for notice pay**

57. The court found the termination of employment was procedurally unfair. The contract of service provides for 2 months notice or 2 months basic salary *in lieu* of notice. The contract is binding on the parties. The court awards 2 months basic salary *in lieu* of notice. As per the last July 2016 pay shift basic salary was kshs.28,520. Total award is kshs.57,040/-

### **General damages.**

58. The court has no jurisdiction to award general damages in employment claims. Compensation is under Section 49 of the [Employment Act](#) for wrongful termination. The Claim for general damages is dismissed.

### **Conclusion And Remedies**

59. The court having found the termination of employment was procedurally unfair and having found the reasons for termination were justified has the following awards:-
- (a) Procedural fairness compensation is awarded the equivalent of 1 month's gross salary for the sum of Kshs.61,510/-
  - (b) Notice pay award equivalent of 2 months basic salary @Kshs.28,520x2 total award for the sum of Kshs.57,040/-
  - (c) Gratuity for period worked for the sum of Kshs.126,251/-  
(The above sums a, b, c subject to statutory deductions only)
  - (d) The Respondent to pay costs of the claim to the Claimant.
  - (e) Interest awarded on award sums in (a,b,c) above from date of this Judgement at court rates until payment in full.

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF MAY, 2022.**

**J. W KELI,**

**JUDGE.**

In the presence of:-

Court Assistant : Brenda Wesonga

Claimant :- Mr. Maloba Advocate

Respondent: - Absent

