



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeru v Superfoam Limited (Cause 768 of 2017)  
[2022] KEELRC 1751 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1751 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 768 OF 2017**

**JK GAKERI, J**

**MAY 9, 2022**

**BETWEEN**

**PRISCAH KARIMI NJERU ..... CLAIMANT**

**AND**

**SUPERFOAM LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a memorandum of claim filed on April 25, 2017 alleging unlawful termination of employment by letter dated January 19, 2017.
2. The claimant prays for –
  - (a) Underpayment of Kshs 497,249.12
  - (b) Pay in lieu of notice Kshs 26,751.76
  - (c) Severance pay Kshs 267,510.00
  - (d) 19 days worked in January 2017 Kshs 16,942.78
  - (e) General damages for unlawful arrest incarceration and confinement
  - (f) 12 months' compensation for unfair and wrongful termination Kshs 321,012.00
  - (g) Costs and interest from the date of judgment.
3. The claimant's case is pleaded as follows:
4. The claimant avers that she was employed by the respondent in May 2005 as a sales agent, a task she performed faithfully until termination on January 19, 2017.



5. It is the claimant's case that on November 25, 2016 the respondent caused her arrest by officers from the Ruiru Police Station who frogmarched her to the police station and incarcerated her despite protestation as she was unaware of the reason(s) for the arrest.
6. That she gathered that she was accused of forgery but after the police carried out investigations the claimant was cleared and released.
7. That the incarceration on the respondent's instructions from 8.30 am to 7.00 pm was malicious, false detention, inhumane and contrary to fair labour practice.
8. The claimant further avers that after her release, she was suspended indefinitely was invited for a hearing slated for December 3, 2016 but did not take place and was rescheduled to December 10, 2016 but was postponed indefinitely until she was called by the Human Resource Manager on January 8, 2017 to report to the workplace the following day, January 19, 2017 when she received a termination letter dated of even date. That the allegations therein enumerated were not only untrue but incorrect and no hearing was conducted.

### **Respondent's Case**

9. The respondent filed an amended memorandum of response on August 29, 2019.
10. The respondent avers that the claim is bad in law, lacks particulars, does not disclose any cause of action and should be dismissed with costs. It denies having employed the claimant in 2005. It also denies having called the police to arrest the claimant or allegations of forgery. The respondent admits that Washington Otieno was its former driver but denies that he was found in possession of goods belonging to the Respondent. The respondent further denies that Mr Otieno received goods from one Kennedy Kyendo, another former employee.
11. It further denies that the claimant was locked up at Ruiru Police Station on its orders or was released and the matter closed. It denies having issued a suspension letter or invitation for hearings were postponed or issued a termination letter on January 19, 2017.
12. The respondent states that it employed the claimant as a tele-sales person on August 7, 2008 and her duties included taking and processing orders, initiating customer relations and maintaining existing customer relationships, ensuring all salesmen made their orders daily, writing dispatch plans and ensuring delivery of goods ordered.
13. It is the respondent's averment that the claimant engaged in double trading by feigning orders from customers to procure goods and thereafter sell them at a higher price to different customers for a profit margin she would keep, leaving the respondent to follow up the issue with the customer whose name was used to make the order but who did not purchase the goods which tainted the Respondent's reputation and reduced revenue.
14. That in one instance, the claimant and one George Owino were held accountable, took responsibility and apologised for the activity. The Chief Executive Officer of the respondent condemned the practice by an internal memo dated September 16, 2016 on which the claimant affixed her signature on September 20, 2016 but engaged in double trading and was suspended on November 30, 2016 and a show cause letter issued on January 3, 2017. That the claimant failed to attend a hearing slated for January 19, 2017. It is averred that the claimant did not respond to the notice to show cause and was dismissed on January 19, 2017. That the claimant did not respond to the notice to show cause and was dismissed on January 19, 2017.
15. The respondent denies having underpaid the claimant.



16. Finally, the respondent avers that the allegations by the claimant remain unsubstantiated. That the claimant had severally engaged in double trading in the respondent's products and despite a reprimand, the claimant still engaged in double trading and refused to attend the hearing.
17. The respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

18. The claimant adopted the written statement which rehashes the contents of the memorandum of claim and was cross examined.
19. In her evidence in chief, the witness told the court that she was neither given a hearing notice nor did she refuse to attend any hearing but admitted having received a notice of suspension.
20. It is the claimant's testimony that on January 3, 2017 she was informed by the Human Resource Manager to appear on 19<sup>th</sup> for a disciplinary hearing but on the material day she was given a termination letter and no hearing took place. The witness testified that on the day of arrest in November 2016, the police requested her to accompany them to the police station and remained there till evening when she was released.
21. On cross examination, the witness stated that she was employed in May 2007 but had no evidential proof as the payslips on record are dated 2013 and 2017. That she was honest and faithful and received financial incentives.
22. The witness confirmed that she was arrested on November 25, 2017 and sought permission to accompany the police to the station and was driven there and had no record of the OB number.
23. The witness further confirmed that one Mr Kennedy Kyendo, a sales representative is the one who had sold goods to Washington Otieno, whom the claimant is alleged to have sold the unauthorised goods to.
24. That she was invited for a hearing through a phone call and when she showed up on January 19, 2017, she was given a termination letter.
25. On re-examination the witness stated that she was arrested on November 17, 2016.

### **Respondent's Evidence**

26. Rw1, Reuben Nyaberi adopted the written statement and was cross examined. In his evidence in chief the witness explained the concept of double trading which the claimant was accused of and revealed that the claimant had been involved in such a transaction in 2011, accepted responsibility, apologised by letter dated September 2, 2011 and paid for the loss suffered by the respondent.
27. The witness states that hearing was scheduled for January 3, 2017 but the Chief Executive Officer of the respondent could not make it and was postponed to 1 January 9, 2017. That the witness called the claimant to attend the hearing. That the notice to show cause dated January 3, 2017 was posted to the claimant's address. That the claimant did not show up on January 19, 2017 but reported on January 24, 2017 at 10.00 am.
28. On cross examination the witness confirmed that the claimant was employed on August 7, 2009 as per the letter of appointment but engaged on June 26, 2008 as per general questionnaire on record and was a casual employee in 2007. That in 2011 the claimant double traded with a customer named Joy Faith Smooth Enterprises and was adversely mentioned by a customer in 2016 and that was the reason why she was requested to record a statement with the police. The witness had no evidence of the complaint by the customer.



29. The witness testified that the Manager of the respondent summoned the police and the witness was unaware of the outcome of the investigations by the police.
30. The witness confirmed that notice to show cause dated January 3, 2017 was posted to an address in Embu but was unregistered and had no record of the postage.
31. It was the witness's testimony that an internal investigation was carried out but he had no report of the investigation. That the claimant was not informed of the right to appear with another employee for the hearing.
32. The witness further confirmed that the termination letter made no reference to a hearing since the claimant did not attend and no minutes were prepared.
33. On re-examination, the witness stated that the notice of show cause was posted by an unnamed messenger.
34. That the issue of double trading in 2011 involved Joy Faith Smooth Enterprises, invoice number 129617 dated August 24, 2011 of Kshs 341,595/- and the allegations in 2016 involved the same customer.

### **Claimant's Submissions**

35. The claimant isolates two issues for determination:
  - i. Whether termination of the claimant's employment was fair/unfair/unlawful/unprocedural;
  - ii. Whether the claimant is entitled to the orders sought.
36. As to the character of the termination, it is urged that it did not meet the substantive and procedural fairness test encapsulated by sections 41, 43, 45 and 47(5) of the *Employment Act, 2007*, in that:

There was no hearing at all. The notice was allegedly posted to the claimant yet the respondent had the claimant's telephone contact. Relatedly, the respondent led no evidence of postage of the letter. The provisions of section 41 of the *Employment Act* were not complied with. The respondent led no evidence of the complaint or statement of the customer who allegedly complained. In addition, Mr Kennedy Kyendo, was not called to clarify his role, in the alleged of double trading.
37. Reliance is made on the decision in *Umuro Roba Godana v County Government of Marsabit & another* [2017] eKLR on the role of courts.
38. As to whether the claimant is entitled to the prayers sought, reliance is made on section 49 of the *Employment Act* to urge that the claimant is entitled to 12 months' gross salary as compensation. That the claimant was humiliated by being frogmarched to the police station and was released in the evening.
39. It is also urged that the minimum wage/salary is non-negotiable since it is a prescription of law. The decision in *Kenya Engineering Workers' Union v Reliance Industries Ltd* [2000] eKLR is relied upon to submit that the claimant is entitled to the sum of Kshs 497,249/-.
40. It is further submitted that the claimant was entitled to notice pay, pay for the 19 days worked in January 2017, amounting to Kshs 16,942.78, service pay of Kshs 267,510/- and costs.



## Respondent's Submissions

41. The respondent on the other hand identifies seven issues for determination, namely whether the respondent had reasonable ground to believe that the claimant was involved in double trading, the place of double trading in sections 43(1), 44(4) and 45(2) of the *Employment Act*, compliance with section 41 of the Act, character of the arrest, underpayment and the prayers sought.
42. As regards the grounds on which the respondent acted, it is urged that the claimant had access to the respondent's sales and distributorship system and procured goods and products using fake orders and requisitions in the name of existing customers of the Respondent and pocketed the proceeds.
43. It is submitted that the claimant and one George Owino were found to have been involved in double trading in 2011. That the issue came up again in 2016 and involved the same customer. Thus, the respondent had reasonable ground to believe that the claimant was responsible and by January 3, 2017, the respondent had sufficient and reasonable grounds of the claimant's involvement. Reliance is made on section 43(2) of the *Employment Act*.
44. As regards the place of double trading under the provisions of the *Employment Act*, sections 44(4) (e) and (g) are cited to urge that double trading amounted to gross misconduct. Other provisions are relied upon to urge that the reason for termination was just and valid. The decisions in *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR which relied on *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR is relied upon to submit that the court must engage on an inquiry to determine whether a reasonable employer could have acted on the facts in question.
45. It is submitted that the claimant's conduct of double trading was repeated. The decision in *Kenya Plantation & Agricultural Workers Union v Delmonte (K) Ltd* [2019] eKLR is relied upon to demonstrate the test of proportionality.
46. The respondent submits that the court should investigate the claimant's conduct of double trading, the context of her relationship with the respondent and the effect of the conduct on the respondent. That the employee's misconduct need not be proved beyond reasonable doubt that reasonable suspicion was sufficient. It is concluded that the double trading by the claimant falls under section 44(4) of the *Employment Act* and justified the summary termination.
47. As regards compliance with section 41 of the *Act*, the decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR which cited the holding in *Janet Nyandiko v Kenya Commercial Bank Limited* [2014] eKLR is cited to elucidate the requirements of sections 45 and 41 of the *Employment Act*.
48. It is submitted that the notice to show cause dated January 3, 2017 met the requirements of section 41(1) of the *Act*.
49. It is urged that the claimant failed to make representations as required by the letter dated January 3, 2017 and failed to attend for the hearing on January 19, 2017.
50. That the respondent complied with the requirements of section 41 of the *Act*.
51. As regards the arrest, it is urged that alleged criminal acts are reported to the police and the respondent did so. That the Respondent neither acted maliciously or unlawfully or in an inhumane manner.



52. With respect to underpayment, it is urged that the claimant failed to establish the claim for underpayment and as evidence was tendered and the payslips on record do not address the entire period. They relate to the period 2013 to 2017. That the law was as follows:
- (i) Legal Notice No 71 of 2012, May 2012 – April 2013 Kshs 15,001.60.
  - (ii) Legal Notice No 197 of 2013, May 2013 – April 2015 Kshs 17,101.80.
  - (iii) Legal Notice No 117 of 2015, May 2015 – April 2017 Kshs 19,154.00.
53. As to whether the claimant is entitled the reliefs sought, it is urged that the respondent had established that it complied with the law in all respects and the claim should be dismissed with costs to the respondent.

### **Analysis and Determination**

54. After careful consideration of the pleadings, evidence on record, submissions by counsel and the law, the issues for determination are whether: -
- a) Termination of the claimant’s employment was fair;
  - b) The claimant is entitled to the reliefs sought.
55. As to whether termination of employment was fair, the home port are the various provisions of the *Employment Act, 2007* which prescribe the requirements and attributes of a fair termination of a contract of employment. In this regard, sections 41, 43, 44, 45 and 47(5) of the *Act* constitute the foundation stone.
56. Section 45(2) of the *Employment Act* is emphatic that for a termination of employment to be deemed fair, the employer must prove that it:
- i. Had valid and fair reason related to the employee’s conduct, capacity or compatibility or based on operational requirements of the employer; and
  - ii. Conducted the termination of employment in accordance with fair procedure.
57. While section 43 prescribes the evidential burden of the employer to establish the reason(s) of the termination of employment. Section 44 exemplifies what constitutes gross misconduct to justify summary dismissal. Section 47(5) of the *Act* reinforces the burden of proof of the parties to an employment dispute.
58. Finally, section 41 of the *Employment Act* prescribes the mandatory procedure to be complied with for termination of employment to pass the fairness test.
59. Needless to emphasise these provisions have been elaborated and applied by this court and the Court of Appeal in innumerable decisions.
60. The Court of Appeal decision in in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR, *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR and many more are authoritative on the requirements of a fair termination of a contract of employment.
61. I will now proceed to apply the law to the facts of the instant case.



## Reason for Termination

62. From the evidence on record, the claimant joined the respondent as a casual employee in 2007 and was thereafter employed on June 26, 2008 and a formal agreement signed on August 7, 2008. She was a telesales representative at a salary of Kshs 10,000/- and entitled to 21 days' annual leave. The contract had no provision for notice of termination by either party.
63. The claimant testified, and it was confirmed by the respondent that her employment was terminated without notice on January 19, 2017. The letter stated in part as follows:
- “We refer to your conditions of employment in terms of which you are prohibited from “double trading,” engaging in this activity constitutes an offence resulting in summary dismissal. You have agreed to this condition in terms of a notification signed by you on September 16, 2016.
- We have evidence that you have been “double trading” using company client’s names to front for your activities. Your employment with Superfoam is terminated with effect of today January 19, 2017.”
64. Evidently, the professed reason for the termination of employment was double trading, an activity the claimant was engaged in, in 2011, owned up, apologised and paid for the loss to the respondent.
65. While the claimant urges that the respondent did not adduce evidence of the reason for termination of employment, the respondent submits that it reasonably believed that the claimant was involved in double trading.
66. In *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR the court rehashed the *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Vol 16(1B) para 642 as follows: -
- “In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
67. In *Charles Musungu Odana v Kenya Ports Authority* (*supra*) the court expressed itself as follows:
- “In other words, the court does not ask what it would have done in the circumstances of the particular case; all the court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the court should not interfere with the employer's decision.”
68. The court is in agreement with these sentiments and will proceed to apply them to the facts of the present case.



69. The claimant testified that she was arrested on November 17, 2016 while in the Director’s office and taken to Ruiru Police Station where she spent the entire day. The memorandum of claim states that the arrest was on November 25, 2016. The respondent’s witness confirmed that the arrest took place in his presence, the date notwithstanding. The claimant was not informed of the reason(s) of the arrest but learnt, while at the police station that a customer had raised a complaint. The claimant was neither charged nor prosecuted for any offence.
70. The respondent’s witness confirmed that he was not aware of any police investigation outcome or status of the case having been reported by the respondent’s Manager. The claimant testified that the allegation of double trading was not established. The claimant’s uncontroverted evidence is that it was one Mr Kennedy Kyendo, a colleague in sales department who had sold the alleged goods to one Washington Otieno, not her.
71. Closely related to the foregoing is the fact that the respondent did not disclose who the customer was and the nature of the complaint. The respondent led no evidence of the particulars of the complaint, not even in the notice to show cause dated January 3, 2017. How was the claimant expected to respond to generalities? The claimant had no doubt dealt with many customers during her employment by the respondent. The absence of particulars may have inhibited the claimant’s ability to respond effectively or at all.
72. Whereas the respondent bothered to avail evidence of the double trading in 2011, it led no scintilla of evidence of the misconduct of the claimant in the instant case. The objective it would appear is evidently to rely on similar fact evidence which typically generates more heat than light.
73. But more significantly, the letter of termination dated January 19, 2017 is emphatic that
- “we have evidence that you have been double trading ...”
74. Regrettably, no shred of the evidence was forwarded to the claimant or led in court. An alleged internal investigation produced no report or findings on the culpability of the claimant. The claimant had no particulars to rebut. In essence, the respondent did not conduct any investigation on the alleged misconduct and dismissed the claimant on mere suspicion based on the earlier misconduct.
75. Relatedly, the court is alive to the fact that the disciplinary hearing was first scheduled to take place on December 3, 2016 but the Chief Executive Officer of the respondent was away which explains the postponement to December 9, 2016 and later to January 19, 2017.
76. Puzzlingly, the notice to show cause is dated January 3, 2017 about one month after the initial date of the disciplinary hearing when the Chief Executive Officer was unavailable. Could it have been an afterthought?
77. This court is called upon to determine whether the respondent acted responsibly and reasonably and complied with the provisions of section 45(2)(a) and (b) of the [Employment Act](#) which are clear that the reason(s) for termination of employment must be “valid” and “fair”.
78. According to the [Black’s Law Dictionary](#), 10<sup>th</sup> edition, valid means
- “legally sufficient, binding, a valid conclusion based on the facts presented”
- while fair means
- “characterised by honesty, impartiality and candor, just, equitable, disinterested”.



79. From the foregoing, the court is not persuaded that the respondent has sufficiently discharged the burden of proof that it had a justifiable reason to dismiss the claimant from employment. The generalised allegation of “double trading” is in the court’s view neither valid nor fair.
80. The respondent’s conduct in the instant case cannot be described as having been responsible and reasonable. A reasonable employer would have relied upon established facts of the conduct complained of as the same was contested.
81. Section 43(2) of the Act relied upon by the respondent is of little assistance since the respondent’s belief was based on a mere allegation which was never tested by the employer or the police. It does not appear to have been genuine.
82. It is the finding of the court that the claimant’s termination of employment on January 19, 2017 was substantively unfair for want of a valid and fair reason as ordained by section 45 of the Employment Act.

### Procedure

83. The tenets of procedural fairness set out in section 41 of the Employment Act, have been elaborated upon in many decisions. The procedure is mandatory as held by the Court of Appeal decision in Pius Machafu Isindu v Lavington Security Guards Limited (*supra*).
84. In Postal Corporation of Kenya v Andrew K Tanui (*supra*) the Court of Appeal expressed itself as follows on the provisions of section 41 of the Act

“Four elements must thus be discernible for the procedure to pass muster: -

- (i) An explanation of the grounds of termination in a language understood by the employee.
- (ii) The reason for 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.
- (iv) Hearing and considering any representation made by the employee and the person chosen by the employee.”

85. The court is bound by these sentiments.
86. According to the respondent, it complied with the provisions of section 41 of the Employment Act in that the respondent’s letter of January 3, 2017 satisfies the requirements of section 41(1) on the reason for which termination was being considered and the claimant was aware of the contents of the letter having been involved in double trading previously in 2011. I beg to differ; the two instances are not identical nor are the circumstances. The letter is too general to pass muster. It is reticent on the customer in question and the particulars of what the claimant is alleged to have done. She double traded with who, when and how? The respondent kept the evidence to itself, if it had it in the first instance. The claimant was entitled to the evidence relied upon, as the reason for termination. Fairness demands nothing less. The respondent failed the test.
87. On the right to have another employee it is submitted that the law does not require the employer to inform the employee of the right. That the employee may waive it. This is true.



88. However, on the notification of the employee of the right to be accompanied by another employee, the Court of Appeal had the following to say in *Postal Corporation of Kenya v Andrew K Tanui* (*supra*) –
- “In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular ...”
89. The court is guided by these sentiments.
90. In the instant case, the notice to show cause makes no reference to claimant’s right to be accompanied by another employee of her choice. The respondent’s witness confirmed as much on cross examination.
91. On the issue of hearing and making of representations and their consideration, it is essential to determine whether the notice of show cause was served upon the claimant. The claimant testified that no invitation notice for the disciplinary hearing was given. It was her testimony that she was called by the Human Resource Department. The respondent’s witness testified that the letter was posted to an address in Embu, but had no evidence of registration of the letter or postage. It is instructive that the respondent had the claimant’s telephone contact and could have called her to collect the letter in person. She was still on paid suspension and thus an employee of the respondent. The respondent’s witness led no evidence that he called the claimant pick the notice to show cause. Because of the importance of the notice to show cause and the timelines involved, it behoved the respondent to ensure that the claimant actually received the letter. The respondent has not demonstrated that it made reasonable attempts to do so, the consequence of which the claimant did not respond to the notice as envisaged within seven days or at all. The letter was not registered and there was no evidence that it was actually posted. There is no evidence on record that the notice to show cause was served upon the claimant.
92. Similarly, the claimant testified that she had been informed of the meeting of January 19, 2017 and when she arrived the Human Resource Manager received her and gave her a letter of termination of even date and no hearing took place.
93. The respondent’s witness confirmed that he called the claimant to notify her about the meeting on January 19, 2017. That she did not report on the January 19, 2017 but reported on January 24, 2017 and thus did not attend the hearing having been aware of the hearing date. Strangely, the respondent’s witness statement on record makes no reference on how the letter was served upon the claimant and when. Similarly, the statement is silent on when the claimant collected the letter of termination and who issued it to her. Intriguingly, the respondent did not file a copy of the termination letter to show when the claimant received her copy or the evidence of receipt. It thus did not controvert the claimant’s evidence that she received the letter on January 19, 2017.
94. Finally, the respondent’s witness confirmed that the termination letter neither referred to the notice to show cause nor any hearing on January 19, 2017. The witness was emphatic that he had no minutes of the hearing and none had been filed. The witness confirmed that no hearing took place ostensibly because the claimant did not attend.
95. This court is of the view that even in circumstances in which an employee does not appear for a disciplinary hearing on the designated date, it is the duty of the employer to ensure that minutes are



taken as evidence of what transpired, the evidence presented and by who, those present, apologise, if any and the decision made.

96. It requires no gainsaying, particularly where a decision to dismiss or terminate the employee is made, that some record is critical. Even if the claimant is accorded a further hearing date, a clear record of the deliberations and decisions made ought to be available for future reference. In the instant case, such record would have greatly strengthened the respondent's case.
97. Unfortunately, and to its detriment, the respondent took the easier route. For the foregoing reasons, the court is satisfied that the respondent has not demonstrated that it accorded the claimant an opportunity to rebut the generalised allegations against her. This was a serious indictment which led to termination of the claimant's employment. The claimant ought to have been heard.
98. It is the finding of the court that the procedure adopted by the respondent fell short of a fair one.
99. It follows, from the foregoing that termination of the claimant's employment contract was unfair.

## Reliefs

### a. Total Underpayments As Particularised In Paragraph 14 Of The Memorandum Of Claim Kshs 497,249.12

100. Although the claimant led no oral or documentary evidence of underpayment as correctly submitted by the respondent, this is a matter of law which the respondent was obligated to comply with. The right to fair remuneration is a constitutional imperative and it is an unfair labour practice to pay employees salaries or wages below the minimum wage. The law sets the floor not the ceiling and employers are obligated to determine the salaries or wages of employees in that context and nothing less.
101. The claimant availed payslips for 2013, 2014, 2015, 2016 and 2017 only. Payslips for other years were not availed. In the circumstances it is difficult for the court to determine whether the claimant was underpaid or not having not led any evidence to that effect. However, the Respondent's payroll records attached to its amended memorandum of response at exhibits 9 – 12 show that the claimant's gross salary as at December 31, 2012 was Kshs 15,650/- while at December 31, 2013 her salary had already been raised to Kshs 17,841/-.
102. The court will proceed in accordance with the payslips on record as demonstrated below: -

Legal Notice No	Duration	Minimum wage (Kshs)	Claimant's wage (Kshs)
117	May 1, 2015 to April 2017	19,154.00	17,841.00
197	May 1, 2013 to April 2015	17,101.80	17,841.00
71	May 1, 2012 to April 2013	15,001.60	15,650.00 and raised to 17,841.00

Findings;



- (i) The claimant may have been underpaid under Legal Notice No 197 for the months of May, June and July 2013
- (ii) The claimant was underpaid under Legal Notice No 117 of 2015 from May 2015 till dismissal.

**b. Payment In Lieu Of Notice**

103. Having found that termination of the claimant’s employment contract on January 19, 2017 was unfair, the claimant is awarded the equivalent of one month’s salary in lieu of notice, Kshs 19,154.00.

**c. Service Pay/Severance Pay**

104. The claimant appears to confuse service and severance pay which are different entitlements and payable in different circumstances. While service pay is provided for under section 35(5) of the Employment Act, 2007, severance pay is provided for under section 40(1)(g) and is only payable in cases of redundancy. The claimant led no evidence of separation by redundancy and severance pay is not available.

105. Service pay on the other hand is only available subject to the provisions of section 35(6) of the Act. Paragraph (g) excludes from payment of service pay for all persons who are members of the National Social Security Fund (NSSF).

106. The claimant’s evidence on record show that she was a member of the NSSF which disentitles her service pay. The prayer is declined.

**d. 19 Days Worked In January 2017**

107. Since the claimant was still an employee of the respondent up to and including January 19, 2017, the court awards salary for the 19 days worked in January 2017. It is noteworthy that the claimant though on suspension was entitled to her salary for the 19 days.

**e. General Damages For Unlawful Arrest, Incarceration And Confinement.**

108. The claimant led no evidence to establish this claim and did not submit on it. Further the claimant admitted in evidence that persons against whom alleged criminal acts have been committed report the same to the police who after investigation determine whether or not to prosecute. The claimant led no evidence on the outcome of the police investigation or the status.

109. The prayer is not supported by any allegation of violations of any law including the Constitution. For these reasons the prayer is declined.

**f. 12 Months’ Salary Compensation For Unlawful Termination**

110. Having found that the termination of the claimant’s employment contract was unfair, the claimant qualifies for the relief provided by section 49(1)(c) of the Employment Act subject to compliance with the provisions of section 49(4) of the Act.

111. In arriving at the quantum of compensation, the court is guided by the following factors –

- i) The claimant was an employee of the respondent for about eight years and six months and wished to continue.



- ii) The claimant did not contribute to the termination but had an earlier warning letter dated September 1, 2011.
- iii) The claimant did not appeal the respondent's decision to dismiss her from employment.
- iv) The respondent had no concrete evidence that the claimant was involved in double trading in November 2016. If it had, it did not avail it to the claimant or the court to appreciate the gravity and veracity of the allegations.
- v) The respondent occasioned the claimant's arrest on an alleged complaint which it had not and did not investigate to establish its veracity. The claimant was released unconditionally and has neither been recalled or charged.

112. In the circumstances the equivalent of six months' salary is fair.

113. In conclusion, judgment is entered for the claimant against the respondent in the following terms:

- a) Total underpayment as computed by counsels for the parties jointly and filed in court within 30 days hereof for adoption with or without modification by the court.
- b) One month's salary in lieu of notice Kshs 19,154.00.
- c) Salary for the 19 days worked in January 2017 Kshs 11,740.00
- d) Equivalent of six (6) months' compensation for unfair termination (19,154 x 6 months) Kshs 114,924.000
- e) Costs of this suit.
- f) Interest at court rates from the date of judgment till payment in full.

114. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF MAY, 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 March 15, 2020 and subsequent directions of April 21, 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**

