



REPUBLIC OF KENYA



**KENYA LAW**  
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**Juma v David Engineering Limited (Cause 108 of 2017)  
[2022] KEELRC 1315 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1315 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 108 OF 2017**

**K OCHARO, J**

**MAY 5, 2022**

**BETWEEN**

**EDWIN OWINO JUMA ..... CLAIMANT**

**AND**

**DAVID ENGINEERING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a statement of claim herein dated 23<sup>rd</sup> January 2017, the Claimant impleaded the Respondent, seeking against it, the following reliefs: -
  - a) A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.
  - b) A declaration that the Claimant was entitled to a certificate of service.
  - c) The sum of Kshs. 318,000 particularized in paragraph 37 above.
  - d) Costs of this suit.
  - e) Interest on the amount awarded at Court rates.
2. In response to the Statement of Claim, the Respondent filed a memorandum of reply dated 28<sup>th</sup> June, 2018 in which the Respondent denied the Claimant's claim, pleading that it did not terminate the services of the Claimant, but instead it is the Claimant who absconded duty.
3. The matter came up for hearing on the 14<sup>th</sup> October 2021, when the Claimant's case was heard. The Claimant testified by adopting his witness statement as his evidence in chief and the documents that he had filed under a list of documents dated 23<sup>rd</sup> January 2017 as his documentary evidence.



4. The Respondent's case was taken on the 14<sup>th</sup> December 2021, when Mr. Gilbert Meo, the Respondent's Human Resource officer testified. He adopted his Witness Statement as his evidence in chief and urged the Court to admit the Respondent's documents herein filed as its exhibits.

#### **The claimant's case**

5. It was the Claimant's case that he came into the employment of the Respondent on or about the 1<sup>st</sup> of January, 2004, as a casual worker, at a daily salary of Kshs. 188.00, an equivalent of Kshs. 5,640.00 per a month. On or about 1<sup>st</sup> October, 2011, by a contract of even date, the Respondent decided to employ him permanently as an Erector for a gross salary of Ksh. 12,711.00 per a month. The salary was subsequently reviewed upwards to Kshs. 21.200, inclusive of House allowance and Transport allowance.
6. He stated that on or about the 8<sup>th</sup> December, 2015, he was sent to Moyale for an Erection project under the JZEC Contractors Limited.
7. The Claimant stayed in Moyale for a week as he waited for his colleagues to join him. With materials and tools necessary for the performance of the said project. This did not sit well with the Respondent's client who kept on complaining that the project was taking a lot of time to kick off notwithstanding that it had paid for the performance early enough.
8. Eventually his colleagues joined him and the work commenced on the 14<sup>th</sup> December, 2010. The Claimant had to work through the festive period.
9. The Claimant contended that on or about the 27<sup>th</sup> December, 2015 his colleagues and him ran out of oxygen cylinders consequently modification 'dommas' could not be done. They continued to undertake other works as they waited for delivery of the cylinders the following year, 2016 at the opening of the Respondent's offices for the new year.
10. It took the Respondent up to the 16<sup>th</sup> January, 2016 to eventually deliver the cylinders to the Claimant and his colleagues. Subsequently, the project was completed on the 3<sup>rd</sup> February, 2014.
11. The Claimant stated that on the 4<sup>th</sup> February, 2016, his colleagues travelled back to Nairobi, leaving him behind to wait for a lorry that was to carry the remaining materials and tools. He left for Nairobi on the 7<sup>th</sup> February 2016 and arrived on the 9<sup>th</sup> February 2016. He contended that for the 6-day period, the Respondent did not pay him any allowance.
12. On 10<sup>th</sup> February, 2016, the Claimant and his colleagues were allowed to proceed for their annual leave. His leave was to take 49 days as it included leave days not taken for the previous years, that is 2013, 2014 and 2015 and also public holidays that he had worked on. The leave was scheduled to end on the 31<sup>st</sup> March, 2016 and he was to report back to work on 1<sup>st</sup> April, 2016.
13. That during his leave, he travelled to his home village in Siaya as his mother was sick.
14. The Claimant asserted that all that time, the Respondent had not paid his salary and he had to service by borrowing from a friend. The Respondent's delay in payment of his salary led to his delay in getting back to work, eventually resuming on the 4<sup>th</sup> April, 2016.
15. The Claimant stated that on or about the 18<sup>th</sup> April, 2016 he received a call and got informed that his mother was unwell again. On the 19<sup>th</sup> April 2016, he got constrained to apply for off days to go attend to her. The Respondent granted him 10 days. He was scheduled to resume work on the 30<sup>th</sup> April, 2016.



16. The Claimant stated that upon reaching home, it dawned on him that the condition of his mother had deteriorated seriously. She required urgent treatment and had to be taken to Siaya District Hospital. There was no one to look after her. He had to. As a result, he was unable to get back to work within the 10 days.
17. The medical bill for his mother went up to Kshs. 70,000. She would not be discharged until the same was cleared, he asserted. The Claimant tried to call the Respondent's office to enquire about his March and April salary, he was told that everyone had not been paid. On the 17<sup>th</sup> May, 2016, the Claimant got the money to release his mother from hospital, and to enable him travel back to work.
18. He stated that on the 18<sup>th</sup> May 2016, when he reported back to work, Mr. Pritt called him to his office and told him to leave the Respondent's compound, and go pick his letter from the labour office. When he went to the labour office, he was told that there was no letter for him there.
19. He stated that on the 19<sup>th</sup> May 2016, he went to the Respondent's office but he was denied entry. He was instead handed a summary dismissal letter dated 4<sup>th</sup> April, 2016, by a security guard. The letter informed him that payment of his salary was to be only after a clear statement was presented to the Respondent.
20. An attempted settlement of the matter at the labour offices did not yield any fruits.
21. The Claimant asserted that the summary dismissal was unfair, he was not given any warning. The Respondent did not accord him an opportunity to be heard.
22. On or about the 9<sup>th</sup> June 2016, the Claimant went back to the Respondent's offices and yet against he was denied entry by the Respondent's security officers.
23. Cross examined by counsel for the Respondent, the Claimant reiterated that he travelled to Moyale on the 8<sup>th</sup> December 2015. Him and the two others who were sent to Moyale were all erectors.
24. The Claimant testified that the works at Moyale started on the 14<sup>th</sup> December 2015. That the same got completed on the 3<sup>rd</sup> February 2016, not 3<sup>rd</sup> February 2014 erroneously mentioned in his witness statement.
25. The Claimant asserted that he travelled from Moyale to Nairobi on the 4<sup>th</sup> February 2016. He did not have any document to prove the travel as he travelled by the Respondent's vehicle.
26. He claimed that when he reported to work on the 9<sup>th</sup> day of February 2016, the director of the Respondent company directed him to pick his leave days that he had not utilized, and proceed for leave. The leave was authorized. Cumulatively it was for 49 days. He was required to get back on the 4<sup>th</sup> April 2016.
27. Referred to the payslips filed under the Respondent's list of documents, the Claimant stated that they signify that he was paid for the months of March 2016 and April 2016.
28. The Claimant further stated that he sought for 10 additional off days because of his mother's ailment. He did not report when he was supposed to because, the Respondent had not paid him for two months.
29. The dismissal letter was addressed to his colleague Stephen Mutunga. He took the letter to the labour office, because he had been directed to pick his from the labour office.
30. The Claimant contended that when he tried to report back, he was not allowed into the Respondent's offices.



31. That there was a meeting between him, the Respondent and the labour officer as can be discerned from the letter dated 23<sup>rd</sup> May 2016 [page of the Claimant's documents].
32. He asserted that he formally applied for the 10 days to proceed to attend to his ailing mother. The application document is among the documents he has placed before Court.
33. In his evidence under re-examination, Claimant stated that though he was given a pay slip for March 2016, the bank statement he presented to Court is testament that he was not paid. This also applied to the months of April and May.

#### **The respondent's case**

34. The Respondent presented Mr. Gilbert Meo, its Human Resource officer to testify in support of its defence against the Claimant's claim.
35. The witness stated that the Claimant was employed as a casual worker on the 4<sup>th</sup> May 2004, and was subsequently employed as a permanent employee as an erector through a letter of appointment dated 1<sup>st</sup> October 2011. At the time of his employment his gross salary was Kshs. 12,711 which rose over the years to Kshs. 21,200.
36. The witness stated that from the Respondent's records he is aware that the Claimant proceeded on 49 days leave on the 11<sup>th</sup> February 2016. His leave was to end on 31<sup>st</sup> March 2016 and he was supposed to resume duties on the 1<sup>st</sup> April 2016.
37. That at the conclusion of his leave, the Claimant returned to work on 1<sup>st</sup> April 2016 as he was expected. However, on the 19<sup>th</sup> April 2016, the Claimant applied for a further 20 days but the Respondent granted him 10 [ten] days, and was to report back to work on the 30<sup>th</sup> April 2016. He did not report as he was expected. He did not even write a letter to explain himself or request for extension of his leave.
38. That the Respondent didn't receive any communication from the Claimant, until the 17<sup>th</sup> May 2016, when he suddenly presented himself for work.
39. When he reported, the Respondent advised him that the matter of his absence had been escalated to the labour office and was therefore out of its hands.
40. That despite having not reported on duty from 30<sup>th</sup> April 2016, the Claimant was paid his salary.
41. The witness stated that on being advised to seek advice of the labour office, the Claimant went and lodged a trade dispute between himself and the Respondent. The labour officer convened a conciliation meeting on 8<sup>th</sup> June 2016. In the meeting the witness insisted that the Claimant had to account for the 17 days.
42. The witness contended that the Claimant was not terminated. However, the Respondent eager .. to get an explanation from the Claimant as to his whereabouts for the 17 days without leave, permission, or communication.
43. Cross examined by Counsel for the Claimant, the witness maintained that the Claimant was paid all that was due to him in terms of salary. That the pay slips indicate that the salary for March and April was paid. However, he acknowledged that the bank account statement tendered by the Claimant as evidence does not reflect any credit entry indicating the alleged payment.
44. The witness acknowledged the fact that the dismissal letter dated 4<sup>th</sup> April 2016 indicated that salaries were to be held till clearance with the Respondent. The salary that the letter was referring to was that of the month of March 2016.



45. The amount of Kshs. 37,616 that was paid into the Claimant's bank account as exhibited by the pay in slip dated 1<sup>st</sup> August 2017, was done by the Respondent 8 [eight] months after the institution of the suit herein.
46. The Claimant absconded duty. However, the Respondent did not invoke the summary dismissal clause under the Claimant's contract of employment to dismiss him summarily.
47. The witness acknowledged that in matters where an employee is accused of absconding, a disciplinary process has to be undertaken. In the Claimant's case, this did not happen because he was not available. Though the Respondent had the Claimant's calls to him were not going through.
48. The witness alleged that when he met the Claimant at the reconciliation table, he verbally told him that there were disciplinary proceedings that were supposed to take place. He verbally told the Claimant to avail himself the following day, the 9<sup>th</sup> June 2016 for the same, however, he did not give him a specific time.
49. In his evidence under re-examination the witness testified that the Claimant was paid long after he had filed this matter in Court.
50. Upon this Court seeking for clarification, the witness stated that though the Respondent had postal addresses for all its employees inclusive the Claimant, he did not write any letter addressed to the Claimant through his address.

#### **The claimant's submissions**

51. The Claimant's Counsel suggests the following issues as the issues for determination in this matter, thus;
  - (i) Whether the Claimant was dismissed from employment or absconded duty.
  - (ii) If the answer to the above question is to the affirmative, whether the said dismissal was lawful and fair.
  - (iii) Whether the Claimant is entitled to the remedies sought.
  - (iv) Who should bear the Costs of this suit?
52. On the first issue, it was submitted that parties herein did not have a common stand as to how the separation occurred. The Claimant took the position that his employment was terminated unfairly, while the Respondent on the other hand argued that the Claimant absented himself from duty without any cause or communication. In view of this, the court is left to decide as to who is telling the truth. The Respondent's version shouldn't be believed by the Court. The Respondent's witness conceded that a Notice to show cause is to be issued to an employee who has absconded duty. Despite this, the Respondent failed to produce any Notice to show cause in court.
53. In addition, the witness under cross-examination alleged that they tried to call the Claimant but he was not reachable, however this claim was not supported by any documentary evidence. Again, the witness confirmed to the Court that he attended the conciliation meeting at the Labour offices held on 8<sup>th</sup> June, 2016 where the Claimant was present. He could however, not explain why he did not inform the Claimant of any disciplinary proceedings at that point. Truly, if the Respondent had the intention of conducting a disciplinary hearing, and the Claimant was unreachable, then he have been informed of the proceedings at this point.



54. Mr. Gilbert [the Respondent's witness] also confirmed to the Court that the Respondent had the addresses of all its' employees and confirmed that this was also an alternative way of reaching the Claimant. Mr. Gilbert mischievously tried to deceive the court that the Respondent wrote a letter to the Claimant on this address informing him of the disciplinary hearing. He could however not explain when the said letter was dated as the same was not produced in court.

Reliance was placed on the case of *David Nyaniui Mburu -vs- Sunmatt Limited* (2017) eKLR, where the Court held as follows with respect to absconders: -

“From the explanation of the Claimant, the reason for dismissal was abscondment. The issue of dismissal on account of abscondment has been discussed in several case law (see Nairobi ELRC Case No.352 352/2012 - Wasilwa Judge) and *Godfrey Aniere vs. Unique Suppliers Limited* (Nairobi ELRC Cause 65 of 2011 - where J. Abuodha stated that: -

“In dismissal on account of absconding to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time” —

55. The Respondent failed to show the steps they took steps to reach him. The Summary Dismissal letter issued by the Respondent does not in any way raise the issue of abscondment. This clearly shows that the issue of the Claimant absconding is a mere afterthought to camouflage its' illegal actions. The Claimant was dismissed and did not abscond duty.

56. On the second issue Counsel submitted that in considering whether a termination of an employee's was fair, a court would usually consider two aspects, substantive justification and procedural fairness. Addressing the aspect of substantive justification, Counsel cited the case of *David Gichana Omuva -vs- Mombasa Maize Millers Ltd* (2014) eKLR, where the Court expressed itself;

“Section 43 of the *Employment Act* has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the Act on the other hand requires the employer to prove that the reason(s) for terminating are valid and fair reasons.”

57. The Respondent issued the Claimant with a Summary dismissal letter stating that the Claimant's conduct had indicated a fundamental breach of his obligations under the Contract of service between the it and him. The Respondent didn't have a valid reason to terminate the Claimant's employment. The Respondent took a position that it didn't terminate the employment, and its witness testified so, yet it issued a dismissal letter.

58. The Claimant stated that he was issued with a Summary Dismissal letter on 19<sup>th</sup> May, 2016. In its' response, the Respondent admitted that the Claimant was allowed to go on leave on 19<sup>th</sup> April, 2016. The termination letter issued by the Respondent is dated 4<sup>th</sup> April, 2016. It does not in any way make sense that the Claimant was allowed to go on leave after he was terminated.



59. On procedural fairness, it was submitted that section 41 of the *Employment Act* provides for procedural fairness and to buttress this submission, reliance was placed on decision in the case of David Gichana Omuya where the Court observed: -

“ And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

60. The Claimant testified on how he was terminated on 19<sup>th</sup> May, 2016 without being accorded a disciplinary hearing. The Respondent didn't establish that it did take care for procedural fairness when it determined the Claimant's employment.
61. On the reliefs sought by the Claimant, it was submitted that he is entitled to one month's salary in lieu of notice by dint of the provisions of section 36 of the *Employment Act* which provides;
- “ Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section”.
62. The Claimant having demonstrated that his employment was terminated without valid reason, and without notice, he is entitled to the relief.
63. It was further submitted the Claimant abandons his claim for unpaid salary as during the pendency of this matter, the Respondent deposited Ksh. 37,000.00 to his back account on 1<sup>st</sup> August, 2017, and can be confirmed from the deposit slip dated 1<sup>st</sup> August, 2017 that the Respondent placed before the Court.
64. The Claimant's Counsel submitted further that the Claimant is entitled to a compensatory relief under section 49[1][c] of the *Employment Act*, for the unfair termination of his employment. To him, 12 months gross salary will serve justice.

### **Respondent's submissions**

65. The Respondent's Counsel identified four issues as the ones that present themselves for determination in this matter, namely;



- a) What was the nature of the employment between the Claimant and the Respondent?
  - b) Was the Claimant unfairly terminated by the Respondent or he absconded duty?
  - c) Is the Claimant entitled to the reliefs sought?
  - d) Who is entitled to costs of this suit?
66. It was submitted that there is no dispute that the Claimant was an employee of the Respondent and that the two parties formed their relationship through various fixed term contracts between 09<sup>th</sup> February 2009 and 1<sup>st</sup> May 2015. The last contract of engagement of the Claimant was a fixed term contract dated 1<sup>st</sup> May 2015 with effect from the same date, contract which was to run for a period of one year from until 30<sup>th</sup> April 2016.
  67. Counsel further submitted that it was a term of the employment contract inter alia that depending on the availability of work, the Claimant would be required to work overtime and compensation thereof would be paid at the end of the month. Consequently, the payment for the overtime worked, as would be indicated on the Claimant's pay slip would vary from time to time.
  68. The Claimant under cross examination did confirm that his basic salary was Ksh. 10,759.00, contrary to his assertion that he was earning Kshs.12,416.00. It was contended that the Claimant was employed as a General Labourer with effect from 1<sup>st</sup> May 2015 to 30<sup>th</sup> April 2016.
  69. On the second issue, it was submitted that the burden of proving that a termination of employment was unfair and or unlawful rests on an employee by dint of the provisions of section 47[5] of the *Employment Act*. To buttress this submission reliance was placed on the case of *George Onyango Akuti vs G4S Security Services Kenya Ltd* [2013 eKLR].
  70. Counsel submitted that it was the Respondent's evidence that, on 24<sup>th</sup> March 2016, the Claimant reported to work and was allocated work by the supervisor. However, once the supervisor was done with allocation of work, he went to the area where he had allocated the Claimant work and discovered that he was not present. Upon further inquiry, the Supervisor established that the Claimant had left the workplace with the staff from the nightshift. The supervisor later confirmed the same from the clocking out time-sheet.
  71. Subsequently, the Claimant did not report to work on the next working day and has since then never reported to place of work for duty and had not given any notice or reason as to his absence from work. All these amounted to gross misconduct under section 44[4][a] of the *Employment Act*, would attract a summary dismissal sanction.
  72. It was further submitted that the Respondent as was expected of him, notified the Claimant that his absenteeism would attract a sanction against him, through a letter dated 1<sup>st</sup> April 2016 and an email dated 10<sup>th</sup> May 2016. Of what was expected of the Respondent, Counsel placed reliance on the case of the case of *Felistas Acheba Ikatwa vs Charles Peter Otieno* [2018] eKLR, where the Court stated that;
 

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”



73. And *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR, Nduma J. observed that;

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

74. It was contended that the Claimant absconded duty, did not respond to a show cause letter issued by the Respondent and thus cannot complain about not being granted an opportunity to be heard. The case of *GMK v Kenyatta National Hospital* £2020j eKLR, where the court held as hereunder was cited, thus;

“The letter clearly warns the claimant that if he failed to show cause his services would be terminated. An employee who absconds duty, and who does not respond to a show cause letter, cannot complain about being heard because such an employee is unavailable to be heard.

From the foregoing, I find that there was valid reason for taking disciplinary action against the claimant. Further having failed to respond to the show cause letter and his whereabouts being unknown, the respondent was justified in summarily dismissing the claimant...”

75. On the reliefs sought, Counsel for the Respondent submitted that having failed to establish that the termination was unfair, the Claimant cannot be heard to claim entitlement to any of those reliefs sought.

### **Analysis and Determination**

76. From the material placed before me I distil the following issues as the issues for determination in this matter:

- a) Whether the Claimant’s employment was terminated by the Respondent.
- b) If the answer to [a] above is in the affirmative, whether the termination was fair.
- c) What reliefs are available to the Claimant if any.
- d) Who should bear the costs of this suit?

### **Whether the Claimant’s employment was terminated by the Respondent.**

77. The parties took a diametrically opposite positions on whether the Claimant’s employment was terminated by the Respondent. The Respondent all through denied that it terminated the Claimant’s employment, and maintained that the latter absconded duty. The Claimant on the other hand charged that his contract of service was brought to an end when Respondent refused to allow him resume duty after a delayed resumption from leave, referring him to the labour offices, and eventually handing him a dismissal letter through a security guard. The Claimant was refused access to his place of work by the guards allegedly at the instructions of the Respondent’s Human Resource officer.

78. The parties were in agreement on one point however, that the Claimant reported from his leave way beyond the day he was supposed to, and that upon getting back to his work place, he was not allowed to work, he was referred to the labour office, for his letter.



79. I find it imperative to state in extenso what the Respondent's witness stated in his witness statement thus: -

“That when the Claimant” reported on duty on 17<sup>th</sup> May 2016, 17 days after he was supposed to have resumed duties, the Respondent advised him that the matter of his absence was beyond it and such advised the Claimant to seek advice from the labour office.”

From the statement it is easy to discern that the Claimant was being told that the Respondent had nothing to do with him at that time. It could not deal with him anymore. The Respondent was implicitly stating that.

80. The Respondent “threw” the Claimant into the hands of a 3<sup>rd</sup> party who would ordinarily have nothing to do with its internal disciplinary affairs. The Respondent did not explain to Court what the justification for this was.

81. This Court faced with a similar situation as is here, in the case of [Rebecca W. Nyangolo vs. Prashant Raval](#) [2021] eKLR expressed itself, thus: -

“54 The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer, dismissal by definition, is initiated by the employer, nor is it something which merely happens – Schmann Concept Communications Natal [Pty] Limited [1997] 8 BLLR 1092 [LC]. In essence some overt action by the employer must be present to bring the employment into termination.”

82. With the above stated premises, I am swayed to hold that the action by the Respondent was an overt act that signified an intention of the Respondent to bring the employment of the Claimant into termination. This coupled with the fact that the Claimant was refused entry into his work place. I believe his evidence that indeed he was denied the entry.

83. The Claimant contended that Respondent served him with a dismissal letter through the security guards, which letter turned out to be one that was intended to be his colleague's. The Claimant further testified that when he went to the labour office, he found copy of the same letter there. The Respondent only contended that the letter was not for the Claimant. Reasonably one would expect them to question the Claimant on how he got the letter or absent of this, explain how the letter left the author's office. This the Respondent did not do. The Court is left with a safe conclusion that as much as the letter was not intended for the Claimant, it signified its decision to terminate his employment.

84. In conclusion, I hold that the Respondent terminated the Claimant's employment.

#### **Whether the termination was fair**

85. In considering whether a termination of an employee's contract of service was fair, one has to check on two aspects; procedural fairness and substantive fairness. Section 43 of the [Employment Act](#), places upon an employer the burden of proving the reasons for the termination failure of which the termination shall be deemed unfair in terms of section 45 of the Act.

86. The Respondent took a firm position that it did not terminate the employment of the Respondent. consequently, there was no evidence led on its part to prove the reasons for the termination, and that the reason[s] was valid and fair. Having found that the Respondent indeed did terminate the contract, and the Respondent having not discharged its burden under section 43 and 45 [2] of the [employment Act](#), I hold that the termination was substantively unfair.



87. The Respondent contended that the Claimant absconded duty. Of significance, what comes out of the Respondent witness' evidence is that, notwithstanding the absconding, the Respondent never at any time made a decision to terminate the Claimant's employment on this ground. Therefore, one cannot be heard to consider absconding as the ground upon which the termination was anchored.
88. I now turn to procedural fairness. It is very clear that the Claimant was not subjected to any form of disciplinary proceedings. He was not accorded any opportunity to defend himself on the whatever grounds that prompted the Respondent to terminate his employment in the manner it did. The Respondent's witness's testimony confirms this. Without much ado, the Court concludes that the termination was procedurally unfair.

**What reliefs are available to the claimant?**

89. The Claimant's employment contract was one terminable by notice pursuant to the provisions of section 35 of the Employment Act. It is not in contest that the notice was not issued to the Claimant. He is therefore entitled to one month's salary in lieu of notice pursuant to the provisions of section 35 as read together with section 36 of the Employment Act, therefore Kshs. 21,200. [Twenty-one thousand, two hundred].
90. The Respondent stated that while this matter was pending in Court, it paid into the Claimant's account a sum of Kshs. 37,016, on the 1<sup>st</sup> August 2017, the amount being the salary that had remained unpaid. The Claimant did not dispute the payment. The Court cannot therefore grant the relief sought under the "Outstanding salary."
91. Section 49 of the Employment Act, 2007 bestows upon Court authority to award an employee who has successfully assailed his dismissal or termination of his contract of employment as unfair, a compensation to an extent of 12 months' gross salary maximum. The grant and the extent thereof depend on the circumstances of each case. I have considered the circumstances under which the Claimant's employment was terminated, including the fact that the Respondent did not bother that it had not paid his salary for a period of 2 months as at the time the termination occurred, that the Respondent deviated from what the law required of it, and the length of period the Claimant remained in the employment of the Respondent and find that he merits the grant of the compensatory relief, to an extent of 7 months' gross salary, therefore Kshs. 148,400 [One Hundred and Forty Eight Thousand Four Hundred].
92. In the upshot, I enter Judgment for the Claimant in the following terms:
- a) A declaration that the termination of the Claimant's employment was unfair.
  - b) One month's salary in lieu of notice, Kshs. 21,200.
  - c) Compensation pursuant to section 49 [1] [c] of the Employment Act, Kshs. 148,400.
  - d) Interest at Court rates on the awarded sums, with effect the date of filing suit till full payment.
  - e) Costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

.....

**OCHARO KEBIRA**

**JUDGE**



Delivered in presence of:

Ms Wanyama holding brief for Walubergo for the Respondent.

No appearance for the Claimant.

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

