



**Dogra v Elite Travel Services Limited (HRG Kenya) (Cause
1587 of 2017) [2022] KEELRC 3945 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1587 OF 2017
K OCHARO, J
JULY 29, 2022**

BETWEEN

REETA KAUR DOGRA CLAIMANT

AND

ELITE TRAVEL SERVICES LIMITED (HRG KENYA) RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated August 4, 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs;
 - a) A declaration that the termination was unlawful;
 - b) One month's salary in lieu of notice - Kshs 320,000
 - c) Salary for 23 days worked in the month of June 2017 - Kshs 245,000
 - d) 6 days accrued annual leave – Kshs 64,000
 - e) Damages for wrongful termination
 - f) Costs of this suit; and
 - g) Interest on (b), (c), (d), (e) and (f); and
 - h) Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The Memorandum of Claim was filed contemporaneously with the Claimant's witness statement, and a bundle of documents that she had intended to place reliance on as documentary evidence in support of her claim. When the matter came up for hearing, she moved the court to adopt her witness statement as part of her evidence in chief, and admit the documents as her documentary evidence.



3. The Respondent filed its Memorandum of Reply on the September 13, 2017 accompanied by witness statements and a list of documents which were adopted as evidence in chief and documentary evidence at the hearing, respectively.
4. At the Close of pleadings, the matter got destined for hearing inter-partes on merit. The Claimant's case was heard on October 13, 2021 and the Respondent's on November 3, 2021.

Claimant's case

5. The Claimant stated that she was employed by the Respondent as an Operations Manager on September 22, 2015. Prior to joining the Respondent's workforce in the stated capacity, she was the General Manager East at Unity Resources Kenya Ltd [Unity]- a procurement and logistics organization. She had worked there for 5 years.
6. In her employment with Unity Resource Kenya Ltd, she was charged with the responsibility of overseeing the general management of the company's logistics, business and its satellite operations, throughout Africa.
7. After serving a 2 months' probation period, she was confirmed into employment on November 23, 2015. Her role at the time of appointment was to generally streamline policies and procedures of the Respondent company.
8. The Claimant contended that in the month of March 2017, after being in the employment of the Respondent for a period of 1 year and 4 months, the Respondent sent her an email detailing her Job Description. The job description was neither discussed nor agreed upon but it had the effect of expanding the scope of her duties.
9. Thanks to her satisfactory standard and quality of work, the Respondent, effected salary increments in her favour at various times, seeing her monthly earnings rise from Kshs 150,000 to Kshs 320,000.
10. It was her testimony that on February 17, 2017, she brought to the attention of the Respondent company that she had approved paternity leave for a member of staff. This didn't sit well with the Respondent's Managing Director who retorted by outlining the company's policy on the same stating that no paternity leave was not allowable and that any staff seeking the same was free to resign from employment.
11. She stated that she decided and proceeded, to explain to the Managing Director that paternity leave was a legal right, and it is here that she started encountering headwinds in her employment relationship with the Respondent. The Managing Director's attitude towards her changed as her actions were perceived to be in support of staff and not in the best interest of the company. A witch hunt ensued.
12. On the same date, she was served with her first warning letter relating to the approval of sick leave that she had made for one of the members of staff, Joyce Kariuki on February 7, 2017. In the warning letter the Respondent contended that the leave was approved by her on basis of a prescription note instead of a Doctor's medical note. That prior to issuance of this the warning, she was not asked, and given an opportunity, to explain herself on the alleged misdoing.
13. That she was served with a second warning letter barely 3 days after the issuance of the first one on account that she failed to report to the Managing Director on the whereabouts of the member of staff whose sick leave she had approved. The employee the subject matter of the second warning letter was Joyce Kariuki, whose leave was the subject matter of the 1st warning letter. She had been absent without leave from February 10, 2017 until the February 15, 2017.



14. The Claimant found the issuance of the 2nd warning letter unwarranted, for the absence of the employee from duty without authority ought to have been a disciplinary matter against the employee. There was no nexus between the conduct of the employee and her omission if any. The employee had a direct report to the Travel Manager who was in a better position to know when she was absent and her whereabouts. She was not notified of any intention on the part of the Respondent to commence any disciplinary action against her on this account, and that she was not accorded any chance to respond to the accusation.
15. On June 16, 2017, a Bid Writer sent an email to respective Department Heads requesting an input on a Request for Proposal. She was tasked with providing feedback on some technical and financial sections, which she worked on with the Head of Finance.
16. She further stated that given the nature of some of the questions that needed feedback, the Bid Writer had also requested for feedback from the Travel Managers who were better placed to provide the required data. However, the requested information didn't come through in time as was expected.
17. The Claimant states that on June 19, 2017, she applied for leave scheduled to commence on the June 23, 2017. The application was approved by the Respondent. She applied for the leave owing to a family commitment, taking her mother to the Indian High Commission for a scheduled appointment. On the eve of the scheduled leave, she was requested by the Managing Director to ensure that the feedback on the required technical and financial sections were completed and handed over to the Bid Writer.
18. She reformatted the Request for Proposal response as per the Managing Director's request, printed the hard copies for submission and sent the soft copies to both the Bid Writer and Head of Finance.
19. Upon submission of the hard copies, the Managing Director enquired as to whether she had read through the 1st draft of the entire response and when she answered in the negative stating that it was not possible as the Bid Writer had advised that she had not received prompt feedback from the Travel and IT departments on some queries and therefore a first draft was not available for her review as at Thursday June 22, 2017, so as to be presented to the Managing Director, the Director got irked and took the opportunity to make slighting remarks on her capacity as the Operations Manager, and the quality of the written document by the Bid Writer.
20. On June 22, 2017, at a time when she was retiring for a night rest, she got several missed calls from the Respondent's Head of Finance and a text message informing her that her leave had been withdrawn and that she had to report to work the next day to continue working on the Request for Proposal.
21. She maintains that the same was impossible as she had made prior commitments including the scheduled visa interview at the High Commission of India. That she however committed to provide the Bid Writer with the necessary support in her spare time and prior to submission of the report on June 27, 2017.
22. That aggrieved and frustrated by the unilateral and unfair decision to retract her leave when it was impracticable to reschedule her planned commitments, the Claimant was forced to write a resignation email. She submitted the same on Monday January 26, 2017. The resignation was to take effect the following day. However, the Managing Director responded to the email informing her that the resignation was unnecessary as the decision to terminate her services had been reached on June 23, 2017.
23. She states that she was also informed that she had to avail herself on June 27, 2017 to receive her letter of termination and hand over. She proceeded to undertake the handing over process but same was delayed



by the Managing Director who insisted on documents which were not in her possession, making completion thereof difficult.

24. The Claimant asserted that in the termination letter she was accused of a failure to complete the work pertaining staff appraisal. This accusation was not grounded as the staff appraisal template had been completed and a soft copy submitted. The only pending item was filing of the same.
25. She contended that her termination was unjustified and wrongful and that she was not issued with a month's termination notice. In addition, the grounds that formed the basis for the termination were not brought to her attention, and that she was not accorded an opportunity to defend herself against the same.
26. In her evidence under cross examination the Claimant stated that her job description was sent to her via email, almost one and half years into the employment relationship. The document encompassing the job description was however not signed by the Respondent and her. It was undated.
27. She reiterated that she had salary increments as she had stated in her evidence in chief. However, she didn't have any documentary proof.
28. Referred to the Respondent's documents, the Claimant admitted that there were email correspondences between her and the Director touching on her work performance. That among the email correspondences from the Respondent was one complaining about an assignment that the Claimant was supposed to undertake but which she hadn't.
29. Referred to the resignation notice, the Claimant stated that it was via an email that she sent on June 25, 2017 at 8.42 pm.
30. The Claimant stated that at separation she was not paid any money at all. The payment of Kshs 189,163.80 was paid after she had filed the matter herein.
31. In her evidence in re-examination, the Claimant stated that before March 2017, she would be tasked verbally. The Job description that was given to her in March 2017 was so given by the Managing Director in hard copy.
32. As the email from the Managing Director pointed out, the leave of Joyce was approved on strength of a prescription and not a doctor's recommendation. On that she apologized. The approval was reversed.
33. The Claimant testified further that there was no disciplinary policy at her work place. She was not aware that she was supposed to appeal against a warning letter.
34. When she joined the employment of the Respondent her starting remuneration was Kshs 150,000, being the Kshs100,000 that was reflected on the letter of appointment, and Kshs 50,000 that she normally received in cash. After she was confirmed into employment the amount that she was receiving in cash was increased to Kshs 80,000.
35. That in April 2016 when the Respondent secured World Bank funding, the amount of Kshs 100,000 was increased to Kshs 180,000. In January 2017, there was a salary increment across the board. The amount that she was receiving in cash, Kshs 50,000 was increased by Kshs 40,000. The Respondent was paying her salary in this segmented manner for audit purposes.
36. To bolster her case, the Claimant called one witness, Ruth Wairagu. The witness urged the court to adopt her witness statement dated February 1, 2017 as her evidence in chief. As there was no objection from the Respondent, the same was so adopted. The witness stated that the Claimant was her colleague



- in the employment of the Respondent at all material times. That during the Claimant's tenure of employment with the Respondent, she [the witness] was working in the position of Bid Writer.
37. The witness stated that she worked for the Respondent for a period of 7 [seven] years rising through the ranks from a Senior Marketing Executive to Bid Writer and Implementation Manager.
 38. She stated that the Respondent paid management staff in two parts. One portion was processed through payroll net of tax directly to the employee's Bank account. The second portion was paid in cash handed over personally by Head of Finance Accountant, Remmi Sirajudin. This mode of payment was a standard procedure for a majority of Senior Managers and long-term staff.
 39. According to the witness, she had a close working relationship with the Claimant and in the course thereof she came to appreciate her as a person who carried out her duties diligently and with the Respondent's interest at heart.
 40. The relationship between the Claimant, the Respondent's Managing Director and the Finance manager was one that thrived on collaboration and team work, till February 2017 when things started to go South. It all started when the Claimant mentioned to the Director that the IT Manager was due for paternity leave. The Director was not happy. She told the Claimant that she and the IT Manager were free to leave the company if they insisted on the Manager's paternity leave.
 41. According to her the issue of paternity leave was an issue that had been outstanding for some time in the company. She had also raised it earlier, and the need for the company to adhere to the Labour Laws of Kenya. A concern which didn't attract any action from the Respondent Company.
 42. Sometime in June 2017, the witness was required to prepare a bid to the Insects and Livestock Research Institute [ILRI]. Initially, the Managing Director gave instructions that the finance part of the document would be addressed by her and the Head of Finance/Chief Accountant while the witness addressed the Technical part. The Claimant was assigned to deal with all the other bids, tenders, and pre-qualifications that otherwise the witness could handle to enable her sufficient time to work on the ILRI bid.
 43. However, later the Managing Director subdivided the document, and assigned some sections to the Claimant, to handle. The Claimant worked on the sections that had been assigned to with the assistance of the Head of Finance/Chief Accountant and Travel Managers. The work progressed on well up until the eve of the Claimant's leave.
 44. The following day, the Head of Finance informed her that the Claimant had proceeded on leave despite the final draft of the bid being incomplete. Since she was the one tasked to handle the main parts of the Technical section, she [the witness] managed to complete it with the assistance of the rest of the team in good time. The finance section was already completed by the Claimant with the assistance of the Head of Finance.
 45. The bid was successfully completed and submitted to the ILRI by the due date. The successful completion and submission of the bid didn't hinge on the Claimant alone. The bid was not successful, a thing that cannot be attributed to the Claimant for on a number of occasions the Respondent had lost bids due to its pricing.
 46. The witness stated that she came to learn that the Claimant's employment had been terminated when she came to the office to hand over. The Managing Director, and the Head of Finance, walked with her into the shared office, taking her through each cupboard as she took out her belongings. The witness would hear the Managing Director shouting at the Claimant in a derogatory manner. She would not stand the manner the Claimant was being treated, she had to leave the office.



47. In her evidence under cross examination, the witness testified that in her opinion, the Claimant was a diligent worker. The witness reiterated that due to good performance that was posted by the Respondent company in 2016, the Claimant and her were commended for their contribution.

Claimant's Submissions

48. The Claimant's Counsel submitted on whether the Claimant's employment was unlawfully, unprocedurally, and unfairly terminated. She submitted that section 41 of the [Employment Act](#) provides for notification and hearing before termination of an employee's employment. The Respondent's first witness in her testimony confirmed that the meeting to discuss the termination of the employment was held on the 23rd day of June 2017. The witness was however unable to produce any minutes in relation to the alleged meeting. However, it is clear that the Claimant was not present in the meeting. She was not accorded any opportunity to make her representations therefore.
49. The Respondent's failure to, notify the Claimant that it was intending to terminate her employment and accord her an opportunity to defend herself was contrary to the above stated provision and therefore rendered the termination of her employment procedurally unfair.
50. It was further submitted that section 43 of the [Employment Act](#), places an obligation on an employer to prove the reason or reasons for the termination of an employee's employment, otherwise the termination shall be deemed unfair pursuant to the provisions of section 45 of the [Act](#).
51. The termination letter that the Respondent placed before the Court brings out several possibilities as to the reason for the termination. A reading of the letter reveals that the Respondent didn't have a genuine reason for the termination. It is not coherent on a common theme.
52. It was further contended that the evidence of the Respondent dwelt so much on the performance of the Claimant in her duties. However, there was no evidence placed before the Court to establish that the Respondent had mechanisms in place for evaluation of its employees' performance. There was no evidence too by the Respondent's witnesses that the alleged below Par performance was brought to the attention of the Claimant.
53. From the termination letter it appears that one of the reasons why the Claimant's employment was terminated was that she had received a third warning letter from the Respondent. The Respondent failed to tender evidence before the Court to demonstrate that it had a Human Resources Policy & Procedures, or Grievance Policy and Procedures that provided for the circumstances under which warning letters would be issued or converted to termination of employment.
54. It was further submitted that the [Employment Act](#) provides for prohibited grounds for termination of an employee's employment which include "going on leave," The prohibited grounds are brought out in section 46 of the Act. The termination of the Claimant which was related to the going on leave was therefore unlawful and in contravention with the provisions of Section 46(b) of the [Employment Act](#).
55. The Respondent's contention that the Claimant resigned from employment was an afterthought. It is a contention that is not in sync with the Respondent's own evidence. The computation of the Claimant's dues was up to the 23rd day of June 2017, the date of the "termination meeting." If indeed the separation was as a result of the resignation, the computation would have been for up to the date when the Respondent allegedly accepted the resignation.
56. Assuming the Court were to agree that the Claimant resigned, the resignation was as a result of a hostile working environment that was created by the Respondent and its breach of fundamental terms of the contract of employment. Therefore, she was constructively dismissed.



57. The Claimant was entitled to leave which she had applied for and approved by the Respondent. The decision by the Respondent to arbitrarily recall and cancel her leave that was so important considering the circumstances under which it was applied for was frustrating to the Claimant. Without delay and not acquiescing to the actions of the Respondent, the Claimant resigned.
58. It was argued that the Respondent made the working conditions for the Claimant difficult. The Respondent would needlessly lay blame on the Claimant. For instance, the Respondent's blame on her that she failed to review the first draft of the ILRI bid when in fact there was no bid for her to review, as the person compiling the draft had not completed to.
59. To buttress her submissions that the Claimant's case meets the threshold for constructive dismissal, reliance was placed on the cases of *Coca Cola East & Central Africa Limited v Maria Kagai Liguga* [2015] eKLR, and *Herbert Wafula Waswa vs Kenya Wildlife Services* [2020] eKLR.
60. As regards the reliefs sought it was submitted that the Claimant is entitled to the reliefs sought having proved that she was dismissed from employment unfairly and unlawfully. The court is urged to find that her salary was Kshs 320,000 at the time of severance.

Respondent's Case

61. Two witnesses testified in support of the Respondent's case. The 1st to testify was its Managing Director, Sonali Zacharia. The witness adopted her witness statement dated September 11, 2017 as her evidence in chief and the documents that the Respondent filed under a list of documents dated the even date as its documentary evidence.
62. The witness stated that the Claimant was hired by the Respondent to carry out key tasks which she failed to fulfil during her employment with the Respondent company. The Claimant was to ensure that all staff employed by the Respondent had clearly defined and drafted mandates duly signed by the staff and the Department manager.
63. She was further charged with the Responsibility to ensure implementation of the leave portal, by the IT department, put together a Company Operations Manual, and put in place the Transport Department Policies and Driver's Incentive Scheme, *inter alia*.
64. It was further stated that the Claimant was a cantankerous individual who treated her duties with disdain and always failed to meet her targets which led to her being served with several warning letters cautioning her to be more result oriented. That she did not take heed of the warnings and counsel.
65. The Claimant was paid a gross salary of Kshs 136,900 from September of 2015 till June of 2017, the Claimant's allegations of salary increments are baseless.
66. At the material time, the Respondent was in the process of implementing paternity leave into the employment contracts and needed to complete the process for fairness purposes to all male employees, but the Claimant was only interested in granting paternity leave to one male staff who was a close friend to her. The Claimant was never fair to all staff in the Respondent Company only choosing to favour a few staff who covered up her inability in the performance her job responsibilities.
67. The witness alleged that there was absolutely no witch hunt by her against the Claimant. The Claimant was on a number of occasions called to her office whereat she would urge the Claimant to improve in her job responsibilities and guide her on the manner how.



68. The witness contended that it was absolutely not acceptable for any manager to grant a staff sick leave based on a prescription. The Claimant was ready to go against the practice when it suited her for the interest of the staff members who were her friends.
69. The witness stated that on the February 15, 2017, she requested the Claimant to find out the whereabouts of one Joyce Kariuki as she had not seen her at work from the 10th to 15th of February 2017. The absence of Joyce from work was without any documentary approval. The Claimant chose to completely ignore the request and never got back to the witness.
70. Following the failure by the Respondent to act on the request, the witness was prompted to issue her with a second warning letter, as it was not the Claimant's first instance to fail to get back to the witness on a matter that required a response and or action.
71. It was the witness's testimony in the morning of June 22, 2017, the Bid Writer sent out an email to the Claimant and other Senior Managers providing them with the first draft of the Proposal and informing them that the witness had requested them to read through the first draft and provide their feedback. The Claimant's contention that the Bid Writer had advised that the 1st draft was not available, is untrue.
72. Notwithstanding the sensitivity and importance of the document that was being worked on, the Claimant didn't find it necessary to inform the witness and the senior management team that she needed to take her mother to the Indian High Commission for a visa appointment for the morning of June 23, 2013. She had time to get back to complete the pending work after the appointment, but she was not interested.
73. The witness stated that on the June 22, 2022, when she instructed the Claimant to read the 1st draft of the document, the latter stormed out of the office daring her to dismiss her if she wanted. Thereafter, she was not heard until the June 26, 2017, when she sent a resignation email.
74. The Claimant received her third warning letter on the June 27, 2017, and agreed to hand over duly in the afternoon of June 28, 2017. During the handing over process it was discovered that most of the works that she had all through presented as complete and in place, weren't. Due to the Claimant's uncooperative nature, the handing over process was not duly concluded. The reason why her final dues weren't made.
75. Cross examined by counsel for the Claimant, the witness testified that at the time of her employment, the Claimant was employed as an Operations Executive, however at the point of exit her position had changed to an Operations Manager. The change in title didn't have any impact on the roles entailed, however.
76. The witness accepted that the appointment letter did not encompass a job description, as she was not aware that there was a legal requirement for the same.
77. The witness stated that Clause 8 of the Claimant's contract of employment, female employees, maternity leave was not automatically entitled, it was conditional. The legal requirement concerning paternity leave, was brought to her attention by the Claimant.
78. Referred to the paternity leave and maternity leave documents for Mike and Eunice respectively, the witness admitted that they are dated February 17, 2017, the same date when the 2nd warning letter was issued to the Claimant.
79. Concerning the approval of leave for an employee on a medical prescription, the witness stated that the Claimant made an explanation on it. The witness pointed out that there was no lose that was suffered by the Respondent as a result of the approval.



80. The witness admitted that the Respondent Company did not have a Human Resource policy- at the material time.
81. The witness contended that it was the Responsibility of the Claimant to check on the whereabouts of the Respondent's employees. The Respondent didn't give the Claimant a job description. The Respondent did not have a specific performance evaluation mechanism.
82. The subject matter of the third warning letter was the bid preparation and her failure to report to work on the June 23, 2017. The Claimant was not accorded an opportunity to make any representations on the same.
83. The witness admitted that she had approved the Claimant's leave prior to the June 23, 2017.
84. The witness stated that the Claimant was dismissed because she had three warning letters, before she changed tone and asserted that the Claimant resigned from her employment.
85. The witness stated that the resignation email by the Claimant was dated June 26, 2017, 20:42 pm. She [the witness] Respond ended to the email at 9:35pm of same date, informing the Claimant that a decision had already been made on the June 23, 2017, to have her employment terminated. When the decision to terminate her employment was made, the Claimant was not present.
86. The computation of the Claimant's final dues was done for the period up to the June 23, 2017, the date when the decision was made.
87. In her evidence under re-examination, the witness stated that even after leave had been approved, the Respondent had a right to recall the approval.
88. The Respondent's 2nd Witness was Aisha Ali. The witness presented herself as the Respondent's General Manager Hotels and Travels. She adopted her witness statement dated September 7, 2017, as her evidence in chief.
89. The witness's evidence was largely on the Claimant's performance which she rated as poor. She testified that the Claimant's substandard, doing things in a manner not in adherence to the Respondent's standards.
90. Cross examined by Counsel for the Claimant, the witness accepted that it was not among her duties to appraise the Claimant. The Claimant was not reporting to her.

Respondent's Submissions

91. The Respondent's Counsel addressed the court on two broad issues. First, whether the Claimant resigned or was unfairly dismissed. Second whether the Claimant is entitled to the reliefs sought. It was argued that the Claimant resigned and was not dismissed. That her resignation was expressed through an unambiguous notification that was in accord with the contract of employment between the Respondent and her. To buttress her submissions, on the point reliance was placed on the case of [*Nancy Jesang Songor v Kenya Women Finance Trust*](#) [2016] eKLR.
92. It was further argued that upon receiving the resignation notice the Respondent's Managing Director did not communicate her acceptance or refusal of the same. However, her actions subsequent to the receipt showed that she was in acceptance of the resignation notice because she proceeded to tabulate the Claimant's dues.
93. A resignation being a unilateral act does not require the employer to accept the same. To bolster this submissions reliance was placed on the case of [*Kenya Hotels & Allied Workers Union v Mara Siria t/*](#)



a Safari Camps[K] Ltd [2016] eKLR. Further reliance was placed upon the holding in *Edwin Bieti Kipchumba v National Bank of Kenya Limited* [2018] eKLR, thus,

“..... Resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The *Employment Act* does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.....”

94. Counsel for the Respondent submitted that nothing turns on the letter dated June 23, 2017 as the resignation letter came first.

95. It was argued further that the claim for constructive dismissal was not raised in the pleadings or in the Claimant’s evidence. It was brought up in submissions for the first time. Consequently, the court cannot make a pronouncement on the same infavour of the Claimant. To fortify this submission, the holding in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* [2014] eKLR was cited, thus;

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “ marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

96. That the above notwithstanding, for a claim of constructive dismissal to succeed, the court must examine the circumstances surrounding the resignation to establish the test of constructive dismissal was laid down in *Kenya Hotels & Allied Workers Union vs Mara Siria*(*supra*).

97. It maintained that the Claimant from her testimony did not establish how the Respondent had made the work environment intolerable for her. There was no proof that she was coerced into resigning. The resignation letter is in a tone that does not suggest that the Claimant was resigning because of an intolerable work environment. As such, the Claimant did not, on a balance of probabilities prove that she was constructively dismissed by the Respondent and the claim must therefore fail.

98. In conclusion, the Respondent submitted that the Claimant, having voluntarily resigned from service was not unfairly terminated and as such is not entitled to compensation in terms of Section 49(1) of the *Employment Act*.

Analysis and Determination.

99. From the pleadings by the parties, their respective evidence and submissions by their Counsel, the following issues present themselves for determination, thus;

[a]. How did the Claimant’s employment come into determination?

[b]. If the answer to [a] above is to the effect that the same was through a dismissal from employment by the Respondent, was the dismissal fair?

[c]. Is the Claimant entitled to the reliefs sought or any of them?

How did the Claimant’s Employment Come into Determination?

100. The parties in this matter did not take a common position regarding the determination of the Claimant’s employment and more specifically on the how. It was the Claimant’s case, and submissions



were made on her behalf, that the Respondent made a decision to bring to an end her employment on the June 23, 2017. That the decision was conveyed to the her through a letter of the even date that was captioned “Third Warning Letter.”

101. The Respondent’s Counsel submitted that the Respondent’s position was that the Claimant’s employment came into termination when she in her own accord resigned from her employment, resignation that was communicated through an unequivocal email correspondence of June 26, 2017.
102. In the penultimate paragraph of the Respondent’s letter dated June 23, 2017, the Respondent stated and expressed to the Claimant,

“In Consideration of this being your third warning letter in less than six months we have no alternative but to terminate your services with immediate effect.”
103. I have neither, doubt in my nor difficulty to conclude that the effect of this paragraph was that the letter was bringing to termination the employment of the Claimant with immediate effect. The paragraph also communicated the Respondent’s decision in regard thereto. As this Court shall demonstrate shortly hereinafter, through this letter, the Claimant was summarily dismissed.
104. The 1st Respondent’s witness [the Managing Director] in her evidence under cross examination admitted that the decision to terminate the Claimant’s employment was made on the June 23, 2017. That the termination was as a result of the Claimant’s poor performance. She further admitted that the Claimant presented her resignation after the decision to terminate had been made. This evidence agrees with the Claimant’s evidence that when she presented her resignation the same wasn’t accepted as according to the Managing Director, her employment had already been terminated.
105. It was the Respondent’s counsel’s submissions that the Claimant’s resignation notification was clear on when it was to take effect. I have carefully considered the contents of the subject email, it is clear that the Claimant had sought to serve the notice period up to July 27, 2017, from the material before this Court I am convinced that she was not allowed to because her contract of service had already been determined.
106. The Respondent computed the Claimant’s dues for up to the June 23, 2017. This being the date of the letter hereinabove mentioned that it its penultimate paragraph brought the employment to an end. The resignation email came in on June 26, 2017 at around 8: 30 pm. The Respondent did not place before this court any sufficient reason or any at all that would explain why then the computation was not done for up to the resignation date, if at all the Respondent considered the email as the fountain for severance. The Respondent’s Counsel choose not to address this pertinent issue in her submissions.
107. To the Court, the fact that the letter dated June 23, 2017, was received by the Claimant on the July 27, 2017, does not make it a latter document than the email that was written on the June 26, 2017, as the Respondent’s submissions suggest.
108. In conclusion, I am not persuaded by the Respondent’s submissions that nothing turns on the letter dated June 23, 2017. Though termed as a warning letter, the same had all the characteristics of a termination letter, and indeed it was.
109. The resignation email by the Claimant was of no consequence as her contract of service had already been determined. She couldn’t resign from an employment which was no longer therefore.
110. By reason of the premises a foregoing, the Court comes to an impelling conclusion that the Claimant’s employment came to an end on the June 23, 2017, when the Respondent made a decision to dismiss her from employment, which decision was conveyed through a letter of the even date.



111. Having found as I have hereinabove I do not find it necessary to consider the Claimant's Claim under the principle of constructive dismissal. However, even if the Court were to delve into the same, it is a claim that it would not determine in favour of the Claimant for one prime reason, it was not pleaded by the Claimant. In NBI ELRC Cause Number 1110 of 2017, *Josphine Mwende versus University of Nairobi*, this Court stated;

“30. Before I delve further into this issue, it is imperative to state from the onset that the issue of the government circular and the contract of employment being or becoming irregular and illegal as a consequence of the directive therein, was a matter that was not pleaded by the Respondent. It is here that I must comment on the importance of pleadings and the implication of a party venturing out of what he has pleaded.

31. No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that can be ascertained from its pleadings. In *Adetoum Oladeji[NIG] Ltd vs Nigeria Breweries PLC S.C 91/2002*, Judge Pius Aderimi J.S.C expressed himself;

“..... It is now trite principle of law that the parties are bound by their pleadings and that any evidence led by parties which does not support the averments in pleadings, or put in another way, which is at variance of the pleadings goes to no issue and must be disregarded.”

112. I entirely agree with Counsel for the Respondent's submissions that Courts of law do not allow parties to have their cases flow from submissions instead of pleadings.

Whether the dismissal of the Claimant was fair.

113. Having found that the separation came about as a result of the Respondent's decision to dismiss the Claimant from employment, I now turn to consider whether the dismissal was fair. The *Employment Act*, 2007, puts forth two aspects that must be considered by a court whenever called upon to interrogate fairness of an employee's dismissal or his/her termination from employment. The aspects being procedural fairness and substantive justification.

114. Section 41 of the *Employment Act* supplies the structure for procedural fairness in the Kenyan situation. It provides;

Subject to section 42[1], 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 the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the hearing.

[2]. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44[3] or [4] hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection [1] make.”

97. The Provision is couched in a mandatory manner, and any form of non-adherence to it legally renders the termination or summary dismissal unfair pursuant to the provisions of section 45 of the Act. See the case of *Janet Nyandiko v Kenya Commercial Bank Ltd* [2017] eKLR cited with approval by the Court of Appeal in *National Bank of Kenya Ltd v Anthony Njue* [2019].



98. It is trite that procedural fairness entails the duty on the employer to, explain to the employee clearly the nature of the accusations for which it is contemplated that his/her employment be terminated, accord an opportunity for the employee to make representations, and, consider the representations before taking a decision.
99. By dint of the provisions of section 45[2], the duty to prove that there was procedural fairness in the termination or summary dismissal lies on the employer. The Respondent blurred by the position it took deliberately or otherwise that the separation was a product of a resignation from employment, and not considering the effect of its own letter dated June 23, 2017, didn't lead any evidence to establish presence of procedural fairness in the Claimant's summary dismissal. Therefore, the Respondent didn't not discharge its burden under section [45][2].
100. Further, looking at the material placed before this court, one cannot find any difficulty in being persuaded by the evidence of the Claimant that the Respondent did not follow the prescripts of section 41 of the *Employment Act*.
101. By reason of the foregoing premises, this Court concludes that the summary dismissal of the Claimant from employment was procedurally unfair.
102. I now turn to the substantive justification of the dismissal. To this Court, the provisions of the *Employment Act*, 2007, on unfair dismissal/termination displaced the ability of employers at common law to dismiss employees without cause. At common law, the employee would be dismissed without reasons if he or she was given reasonable notice or pay. One can confidently assert that the unfair dismissal outfit consists of expansive protection to employees.
103. Section 43 of the *Employment Act* commands that whenever there is a dispute regarding a termination the employer is enjoined to prove the reasons for the termination. Upon proving the reason or reasons for the termination, the employer is required to go further to prove that the reason[s] for the termination was valid and fair pursuant to the provisions of Section 45[2] of the Act. It is possible for an employer to prove the reasons but fail to prove that they were valid and fair. In such a situation the termination of an employee's employment or summary dismissal of an employee shall nonetheless be deemed unfair.
104. Owing to the position that the Respondent took as regards the separation, it didn't not pursue through evidence to establish that there was a termination or summary dismissal that was based on a particular reason[s] and that the reason[s] were valid and fair. Legal burdens are discharged through evidence. Since the Respondent didn't lead evidence on the reasons for the dismissal and their validity and fairness, this Court concludes that it failed to discharge the legal burden under section 43 and 45 of the *Act*.
105. The Court notes that the Respondent's witnesses' statements turned evidence in chief dwelt a lot and in detail on what they all termed as a below par performance.



106. In order for an employer to fend off an employee's Claim for unfair termination by relying on the reason that that employee's performance was poor, hence the termination in issue, the reliance has to meet a specific legal threshold. This was aptly captured in the decision in *Jane Samba Mukala v Ol Tukai Lodge* [2010] KLR, thus;

“Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section [8][c] further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.”

107. The Respondent did not in any manner or at all place evidence before this court that was aimed at achieving the threshold.
108. By reason of the foregoing premises, I find that the summary dismissal was without substantive justification.

Whether the Claimant is entitled to the reliefs sought or any of them.

109. Before I delve further into this issue, it is imperative to state that the Claimant and her witness testified that at the termination of the Claimant's employment she was earning Kshs 320,000. That her pay slips reflect a lesser amount because part of the amount was being paid in cash. The salary was segmented in the manner for attainment of the Respondent's audit and tax interests. The Claimant was unknowingly disclosing here that she was a cog in a tax evasion scheme. An illegal scheme therefore. In the case of *Kenya Pipeline Co Ltd v Glencore Energy [UK] Ltd* [2015] eKLR, the Court stated and I agree, that;

“In *Starndard Chartered Bank V Inter Coms Services Ltd & 4 Others [Supra]*, this court accepted the submissions made that once an issue of breach of statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the court must investigate it because the courts' fundamental role is to uphold the law. The court upheld and endorsed the old English case of *Holman V Johnson* [1775-1803] ALLER 98 where the Chief Justice Mansfield stated; -

The principle public policy is this *Ex dolo malo no ovitur citor* . No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause appears to arise ex turpi causa, or transgression of a positive law of the country ,then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lender their aid to such plaintiff.....”



110. It is by reason of public policy that this Court goes for the Kshs 136 900 obtaining on the pay slips exhibited by the Respondent as the monthly salary for the Claimant at the time of termination, not the Kshs 320,000 that the Claimant and her witness testified on as being the salary. In any event, the amount was not sufficiently proved.
111. The Claimant's contract of service was one terminable by notice pursuant to the provisions of section 35 of the Employment Act, 2007. It is clear from the material placed before the Court by the parties herein that the Claimant was not issued with any notice as contemplated under the abovementioned section or the contract of employment. This therefore entitles the Claimant to a notice pay pursuant to section 36 of the Act. The Court awards the Claimant Kshs 136,900.
112. Having found that the Claimant's employment was brought to an end through the Respondent's letter dated June 23, 2017, and considering that there was no prove that at the separation she was paid her salary for the 23 days worked, she is hereby awarded a sum of Kshs 104,972.00.
113. The claim for 6 days accrued annual leave as at the time of separation, was not contested. The Claimant is hereby awarded a sum of Kshs 27,384.
114. The Claimant sought for a compensatory relief as contemplated under section 49[1][c] of the Employment Act for wrongful termination. In its past decisions, this Court has held that the grant of the relief under the provision and the extent of the grant is dependent on the circumstances peculiar to each case. Considering, that this Court has found that the dismissal of the Claimant from employment was both procedurally and substantively unfair, the Respondent's attempt to run away from the dismissal letter an act which easily passes for unfair labour practice, the substantial deviation of the Respondent from what the law required of it in matters summary dismissal, and keeping in view the fact that the Claimant had reached a point where she had decided to no longer continue being an employee of the Respondent, I find that the Claimant is entitled to the relief but only to an extent of three months gross salary, Kshs 408,000.
115. In the upshot, Judgement is hereby entered for the Claimant in the following terms
- [a]. A declaration that the dismissal of the Claimant from employment was procedurally and substantively unfair
 - [b]. One month's salary *in lieu* of notice, Kshs 136,900.
 - [c]. Salary for the 23 days worked in June 2017, Kshs 104,972.
 - [d]. Compensation for accrued leave, 6 days Kshs 27,384.10
 - [e]. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act. Kshs 408, 000.
 - [e]. Interest at court rates on the sums awarded hereinabove from the date of this Judgement till full payment.
 - [f]. Costs of the suit.
 - [h]. The sums awarded herein above shall be less any sums that the Respondent has paid if any during the currency of this suit, and statutory taxes.

READ, SIGNED AND DELIVERED THIS 29TH DAY OF JULY 2022.

OCHARO KEBIRA

JUDGE*

