



**Chikololo v National Bank of Kenya (Cause 812 of 2017)
[2022] KEELRC 12877 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12877 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 812 OF 2017
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

GEORGE NYOTA CHIKOLOLO CLAIMANT

AND

NATIONAL BANK OF KENYA RESPONDENT

JUDGMENT

Introduction

1. At all material times the claimant was an employee of the respondent bank. claiming that his contract of service was on the April 30, 2014 wrongfully, and or unlawfully and unfairly terminated by the respondent, he sued it through his statement of claim dated April 28, 2017, for the following reliefs and orders;
 - A]. Reinstatement to his previous position/job without any loss of benefits.
 - B]. Salary arrears for the entire period the claimant has been out of employment.
 - C]. Damages for wrongful and or unlawful termination.
 - D]. In the alternative, payment of all the lawful terminal dues set up at paragraph 8 of the statement of claim.
 - E]. Maximum 12 months compensation for wrongful termination.
 - F]. Costs of the suit with Interest.
2. Upon being served with summons to enter appearance, the respondent did enter appearance on the June 19, 2017, and subsequently filed a reply to statement of claim dated July 3, 2017. In the reply, the respondent denied the claimant's claim in toto and his entitlement to the reliefs sought.



3. The claimant's case was heard on the October 26, 2021, when he urged the court to adopt his witness statement filed herein as his evidence in chief, and the documents that he had filed contemporaneously with the statement of claim, and those that he filed under the supplementary list of documents dated September 30, 2021, as his documentary evidence. He briefly testified orally in chief, clarifying the contents of the witness statement, and the documents, that he felt imperatively required to, before cross examination by counsel for the respondent.
4. On the other hand, the respondent's case was heard on the March 29, 2022. The respondent presented one witness, Mr Stephine Obong'o to testify on its behalf in support of the defence against the claimant's case. The witness moved the court to adopt his witness statement dated September 20, 2021 as his evidence in chief. He tendered the documents that the respondent had filed herein as its documentary evidence.
5. At the close of the defence case, the court did direct the parties to file written submissions, submissions which they have filed.

The Claimant's Case

6. It was the claimant's case that he first came into the employment of the Respondent on the March 2, 1992 in the position of clerk. His confirmation into employment was subject to a successful completion of a probationary period of 6 months. He was confirmed on the September 7, 1992.
7. Thanks to his outstanding performance, he on various dates in the course of his employment received several awards. Promotions and merits; merit award for 1995 on the August 6, 1996; merit award on January 24, 2005; promotion to Officer Grade 1 on July 4, 2017; promotion to Grade MG8 on July 31, 2012; long service award for 20 years of continuous and dedicated service, through certificate of service dated December 21, 2012; and end year award cash token for the long and royal service of 20 years, December 3, 2012.
8. By a letter dated March 15, 2012, the respondent during its re-alignment procedures and processes, he was transferred, the Chagamwe Branch Sales Team.
9. The claimant stated that as a result of further re-alignment of its branch structures, the Respondent changed his title to Business Banking Consultant, effective November 1, 2013 through its letter dated October 29, 2013.
10. The claimant stated that the new role was assigned to him in the month of March, 2013 during the pendency of the 2013 financial year which began on the January 1, 2013 and was to end on the December 31, 2013 upon which he was to be evaluated for the full financial year.
11. The claimant asserted that in the year 2014, he had as part of his new role sought to achieve his targets by getting the respondent bank business opportunities that were at different stages of processing as at April 30, 2014.
12. He stated further that he participated in the respondent bank's business promotion called "*Ponyoka na Milli*" for which he had set a target for himself, which target he surpassed by attaining 127% as at April 2014.
13. Through an email dated November 11, 2014, the respondent assigned him an additional role in Bank Assurance Scheme, in addition to his role as the Business Banking Consultant.
14. The claimant stated that he was shocked when he received a letter dated April 30, 2014, terminating his employment on account of poor performance yet he had been assigned the new role in the month of



- March during pendency of a financial year. According to the respondent's performance policy, clause 4.5 thereof, the performance cycle was a twelve months' one, with two half year appraisals.
15. The claimant testified that according to the said policy, the performance targets were to be proposed by an employee, but for the year 2013, the employees inclusive him were just given targets by the respondent without any input from them.
 16. He further testified that before being redeployed to the position of Business Consultant, he was in the respondent's credit department, a department which was relevant to his professional training, accounting and finance. The position to which he was redeployed which was in nature sourcing for customers for the Respondent did not have any connection at all with his training. Further, he had no training related to the new position.
 17. The performance appraisal that allegedly formed the basis for the termination didn't set forth the criteria for the scoring.
 18. The claimant asserted that he was neither served with any notice to show cause nor given a chance to be heard by the respondent.
 19. The claimant further asserted that though the respondent's policy provided for a three months' notice, he was only paid one month's salary in lieu of notice, hence his claim for salary for two months in lieu of notice.
 20. He challenged the decision to terminate his employment, on the May 7, 2014. On the appeal letter, his branch manager made an endorsement urging allowing of the appeal upon premise of her confidence that given a chance the claimant would convert the business in the pipeline into sales with an end product being an improvement on his targets.
 21. Despite the endorsement, his appeal was disallowed.
 22. He maintained that the respondent terminated his employment without any valid reason and without adherence to procedural fairness, therefore putting him in the path of entitlement to all those reliefs he has sought in his pleadings.
 23. Cross examined by counsel for the respondent, the claimant testified that he was first employed by the respondent as a clerical staff, and thereafter due to his impressive performance, his roles changed significantly. As at the time of termination he had rose to a managerial position.
 24. He stated that his last position of work was in the respondent's sales team. He accepted that he did not at any time complain to the respondent that he would not be able to adequately perform in the new position.
 25. That though the performance plan tendered by the respondent bears the performance indicators, the indicators were for the year 2012.
 26. The termination letter indicated that there had been two performance appraisals on him, both of them scored his performance as below par.
 27. Miriam who endorsed his letter of appeal, was his manager. Though she wasn't part of the respondent's Human Resource management team, she was the one who appraised him.
 28. Referred to the letter of confirmation, the claimant stated that the same provided for a one month's termination notice, and that indeed the termination letter mentioned of one-month period.



29. Referred further to the letter dated December 9, 2013 that he tendered before court under his supplementary list of documents, he admitted that the same related to “change of notice period; management staff”. It reduced the notice period from three months to one month.
30. At the time of exit, he wasn’t a member of any union. He was a member of NSSF, and was in a pension scheme.
31. True to what is alluded to in the letter that conveyed the decision on his appeal, he was present at the appeal hearing.
32. Under his evidence in re-examination, the claimant stated that the termination letter clearly stated that the year under review was 2013. The appraisal document that the Respondent has tendered before the court relate to the year 2012, when in fact he was serving at Nkurumah branch not Chamwangwe branch.

The Respondent’s Case

33. The respondent’s witness herein above mentioned presented himself to the court as the Head of Employee Relations. The witness statement that he urged the court to adopt as his evidence in chief was very brief.
34. The witness confirmed the claimant’s evidence as regards when and how he got into the employment of the respondent.
35. The witness asserted that on or about August 5, 1998, the claimant received a dismissal letter after two previous notices of warning for neglecting to perform the duties for which he was employed, neglect which amounted to breach of his contract of employment. The decision to dismiss him was subsequently reversed.
36. The Claimant was transferred to the respondent’s Changamwe Branch on May 18, 2012 due to business exigencies. Additionally, he was promoted and given a salary increment. He was later on deployed as a member of the Branch Sales Team effective March, 2013 following a realignment of procedures and processes in the branches.
37. The witness stated that on the November 1, 2013, the claimant was appointed as a Business Banking Consultant.
38. The witness further stated that the claimant’s employment was lawfully terminated on account of poor performance, after achieving an end of the year performance rating of below performance standards.
39. The claimant appealed against the termination, an appeal which was declined and the decision thereof conveyed through the respondent’s letter dated June 20, 2014.
40. The claimant resubmitted an application for re-instatement through a letter dated October 13, 2016 which request was declined by the respondent via its letter dated November 1, 2016.
41. Upon termination of his employment, the claimant was paid his terminal dues duly.
42. In his evidence under cross examination, the witness testified that the termination letter did put forth the reasons for termination, which reasons were summarized to three points. The first point related to half-year review which was rated as below performance standards. The witness admitted that from the documents presented by the respondent, there is none from which it can be discerned how the rate was arrived at.



43. The witness further stated that the termination was based on the performance review for the year 2013. However, he didn't any document to demonstrate the review. The witness further admitted that though the termination letter refers to a performance improvement plan, no document was place before court to demonstrate its existence.
44. The third point related to discussions on the claimant's performance. However, the witness admitted that there is not a single document among those presented to court by the respondent that can prove that indeed there were discussions as pointed out in the letter.
45. The witness testified further that the letter mentions an end year performance review. Pressed to show court a document resultant therefrom, the witness conceded that there was none that was filed in court by the respondent.
46. According to the witness, the respondent's Human Resource manual, tasks it to provide performance guidelines. Further, the employee's manager is formally responsible for setting targets. Whether this happened as regards the claimant's case, the witness confessed his lack of knowledge.
47. According to the witness, the claimant's contract of employment provided for a three months termination notice, however, the termination letter offered a one month's salary in lieu of notice.
48. That though the claimant's appeal was supported by the Branch Manager, the appeal committee didn't consider the manager's view[s]. The witness asserted that notwithstanding the support by the Branch Manager, the Human Resource Division would still decide not to be influenced by the same as it did in the claimant's case.
49. The witness stated that the claimant was not issued with a notice to show cause before the termination.
50. In his evidence under reexamination the witness stated that the appraisal process starts with the employee appraising himself, subsequently the line manager considers the employee's appraisal to check on whether the same is factually correct. Then the appraisal moves to an independent committee.
51. At the time of exit there was in place a policy that had changed the notice period from three months to one month.

The Claimant's Submissions

52. The claimant identifies three broad issues for determination in this matter; whether the claimant's termination was substantively fair; whether the claimant's termination was procedurally fair; and what reliefs are the claimant entitled to?
53. It was submitted that section 43 of the *Employment Act* places a legal burden on an employer to prove reason[s] for the termination of an employee's employment whenever there is a dispute regarding the termination. That a failure to discharge the burden will lead to the termination being considered unfair pursuant to the provisions of section 45 of the Act.
54. It was further submitted that the termination letter indicated that the claimant's employment was being terminated for poor performance, in compliance with the bank's performance management policy clause 4.7.2. According to the claimant, the clause postulates that the respondent's performance management processes takes place in cycles of twelve months. He urged the court to consider clauses 4.5 and read the same together with clause 4.5.3 of the policy.
55. The claimant submitted that though the termination letter was categorical to the effect that the termination related to performance in the year 2013, the respondent failed to tender before court any performance evaluation document for the 1st half of 2013, and what the he scored. Consequently, the



- respondent didn't not establish that the claimant's performance for that half of the year was below par. The termination was substantively unfair therefore.
56. Further, the respondent failed to demonstrate that the claimant was placed under a performance improvement plan, the length of the plan and whether after the performance improvement plan period his performance was reviewed.
 57. On the second issue the claimant submitted that the termination of his employment was procedurally unfair within the meaning of section 45 of the Act. He only learnt of the accusations against him through the termination letter. He was not accorded an opportunity to defend himself against the same. In his evidence under cross examination the respondent's witness admitted that the claimant was not served with a notice to show cause.
 58. The respondent's action was in breach of the rules of natural justice, the provisions of article 47 of the [*Constitution of Kenya 2010*](#) and section 4 of the [*Fair Administrative Action Act*](#).
 59. On the reliefs sought, the claimant submitted that he has established his case and therefore entitled to the reliefs.
 60. On the claim for two months' notice pay, it was submitted that he was entitled to three months, termination notice or pay in lieu of notice pursuant to the respondent's new grading structure letter dated November 10, 2009. That he didn't sign the letter dated December 9, 2013 that was issued signifying a change of the notice period to one month. He was not consulted on the change as dictated by section 10[5] of the [*Act*](#). The respondent cannot be allowed to rely on the letter therefore to justify the change in the period.

The Respondent's Submissions

61. The respondent identified two issues for determination; whether the claimant was lawfully dismissed; whether the claimant received terminal dues. It was submitted that the summary dismissal of the claimant from employment was lawful as it was within the provisions of the [*Employment Act*](#). It related to poor performance a fair reason recognized by section 45[2] of the [*Act*](#).
62. In its submissions, the respondent heavily reiterated the evidence of its witness, maintaining that the evidence demonstrated that the claimant's performance was unacceptable, and that despite being placed on a three month's improvement plan, he did not improve on his performance.
63. That the claimant was put on a performance improvement plan in accordance with section 2.5.2 of the respondent's Human Resource Manual of June 2012. The respondent did all that was required of it under its manual and the law. To buttress this submission reliance was placed on the case of *Kenya Science Research International Technical and Allied Workers Union v Stanely Kinyanjui and Magnet Ventures limited* Industrial Court cause No 273 of 2010.
64. As regards procedural fairness, it was submitted that the termination notice did fully bring out the reasons for the dismissal and that a one month's notice was issued.
65. The claimant's assertion that he was entitled to a three months' notice was erroneous. There is ample evidence that there was a policy change that reduced the notice period to one month down from three months.
66. It was argued further that it is not in all cases that an oral hearing is necessary. On this point the respondent sought fortification in the cases of [*Local Government Board v Arlidge*](#) [1915] 1 AC and [*Judicial Service Commission v Gilbert Mwangi Njuguna and another*](#) [2019] eKLR.



67. On the reliefs it was submitted that at all material times the respondent was clear on the terminal benefits of the claimant and the same was put forth in the termination letter but the latter failed to accept the same.
68. The claimant's claim for two month's pay is an outright misrepresentation of fact and without any legal foundation. The compensatory relief sought by the claimant to an extent of 12 months gross salary cannot be availed to the him as the termination of his employment was procedurally and substantively fair. Reliance was placed on the case of *CMC Aviation Limited v Mohammed Noor*, Civil Appeal No 199 of 2013.

Analysis and Determination

69. From the evidence and material placed before me by the parties, I distil the following issues as the issues for determination in this matter:
- [a]. Whether the termination of the claimant's employment was procedurally fair.
 - [b]. Whether the termination of the claimant's employment was substantively fair.
 - [c]. what reliefs are available to the claimant, if any?

Whether The Termination Of The Claimant's Employment Was Procedurally Fair

70. It is not in contest that the claimant's employment was terminated by his employer- the respondent, through the letter dated April 30, 2014, on account of a below par performance. Section 41 of the *Employment Act* provides for the procedure to be adopted by an employer contemplating dismissing an employee or terminating an employee's contract of employment. The provision applies inter alia where the intended termination or dismissal is on account of poor performance. Courts have severally held and it is trite law that the procedure is mandatory, non-adherence to the same will lead to a legal conclusion that the termination was unfair. See *Joyce Mukbolwe v Mustek East Africa* [2021] eKLR and *National Bank of Kenya v Samuel Ngaru Mutonya* [2019] eKLR.
71. The stated provision requires that once an employer forms the intention to terminate an employee's contract of employment, he or she must bring the intention and the grounds stirring up the same, to the attention of the employee in a manner that the employee can understand, then accord the employee an opportunity to make representations on the grounds. The employer thereafter must consider the representations by the employer before making the decision as to whether to terminate or not. Imperative to state the fair procedure under the section also envelops the right to accompaniment.
72. The claimant contended that the procedure was not adhered to. The respondent's witness admitted that the claimant was not issued with any notice to show cause, and that he was not accorded a hearing before his employment was terminated in the manner and account it was. Consequently, I am impelled to conclude that the termination of the claimant's employment was not procedurally fair.

Whether The Termination Was Substantively Fair

73. Section 43 of the *Employment Act* places a burden on the shoulders of the employer to prove the reasons for the termination of an employee's employment. However, this section of the law cannot be read in isolation from the provisions of section 45 of the *Act*. Inherent in the latter provision is a further burden to demonstrate that the reason[s] for the termination was valid and fair.



74. The claimant’s employment was terminated through the letter dated April 30, 2014 which read in part;
“This letter represents a formal notification to terminate your employment contract, effective April 30, 2014. Your termination is in accordance with the bank’s performance Management policy clause 4.7.2.....”

75. Section 44 of the Employment Act stipulates when summary dismissal can occur, thus;
“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by statutory provision or contractual term”

Section 35 [1][c] of the Act provides a termination notice that I hold relevant to the instant matter. The section provides;

- “ 1. A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall if made to be performed in Kenya be deemed to be;
 - [a]
 - [b]
 - (c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of the notice.”

76. The respondent contended that the claimant was entitled to a one-month termination notice under the contract while the claimant asserted that he was entitled to three months’ notice period. Whether one or three months’ notice I will determine hereinafter shortly. However, one thing is clear, the termination was without the statutory notice or contractual notice. What happened here was therefore a summary dismissal. The respondent submitted that there was a one month’s termination notice issued. I see none on record. It cannot comfortably be allowed to confuse the termination letter which took effect immediately with the statutory or contractual notice.

77. Having said that a summary dismissal occurred here, the respondent would only be said to have had a valid reason for the dismissal if the claimant was guilty of a conduct in the nature of that contemplated in section 44[3] of the Act. The section provides;

- “ 3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.”

78. The respondent didn’t bring out any evidence that the claimant was guilty of a conduct that was in character a fundamental breach of his obligations under the contract or that fell under the catalogue brought out under section 44[4].

79. The respondent took a position that the claimant’s employment was terminated on account of his poor performance. The question that needs to be addressed then is, can it be said that it was proved to be a valid and fair reason? Without hesitation I, say no. For an employer to prove that he or she validly and fairly terminated an employee’s contract, it does not take just an assertion that an employee was



guilty of poor performance. It requires a detailed demonstration. The respondent didn't do this. See the courts decision in *Joyce Mukolwe v Mustek East Africa Limited* [2021] eKLR.

80. In the case of *National Bank of Kenya v Samuel Ngure Mutonya* [2019] eKLR, the Court of Appeal stated;

“The reason advanced by the Bank for terminating the Respondent’s employment was poor performance. In *Jane Samba Mukula v Ol Tukai Lodge Limited Industrial Cause Number 863 of 2010*; [2010] LLR[ICK] September, [2013] the court observed as follows;

[a]. “Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the 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.

[b]. It is imperative on the part of the employer to show that measures were in place to enable them access the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to say that one has been terminated for poor performance as the effort leading to his decision must be established. Beyond having such evaluation measure, before termination on ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

[c]. In an event a decision is made to terminate an employee on the reasons , the employee must be called again and in the presence of an employee of their choice, the reasons for the termination shared with the employee”

81. From the evidence by the parties placed before this court, there is no doubt that the alleged poor performance by the claimant was for the year 2013. The respondent’s witness correctly admitted in his evidence under cross examination that the respondent had not placed before court any document to prove that the claimant’s performance was evaluated in regard to the 1st half and 2nd half of the year. He further admitted that that too the respondent didn’t avail any evidence to show that the claimant was placed on a performance improvement plan and that there was an evaluation of the claimant’s performance during the period of the plan.

82. The respondent tendered before the court a performance plan, however the same is for the year 2012 as it is dated February 20, 2012. The document does not come to the aid of the respondent’s case in the circumstances of the case. The year in issue was 2013.

83. By reason of the premises foregoing I find that the respondent failed to establish that the reason- poor performance, that it cited as being the reason for the termination was valid and fair. The respondent failed to discharge the burden under section 45 of the *Act*.

84. The court has not lost view of the fact that the claimant had worked for the respondent for more than twenty years before the termination. He placed before the court evidence to demonstrate that during his tenure, his performance was largely stellar. Further, the court has not lost view of the fact that the line manager of the claimant did recommend on the claimant’s appeal letter that the he be given an opportunity for she was certain his performance would improve. The Appeal Committee ignored the



recommendation. However, the court wasn't told why the same was not found to be attractive to them. I cannot hesitate to conclude that in the circumstances the respondent didn't act in equity and justice.

85. In sum, the court finds that the termination of the claimant's employment was not substantively fair.

Of the Reliefs

86. The claimant sought for reinstatement to his position/job without any loss of benefits. The claimant has not made any submission on this relief. That notwithstanding the court has to consider the material placed before it and the relevant law, and render itself on the relief. section 12 (3) of the *Employment and Labour Relations Court Act* read together with section 49 of the *Employment Act*, gives this court power to order a reinstatement in appropriate cases. See *Anthony Njue John v National Bank of Kenya Limited* [2017] eKLR.

87. Considering the circumstances under which, and the manner in which the claimant's employment was terminated it is not difficult to state that this is a matter where this court finds that reinstatement would have been an appropriate remedy. The respondent failed totally to demonstrate to this court that there was a performance appraisal, that the claimant was placed on a performance improvement plan, and that after the performance improvement plan there was an appraisal, all these leading to the court's conclusion that the reason for the summary dismissal wasn't valid and genuine. In the process of performance evaluation, one expects a trail of document's, one wonders how the respondent, a banking institution would fail to produce documents, if indeed they existed.

88. This court finds that reinstatement would have been an appropriate remedy, conscious of the fact that the circumstances of the case Anthony Njue John Case [*supra*] involving same respondent as herein were in all fours with the instant matter, and reinstatement was granted. Further that the Court of Appeal in its decision in *National Bank of Kenya Limited v Anthony Njue John* [2019] eKLR, affirmed the decision on reinstatement. The court held;

“ We have the above reasoning in light of the circumstances of this appeal and we are satisfied as was the trial Judge that the circumstances demonstrated above both on record and the reasoning of the Judge warranted an order for reinstatement considering that the fault lay the bank in failing to re-evaluate the respondent's performance in the year 2014 as had initially been planned before terminating his employment with them on account of what the Bank termed as unacceptable performance. We affirm the Judge's finding that reinstatement was the most appropriate remedy in the circumstances of the appeal.....”

89. Notwithstanding the foregoing premise, this Court is handicapped to grant the remedy, handicapped by operation of the law. Section 49[3] [a] of the *Employment Act* provides for reinstatement if the termination is found to be unfair. However, the remedy can only be availed to the employee who has successfully litigated against his employer, if the order for reinstatement is made within 3 years of separation. This judgement comes after a period of more than 8 years of the date of separation. By dint of the provisions of section 12[3][vii], this court in unable to order reinstatement of the claimant.

90. The court was to order the remedy of reinstatement to be accompanied by the order for salary arrears for the entire period the claimant has been out of employment. Considering this courts view that the termination of the claimant's employment was not proved justified, and that the remedy of reinstatement is not possible only as a result of the operation of the law, the court is not handicapped to still go ahead and grant the salary arrears for the period. To fail to so grant shall be against fairness and equity. The respondent shall have been allowed to benefit from its untoward conduct. Consequently, I award the claimant salary arrears, only to the extent hereunder.



91. It has not escaped this court's sight that the claimant waited until two days to the lapse of three years from the date of the unfair termination to file his claim herein. This delay didn't help mitigate damages. The claimant cannot be left to benefit from his own indolence. For this reason, I exclude the three years' salary from the award. The award shall be for the period May 2017, till the date of this judgment, therefore 64 months, Kshs 14,347,776. In the *National Bank of Kenya Limited* [supra] the Court of Appeal upheld the award on salary arrears.
92. The claimant prayed for salary for the month of May, 2014, Kshs 224,184.00. The respondent did not demonstrate that it did pay him this sum. In fact, the respondent's submissions are in the tone that it did not. The claimant's evidence in support of this claim was not rebutted therefore. The salary for the month is included in the award hereinabove. Consequently, the court cannot grant the same.
93. The respondent too didn't place any evidence before this court to the effect either that the claimant didn't have any accrued leave days or that he was compensated for the 18.6 days claimed. I have no hesitation to award Kshs 159,515.55 as sought by the claimant.
94. Section 49[1] bestows upon this court power to grant a compensatory relief for unfair termination. The grant of the relief and the extent thereof is discretionary, and influenced by the peculiar circumstances of each case. Considering that this court has found that the dismissal of the employment in the manner it happened was not justified, that without good explanation the respondent deviated from its own Human Resource manual, and what the law expected of it, that on the material placed before this court the claimant didn't contribute to the dismissal and that he had worked for 20 years for the respondent, a period of good performance, and come to a conclusion that an award of the compensatory relief is justified and to the extent of twelve months gross salary. Therefore, Kshs 2,690,208.
95. The claimant further sought for general damages for unlawful termination, this the court cannot award having granted a compensatory relief under section 49[1][c] and there being absence of justification for the same by the claimant.
96. In the upshot, judgment is hereby entered for the claimant in the following terms;
- [a]. A declaration that the termination of the claimant's employment was both procedurally and substantively unfair.
 - [b]. Salary arrears for sixty-four months, Kshs 14,347, 776.
 - [c]. Compensation for 18.6 untaken leave days, Kshs 159,515. 55.
 - [d]. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, Kshs 2,690, 208.
 - [e]. Interest at court rates from the date of this judgment till full payment.
 - [f]. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr Museve for the claimant.



No appearance for respondent.

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.

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

OCHARO KEBIRA

JUDGE

