



**Ngendo v Choice Microfinance Bank (Cause 2307 of 2016)
[2022] KEELRC 12880 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12880 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2307 OF 2016
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

LINDA WARIARA NGENDO CLAIMANT

AND

CHOICE MICROFINANCE BANK RESPONDENT

JUDGMENT

1. The claimant herein was at all material times an employee of the respondent until the February 29, 2016, when her employment was determined. Charging that the termination was unfair, unlawful and wrongful, she impleaded the respondent through a statement of claim dated November 14, 2016, seeking the following reliefs.
 - a. A declaration that the termination of the claimant's employment by the respondent was unjustified, unlawful, unfair, wrongful and illegal.
 - b. The Court be pleased to order the respondent to pay the claimant her statutory entitlement and or terminal dues totaling to Ksh 1,950,000 with interest at Court rates.
 - c. Payment *in lieu of* notice, Kshs 150,00.
 - d. One year's compensation for unlawful dismissal – Ksh 1,800,000.
 - e. Damages for discriminatory dismissal whilst the claimant was on maternity leave.
 - f. Default interest on the claimant's facility at Equity Bank.
 - g. Costs of the suit.
2. The respondent entered appearance to the summons, by filing a memorandum dated December 2, 2016, it subsequently filed a reply to the statement of claim dated June 6, 2017. In the reply the claimant's claim was denied. Her entitlement to the reliefs sought too.



3. Pursuant to the rules of this Court, the claimant did file a response to the respondent reply on the May 5, 2017. At the close of pleadings, there was a joinder of issues and the matter got destined for hearing on merit interpartes.
4. The claimant's case was heard on the October 12, 2021, when the same was adjourned to the November 16, 2021 at the instance of counsel for the respondent. On the November 16, 2021, again, counsel sought for an adjournment. The Court got prompted to reluctantly grant the same, but marked it as a last adjournment. The matter got slated for hearing for the November 30, 2021.
5. An attempt by the respondent to secure a further adjournment on the November 30, 2021, was unsuccessful. The respondent's case was thereby closed without it adducing any evidence in support of its defence.
6. Parties obliged the Court's directions on filing of written submissions.

The claimant's case

7. At the hearing the claimant urged the Court to adopt her witness statement as part of her evidence in chief, and documents that were filed under her list of documents dated November 14, 2016, and a further list dated May 25, 2018 as her documentary evidence. As there was no objection from the respondent the adoption was so ordered.
8. The claimant testified that she came into the employment of the respondent on the March 16, 2015. Prior to joining the respondent's workforce, she had been in a continuous employment of Equity Bank Kenya Limited for a period of 8 years.
9. The claimant contended that she was head-hunted to join the respondent's employment by her former colleague Ms Lydia Maingi, currently the Chief Executive Officer of the respondent Bank. After the head-hunt and before getting the employment as the Operations Manager of the respondent entity, she was interviewed by them and had to get approval from the Central Bank of Kenya.
10. Her terms and conditions of employment were enveloped under the contract of employment dated February 16, 2015. Salary under the contract was set at Kshs 150,000, [consolidated gross pay] per a month. The contract of service took effect on 16th March 2015.
11. At the time of joining the respondent, the respondent had not acquired the necessary license from Central Bank for operation. It had few employees and who had limited experience in the Banking Industry. It took her effort to write and prepare manuals that the Central Bank required, and interviewed other staff whose employment was a prerequisite for issuance of the license. The got tasked to and trained others who were assigned to her. She set up the operations system for the respondent.
12. The relationship between her employer and her started deteriorating when it acquired the license from the Central Bank of Kenya to operate as a Community Bank. Some of the directors wanted to open accounts for people living in the diaspora, which according to her was against the then obtaining guidelines. Her advise to the effect was not received well by the directors. They felt that she did not want the bank to grow.
13. The claimant insisted and cautioned that the breach of the guidelines would lead to loss of the license by the respondent. Later on, it dawned on her, that some of the director's interest was to use the Bank help them grow their other businesses. The directors cared little for running a professional financial institution.



14. On or about the February 15, 2016 the claimant was due for her maternity leave. She made an application for the same on the February 15, 2016. The application was approved.
15. The claimant stated that ten days after the birth of her son through a caesarean Section, a letter was brought to her home informing her that the respondent had terminated her employment on account that her performance did not meet the respondent's expectations. The termination letter was dated 29th February 2016, same day when it was brought to her.
16. The claimant asserted that the respondent's sole aim was to head-hunt her from Equity Bank and thereafter use her qualifications to obtain the license from the Central Bank and later abandon her.
17. The act of terminating her employment whilst on her maternity leave was not only discriminatory in nature but also biased, she asserted.
18. The claimant contended that at the time she was joining the respondent she had a facility with her former employer, Equity Bank. Following the termination, she was not able to service the loan which consequently started attracting penalty interest. To buttress this claim, she tendered as evidence a letter dated July 12, 2016, demanding for payment of arrears.
19. Cross examined by counsel for the respondent, the claimant stated that she never applied for the job and reiterated that she was head-hunted.
20. The claimant further stated that she received a certificate of recognition dated April 8, 2018 which was consequential to a training, she argued that if the respondent had intended to release her, it would not have sent her for a training.
21. In the month of May 2015, the respondent issued her with a certificate of appreciation dated May 22, 2015.
22. The claimant further stated that her probation period was extended through a letter dated October 16, 2015. However, prior to this letter that was coming up on the 8th month into her employment, there had been no communication to her regarding any appraisal of her performance.
23. The claimant further stated that having started working on the March 16, 2015, her confirmation was due in the month of August 2015. She would not understand why the respondent had to wait until October to purport to extend her probation period.
24. She stated that the respondent's allegation that she was not a team player, was untrue. The respondent does not have any documents from her workmates demonstrating that she was uncooperative to them.
25. She further testified that her job description was measurable. The respondent did not evaluate the areas concerning her description.
26. The termination was to take effect on the February 29, 2016.
27. She received her dues and signed an acknowledgement in that regard. The acknowledgement was not testament to a waiver of her pursuing her rightful entitlement[s].

The claimant's submissions

28. The claimant in her written submission reiterated the factual aspects of her claim as was brought forth in her witness statement and evidence in chief. It won't be worth to recapture that aspect of that aspect of her submissions.



29. The claimant distilled the following issues as those that present themselves for determination in this matter, thus;
- a. Whether the claimant's termination was unfair and unlawful.
 - b. Whether the claimant was on probation or a permanent employee.
 - c. Whether the claimant is entitled to payment of leave days and payment in lieu of notice.
 - d. Who should bear the costs of the suit.
30. It was submitted that Section 45[1] and [2] speak to fairness in termination of an employees' employment. That considering the circumstances of the instant matter, it is clear that the fairness contemplated in the provision was absent. The respondent did not demonstrate that it had a valid and fair reason[s] for the termination and that the termination was procedural.
31. The claimant submitted that after the lapse of the 6 months' probation period, the respondent reviewed her probationary performance on October 16, 2015 a month after the probation period had ended. The respondent then extended the claimant's probation period for a further 3 [three] months with reasons that the claimant's performance was below expectation.
32. It was further argued that after the alleged appraisal the claimant was not placed under any training to enable her improve her performance on the areas that the respondent held that she was not performing satisfactorily. After the lapse of the extended period, the claimant was issued with a termination letter 2 months after the extended period came to an end.
33. It was contended that prior to the termination she was neither issued with a show cause letter to explain why her employment could not be terminated nor given a hearing to enable her answer to the issues that were being raised concerning her employment.
34. Regarding what was expected of the respondent on terminating the claimant's employment on account of poor performance, the holding in *Bank Insurance and Finance Union [Kenya] v. Barclays Bank of Kenya Limited & another* [2016] eKLR was cited, thus;

“The subject of poor performance of an employee is a serious matter. Such requires thorough investigations before an employee can use such a reason as the basis for termination. The rationale is that an employee is hired for being competent for the job and upon confirmation, such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established.

The right under Section 41 of the *Employment Act* and under Article 41 of *the Constitution* read together with Article 47 on fair administrative action require that a person faced with an adverse action must be supplied with all relevant materials, coaching, training, time and all resources necessary to be able to prepare their defence, improve on their performance, build on their skills.

An employer can therefore not just rely on the grounds of poor performance to terminate an employee. The rationale is that, such an employee was hired and found fit for the job, any deterioration in performance must be interrogated and effort made to address it. It cannot be simply cited that the claimant suddenly became of poor performance when all his quarterly performance appraisals were in the positive.

However, such should be applied to enhance productivity of employees. Where an employee is of poor performance and is not productive as a result, such is a matter addressed in law,



Section 41 of the Employment Act procedures apply. Where there is poor performance at work, such becomes a ground for dismissal and the employer is by law required to take the employee through the motions of the law before such can be genuine, valid or just reasons for termination.

This Court has had occasion to address the issue of poor performance of an employee as a condition or ground and or reason for termination of employment. It is not sufficient for an employer to cite poor performance as the reason for termination. The employer must demonstrate what measures have been put in place to support a poor performing employee. That despite support, the poor performing employee has not made effort to improve and hence the reason for termination.

35. Reliance was also placed on the case of June Samba Mukasa v. Dr. Tukai Lodge Limited, Industrial Cause No. 823 of 2010.
36. The claimant had worked for Equity Bank for 8 years before she was head-hunted by the respondent. The claimant was assessed and vetted by the Central Bank and out of all candidates she was the successful candidate who was deemed qualified to head the operations department, and it was by this that the respondent was issued with the license to operate. Thus, the claimant was qualified for the job she lost.
37. On the 2nd proposed issue, whether the claimant was on probation or a permanent employment at the time of termination counsel for the claimant submitted that the claimant was first put on probation for 6 months. The probation period was then extended for 3 months and thereafter extended up until when the claimant was terminated on March 31, 2015 thus a period of 14 months and 2 days.
38. It was argued that the claimant's probation period ended after the agreed 6 months that was stipulated in the contract of employment. The respondent had not reviewed the claimant's progress for the said period and did only did a month after the probationary period. At the lapse of the probation, the claimant was deemed permanently employed, by operation of the law.
39. Reliance was placed on the holding in Narry Philemon Onaya Odek v. Technical University of Kenya [Formerly Kenya Polytechnic University College] 02017] eKLR, thus;

“The sanctity of the employment contract. Cannot be gainsaid. The parties herein agreed to be bound in the employment relationship by the contract of service and under the terms and conditions of service. The contract of service carried with it rights and duties, responsibility and obligations on either party. In this case the claimant was required to be on probation for a period of six [6] months and upon which he would be reviewed and confirmed into full employment.

In this this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship

The emphasis here is that the employer has the right to terminate the employment of an employee during probation period on short notice or upon payment in lieu thereof. However, such probation period cannot be for more than 6 months or for a period as agreed by the parties and where the employer finds the need to have the probation period extended



beyond the agreed period, this must be done with the agreement of the employee. In this regard the Court in *Peris Nyambura Kimani vs. Dalbit Petroleum Limited*, Petition No. 63 of 2013, held as follows: -

“Section 42 thereof becomes one of the most outstanding provisions of the law and part of the new thinking in Employment and Labour Relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee’s employment can be terminated legally within 7 days or less or be terminated immediately upon payment of 7 days wages

Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of the law and cannot go beyond the legal maximum 12 months. Such a probation period shall not be for more than 6 months but may be extended for a further period of not more than six months with the agreement of the employee.....”.

40. The termination of the claimant’s employment was neither procedurally nor substantively fair.
41. On the reliefs sought the claimant submitted that at the time of separation she had worked for a period exceeding 12 months and had not proceeded for her annual leave, she is entitled to pay for the untaken leave.
42. Section 29 of the *Employment Act* provides for maternity leave with full pay. The respondent purported to dismiss the claimant when she was on this leave and the notice period allegedly issued covered this period. This curtailed her right to maternity leave.
43. Costs follow the event. Since the claimant has proved that her dismissal was unfair and wrongful, she should be awarded costs of this suit.

The respondent’s submissions

44. The respondent in part of its submissions re-states its pleadings, for the reason[s] that this court shall bring forth hereinafter that part of the submission is not useful for purposes of this Judgment.
45. The respondent submitted that the claimant’s probationary period first ran from March to September 2015 [six months] and was thereafter extended between October to December 2015 [another three months]. This was in accordance with Section 42 of the *Employment Act*.
46. It was argued that the claimant did not contest the extension.
47. The respondent argued further that the termination letter was issued on the February 29, 2016, which was essentially before the expiry of the statutory maximum twelve-month probation period.
48. The respondent gave the claimant three months’ notice that ran from 1st March 2016 to 31st May 2016. Despite the notice, the respondent assured the claimant that it would pay her salary during this period. The terms and conditions of her employment remained unchanged.
49. The claimant was paid all her dues and she made an acknowledgment to this effect. The termination of her employment was procedurally and substantively fair.

Analysis and determination

50. From the material before this Court by the parties, the following issues emerge for determination by this Court thus;



- a. What is the impact of the respondent's failure to present a witness?
- b. Whether at the time of the termination of the claimant's employment she was on probation.
- c. Whether the termination of the claimant's employment was fair.
- d. Whether the claimant is entitled to the reliefs sought or any of them.

What is the impact of the respondent's failure to present a witness to testify?

51. Though the respondent entered appearance and subsequently filed a response to the claimant's statement of claim, thereby placing this matter on the path of being heard inter partes on merit, for the reason herein before put forth, it did not present a witness to adduce evidence in support of its defence against the claimant's claim.
52. Not doubt, in an adversarial system like is ours, and in a legal regime like our employment and labour relations where the law places various legal burdens on an employer to discharge in a dispute[s] emanating from an employee's dismissal from employment or termination of an employee's contract of service, the failure by a respondent to adduce evidence, or present a witness, to present evidence as the case may be, in support of its defence against the employee's claim, will have an uncomfortable effect on its defense.
53. A legal burden can only be discharged by a party upon whom it has been placed by the law, through adduction of sufficient evidence. Section 43 of the *Employment Act*, 2007 places upon an employer a burden to prove the reason[s] for the termination of an employee's employment. Section 45[2] of the Act imposes a further burden on him or her to prove that the reason[s] was valid and fair, and procedurally fair. In sum, where a party charged with the responsibility of discharging a legal burden does not place any evidence before the Court geared towards that, the Court will not find any difficulty in holding that the burden was not discharged. Jurisprudence is now firm that where a defendant filed a statement of defence/response but fails to testify in support of the defence/response, such a statement of defence/response remains just a statement without any evidential value, and it is as such that this Court treats the respondent's response to the claimant's statement of claim.

Whether at the time of the termination of the claimant's employment, she was on probation.

54. The claimant came into the employment of the respondent through a contract of employment dated February 16, 2015. The contract provided *inter alia*;

“Terms of engagement.

Your employment shall be subject to probation of 6 [six] months commencing from the date on which you assume duties. During probation either party should give seven [7] days' notice in writing.”

55. This clause of the contract of employment did not provide for extension of the probation period, however, it expressly provided when the notice for termination of the probationary employment would issue by either party. It had to be during the probation period. Miriam Webster Dictionary defines during as “throughout the duration of, 2. “at a point in the course of” and Cambridge English Dictionary, “from the beginning to the end of a particular period or at some time between the beginning and the end of a period.”
56. It is common cause that the probationary period in issue commenced on the March 16, 2015, and was therefore to lapse on the September 15, 2015 pursuant to the stipulations of the contract of employment. The respondent did not in the course [during] of this period signify its intention to



terminate the probationary employment, either at any time before the lapse or at the lapse of period, through the written notice contemplated under the clause.

57. A contract of employment guides the sails of an employment relationship. An employer has no liberty to go outside of the sails set. After the September 15, 2015, as there had been no notice of termination issued by the respondent as was contemplated under the above stated clause of the contract, the claimant became confirmed into employment. In this regard the Court in the case of *Peris Nyambura Kimani vs. Dalbit Petroleum Limited*, Petition No. 63 of 2013 held;

“..... The failure by the respondent to have systems in place so as to have the claimant’s employment reviewed in time and before the probation period lapsed cannot be visited upon the claimant as an employee. Where there existed a written contract of service spelling out the terms and conditions of his employment with the respondent, such cannot be negated by extraneous matters and factors beyond his control, the respondent was under a duty as the employer to observe.

Noting the above, the probationary terms of the claimant’s contract of service lapsed after 6 months. By operation of the law and in accordance with Section 42 of the *Employment Act*, the claimant successfully completed her probation period and thus his employment confirmed. After the lapse of 6 months, the respondent as the employer had a right to review such contract of service retrospectively. Effectively, under the terms of service, once the claimant proceeded to offer his labours to the respondent upon the lapse of 6 months, he would only be terminated from such employment in accordance with Section 35, 40, 44 of the *Employment Act, 2007* or by mutual agreement of the parties.”

58. This Court notes that the contract of employment did not provide for a written confirmation into employment or give any detail as regards how the confirmation was to be conveyed and or effected leaving it to one to safely conclude, that in the absence of a termination notice issued by the employer during the probationary period as contemplated under the contract of employment, the confirmation came in automatically at the lapse of the 6 [six] months’ probation period.

59. This Court takes cognizance of the provisions of Section 42 of the *Employment Act 2007*, and more specifically the anchor provided therein to enable an extension of a probationary period. The Section provides as follows: -

“ 42. Termination of probationary contracts.

- (1) The provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract.
- (2) A probationary period shall not be more than six months but it may be extended for a period of not more than six months with the agreement of the employee – [emphasis mine].
- (3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under sub-section [2].
- (4) a party to a contract for a probationary period may terminate the contract by giving not less than seven days’ notice of termination of the contract or by payment, by the employer to the employee, of seven days’ wages.”

60. If there had to be an extension of the probationary period that was stipulated under the contract of employment between the respondent and the claimant, the same would not be legally done absent of a



mutual agreement between them. Invoking the provisions of Section 10 of the *Employment Act*, where there is a dispute as to whether there was an agreement or not, it became a duty on the employer to prove that there was such an agreement.

61. In the instant matter, the respondent did not place forth before this Court any evidence to establish that there existed such an agreement for extension of the probationary period.
62. The purported extension of the probationary period by the respondent was of no effect, the claimant had already gotten confirmed into employment by operation of the law.
63. The provisions under Section 42 of the *Employment Act 2007*, is a true reflection of the purpose or object of labour legislation. The object of labour law was neatly articulated by Sir Otto Kalin – Freund in his seminal text, *Labour and the Law*, Hamlyn Lecture series [1972],

“The main object of labour law has always been and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”
64. Through its letter dated February 29, 2016, the respondent expressed;

“Reference is made to our letter for extension of your probation period dated October 16, 2015.

The Bank confirms the decision not to continue your probationary period. As a result, your employment will end on May 31, 2016” [emphasis mine].
65. The claimant came into the employment of the respondent on the March 16, 2015, and was placed under probation. There cannot be any contest that at the time the termination was to take effect, on May 31, 2016, she was still under a probationary employment. This was contrary to the injunct by the provisions of Section 42 [3]. The aggregate period was more than twelve [12] months. The Court agrees not with the submissions by counsel for the respondent that the aggregate period that the claimant served under a probationary employment was 11 [eleven] months.
66. In conclusion, the claimant was not under probation at the time of the termination, she had been confirmed into employment by operation of the law.

Whether the termination was fair __**

67. Invited to interrogate presence or otherwise of fairness in termination of an employee’s contract of service, a Court has to consider procedural and substantive fairness. Substantive fairness has to do with the reason for the termination of the employee’s employment while procedural fairness with the procedure followed by the employer in the termination.
68. As pointed herein-above Section 43 of the *Employment Act* places a specific legal burden on the employer in disputes relating to termination of an employee’s employment. He or she has to prove the reason[s] for the termination, in the defaulting, the termination shall be deemed unfair pursuant to the provisions of Section 45 of the Act.
69. The respondent did not tender any evidence in this matter, it cannot therefore be said that he discharged the burden of proof under the provision. It can only be said that he failed.
70. Section 45 [2] of the *Employment Act* provides that termination of an employee’s employment shall be deemed unfair if the employer fails to prove that the termination was, upon a valid and fair reason,



and procedurally fair. Since the respondent did not tender any evidence to prove that the termination was for a valid and fair reason, this Court concludes that the termination was substantively unfair.

71. From the termination letter, it is clear that the claimant's employment was terminated on account of poor performance. It is worth stating at this point that it is not enough for an employer to state that he or she terminated an employee's employment due to the employee's poor performance. The law requires of him or her, more. In the case of *Jane Samba Mukala vs. Ole Tukai Lodge Limited* [supra], the Court held;

“Where poor performance is shown to be reason for termination the employer is placed in 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, he had in place an employment policy or practice on how to measure good performance as against poor performance.

It is imperative on the part of the employer to show that measures were in place to enable them assess 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 just say that one has been terminated for poor performance as the effort leading to this decision must be established.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weakness.

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

72. The respondent did not place evidence before the Court to address that which it was required to, demonstrate substantive justification for the termination.
73. The claimant asserted that she was head-hunted by the respondent from her former employer, Equity Bank [K] Limited, for whom she had worked for 8 years. That she was vetted by the Central Bank of Kenya before she was allowed to take up the employment with the respondent. She helped the respondent to acquire the operations license by processing the necessary documents. I find considerable difficulty in absence of any evidence from the respondent to see the substantive justification for the termination of such employee's employment on account of poor performance.
74. Section 41 of the *Employment Act*, provides for procedural fairness which is an encompassment of certain specific rights to an employee whose employment his or her employer intends to terminate. Whether under a probationary contract of employment or a permanent employment, an employee can grieve under the provision. Fair process as contemplated under the Section has three components, and absence of any of the components shall render the termination procedurally unfair. The information / notification component – the employer must inform the employee of his or her intention to terminate the employee's employment and the reasons stirring the intentions; the hearing component – the employer must accord the employee an opportunity to be heard on the allegations against him or her; the consideration component – the employer has to consider the representations made by the employee and the colleague accompanying him under the right of accompaniment under the provision, before making a decision to terminate.



75. From the evidence placed before this Court, it is clear that the mandatory procedure contemplated under Section 41 of the Employment Act was not adhered to.
76. The termination was not procedurally fair.

Of the reliefs

77. The claimant sought inter alia for payment of a one month's salary in lieu of notice, alleging that the respondent did not pay her any notice pay pursuant to the provisions of Section 35 as read together with Section 36 of the employment Act.
78. I note that the respondent purported to issue a three months' termination notice. However, this Court has not lost sight of the fact that the notice period covered the maternity period that the claimant was on, period during which she was entitled to be paid pursuant to the provisions of Section 29 of the Employment Act. Having found that the claimant was unlawfully & unfairly terminated, the import thereof is that the maternity leave period strictly remained so, and to decline to award a Notice Pay to the claimant pursuant to the provision of Section 36 of the Act, will tantamount to unjustifiably diminishing what the claimant was entitled to during the period. Consequently, the claimant is awarded one month's pay *in lieu of* notice, Kshs 150,000.
79. The claimant further sought for a compensatory relief under Section 49 [1] [c] of the Employment Act, to an extent of 12 [twelve] months' salary in lieu of notice. Having found that the termination was both substantively and procedurally unfair, and, considering the respondent's deviation from what the law required of it, that the claimant was head-hunted from the employment of her former employer with whom she had worked for 8 [eight] years, only to be dismissed within a year in her new employment, the fact that there was no proof that she contributed to the termination, and the industry in which she was working, and conclude that indeed she deserved the compensatory award and to the extent of 11 [eleven] months' gross salary, Kshs 1,650,000.
80. A further relief of damages discriminatory dismissal was sought. I fear there was no evidence or sufficient evidence placed before this Court to establish this claim. Consequently, I decline to make any award under this head.
81. The claim for "Default interest" on her facility at Equity, was a claim that needed to be particularized in the claimant's pleadings and be specifically proved at the hearing. This, the claimant did not do. Further, there is no evidence placed before this Court from which one can discern the default interest suffered. This claim is for the failing and it fails.
82. In the upshot, Judgment is hereby entered in favour of 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, 150,000.
 - c. Compensation pursuant to the provision of Section 49 [1] [c] of the Employment Act, Kshs 1,650,000, 11 [eleven] months gross salary.
 - d. Interest on the amount awarded in [b] and [c] above, at Court rates from the date of this Judgment till full payment.
 - e. Costs of this suit.

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



OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Agutu for the respondent.

Mr. Muthee for Kabiru 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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

