



REPUBLIC OF KENYA



KENYA LAW
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**Mwarania v Sterlite Technologies Limited & another (Cause 25 of 2020)
[2022] KEELRC 13409 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13409 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 25 OF 2020
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

VICTOR MUTEMBEI MWARANIA CLAIMANT

AND

STERLITE TECHNOLOGIES LIMITED 1ST RESPONDENT

OUTSOURCE EASTERN AFRICA LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant instituted this suit vide a memorandum of claim dated June 18, 2020, claiming to have been unfairly terminated and seeking for compensation for the unfair termination. He prayed for the following reliefs;
 - a. A declaration that the claimant was wrongfully and unfairly terminated from his employment by the respondents.
 - b. A declaration that the respondents have breached the constitutional rights of the claimant by engaging in unfair labour practices and by inhuman and degrading treatment of the claimant contrary to articles 28, 29 and 41 of the *Constitution*.
 - c. Terminal dues in the sum of US\$ 155,179.30 made up as follows; -
 - i. US\$ 3.834 being half pay withheld for April, 2020.
 - ii. US\$ 2.834.30 being reimbursement for all pending claims made up as follows; Tanzania tender submission trip=US\$ 941.46 February, 2020 expenses-US\$ 572.84. Sudan business trip - US\$ 1,320.00. Internet subscription for March, 2020-US\$ 100. Monthly pre-paid mobile phone service US\$ 100 Fuel expense last expense before covid-19-US\$ 120.



- iii. US\$ 7,667 being salary for the month of May, 2020.
 - iv. US\$ 17,634 being 2 month pay (inclusive of house allowance) in lieu of notice.
 - v. US\$6,102 being pay for pro-rata leave for 9 months at the rate of 2 days per completed month of service.
 - vi. US\$ 10,350 being unpaid house allowance for 9 months with effect from September 2, 2019 to May 30, 2020.
 - vii. US\$ 105,804 being compensation for wrongful and unfair termination at 12 months gross pay.
 - viii. US\$ 954 for refusal to issue a certificate of service under section 51 of the *Employment Act*.
- d. General damages for breaches, violations and abuse of the claimant's constitutional rights.
 - e. An order that the respondents issue a certificate of service to the claimant unconditionally.
 - f. Costs of this suit and interest on all the amounts herein.
 - g. Any other or further relief that the court may deem fit to grant.

Claimant's Case.

2. The claimant was employed by the respondents as a Business Development and Sales Manager, East Africa on the September 2, 2019 at a salary of US\$ 92,000. That upon his appointment he travelled to Dubai then to India for orientation. On coming back, his employment would make him travel to Tanzania, Sudan, Rwanda, Burundi, Uganda and Egypt in discharging his duties.
3. During the above mentioned travels, the claimant incurred costs in air tickets, accommodations, subsistence, photocopying, local travel for which he was entitled to reimbursement. That he would ordinarily submit reports of the work done and expenses incurred which were to be approved by the respondent before payment.
4. Sometime on March 20, 2020, when he submitted his claim for reimbursement, the respondent asked for more particulars in relations to air tickets and receipts before making reimbursements, which the claimant complied with but the respondent was still dissatisfied and asked for more information. On April 4, 2020, he was informed by the respondent that there were irregularities in the receipts send to it and he was later advised to resign to make things easier.
5. When he refused to resign, he was suspended on half pay from April 10, 2020, to pave way for inquiry into the alleged irregularities on reimbursement made by the claimant. On the same day the claimant was required to give more particulars on some items. His email was immediately deactivated.
6. While still on suspension, he received information from the respondents on the May 4, 2020 advising him to resign without giving him an opportunity to give his side of the story. On May 6, 2020 the claimant received a mutual separation agreement with instruction to sign and deliver a copy to the respondent and he clears with the employer. The claimant did not sign the said letter despite a further reminder on May 8, 2020 and instead he sought for legal advice which advocates wrote to the respondent demanding for them to follow due process in terminating the services of the claimant.
7. On May 30, 2020, the claimant was served with a notice of termination without being subjected to any disciplinary hearing.



8. During the tenure at the respondent, the claimant avers that he was not paid house allowance, nor given annual leave. That he was terminated abruptly without notice, an act that has constrained him financially and embarrassed him in total violation of articles 28, 29 and 41 of the Constitution.
9. Both respondents filed separate responses to the claim with the 1st respondent filing an amended statement of response, counterclaim and set-off on May 13, 2022, while the 2nd respondent filed a response to claim on the November 5, 2020.

1st Respondent's Response and Counterclaim and Set-off.

10. The respondent herein admitted to employing the claimant on September 2, 2019 as a Business Development and Sales Manager at a salary of US\$ 92,000. That he served the respondent till May 28, 2020 when his services were terminated.
11. It is admitted that in accordance with clause 14 of the employment contract, the claimant was entitled to reimbursement of any expenses incurred during the course of work-related duties which must have proof of the said expenses. That the respondent suspected some misconduct from the claimant with regard to the reimbursement sought and initiated an inquiry on April 10, 2020 after suspending the claimant on half salary.
12. The respondent requested for proof of the expenses which soft copies were forwarded to it on the April 16, 2020 and hard copies on the May 6, 2020. After investigation were carried, it was discovered that the receipts submitted were fraudulent as per the report filed before this court.
13. Several correspondences ensued and the claimant proposed to mutually separate from the 1st respondent employment and a zoom meeting was set up for May 4, 2020 to agree on the terms of separation. The claimant was then given 48 hours to consult his advocates on separation terms which he obliged. After the 48 hours, there was no agreement from the claimant's end informing the decision by the respondent to extend time for the claimant to consult till May 11, 2020. On May 11, 2020 the claimant through his advocates denied all allegation of fraud against him and declined to sign the mutual separation agreement. That the respondent herein advised the claimant vide its letter of May 15, 2020 to consider handing the matter internally but he was adamant leading to his termination on May 30, 2020.
14. The respondent maintained that it is the claimant that initiated the mutual separation talks and not the other way round. It is their case that when the claimant failed to sign the mutual separation agreement they invited him to continue with disciplinary hearing but that he failed to do so as such they cannot be faulted for the collapsed internal disciplinary process. It maintained that it had all the reasons to summarily terminate the services of the claimant.
15. It is stated that that the claimant breached clause 5 to 8 of the 1st respondents travel advisory policy which required all international travel settlement to be done within 30 days of the return of the employee. Also that clause 8 provided for a claim without proper description of expenses to be rejected.
16. With regard to house allowance claim, the 1st respondent stated that the gross pay of Kshs US\$ 92,000 was an all-inclusive sum which included house allowance.
17. On leave claim, the 1st respondent stated that the employees were allowed to take their annual leave under clause 3.1 of the 1st respondent's international leave policy. That the claimant did not apply to take his leave days as such they cannot be held liable for failure by the claimant to apply for the said leave.



18. The 1st respondent avers that the claimant was not paid terminal dues as he was yet to clear with it. He stated that the claimant was still in possession of its laptop, joint closure, distribution box 3 splice tray, OTB, 144 F Micro module, 96F riser micro module, 12F/24F TB cable and 48 F retractable all worth approximately Kshs 1,500,000 together with the laptop worth Kshs 110, 503.68.
19. The 1st respondent maintained that the termination was justified and thus the reliefs sought are not warranted.
20. With regard to its counterclaim and set-off, it is stated that the above listed items all costs Kshs 1,610,503.68 which they are counterclaiming from the claimant. He added that in the event the court finds in favour of the claimant then a set of Kshs 1,610,503. 68 be considered by this court. He however prayed for judgement to be entered for it against the claimant as follows; -
 - a. Kshs 1, 610, 503. 68.
 - b. Set off as prayed at paragraph 42 of the counter claim and set off.
 - c. Interest at court rates.
 - d. Costs of this suit.

2nd Respondent's Defence.

21. The 2nd respondent entered appearance on the November 5, 2020 and filed their defence to claim on even date. In their defence the respondent herein contends that it does not have any employment relationship with the claimant and that it was improperly joined into these proceedings.
22. It is stated that since the 1st respondent did not have an office in Kenya, the 2nd respondent was contracted as payroll agent, to receive funds from the 1st respondent, deduct individual statutory deductions such as NHIF, NSSF, HELB and PAYE, remit to the various bodies before paying the net pay to the employees. That this arrangement was captured in the claimant's clause 20 of the employment contract.
23. It maintained that it has never dealt with the claimant on his day to day work save for only pay issue. Also that the employment contract was between the claimant and the 1st respondent and the termination was equally instigated by the 1st respondent.
24. It is the 2nd respondent's case, that the claimant has not disclosed any action against it as such the claim herein as against the 2nd respondent should be struck out with costs.
25. In reply to defence and counterclaim by the 1st respondent, the claimant stated that the code of business and ethics and the alleged authorised policy were not brought to his attention, neither were they attached to his employment contract.
26. He maintained that all expenses claimed were incurred in line of duty and he always attached supporting documentation for any such reimbursement requests. He added that the respondent did not at any time request for more particulars, neither was he involved in the purported investigation and thus could have shed more light on any issue that could have been raised on the said receipts.
27. He also denied allegation that he was the one that initiated the mutual separation talks. He also denied being invited to any disciplinary hearing meeting.



28. He maintained that time was not of essence in the reimbursement of expenses incurred because the respondent time and again reimbursed him and even reimburse claim for February 11, 2020, December 19, 2019, November 26, 2019 and November 22, 2019 which were all made at the same time.
29. He indicated his willingness to return all the respondent's properties in his possession and stated that he had intimated the same and even requested the respondent to meet the courier services in order to deliver all of them but the respondent went mute on the request. He added that the items listed in the defence are indeed in his possession and save for the laptop the other items are samples to be shown to potential customers, therefore are of no use to him as such cannot be used as set off.
30. He prayed for the counterclaim and set-off to be dismissed with costs to him.

Hearing.

31. During hearing the claimant testified at CW-1 and adopted his witness statement of June 18, 2020 and a further statement of June 15, 2022, which reiterated the contents of the claim and upon cross examination by Arunga Advocate, the witness testified that he was employed on August 12, 2018 and served for 10 months. He stated that he was the Business Development Manager but that there were no employees serving under him. He stated that he knew the respondent's policies and that under clause 5 of the contract of employment, any reimbursements were to be made by 5th of every month, however than any claim that would not have been made by the said time was carried forward to the next month. He stated that the reason for termination as indicated by the 1st respondent was for submitting fraudulent receipts. He admitted that under page 93 of his bundle of documents, there are issues that had been raised against him and admitted that he had used personal receipt in context of the said paragraph.
32. Upon further cross examination, the witness testified that he always made his claim though the system provided by the 1st respondent and therefore does not know how the same was fraudulent. He stated that the pay given to him did not include house allowance. On leave pay sought, he admitted that he never sought for any leave while at the respondent's employ. Also that he was not aware of the respondent's international leave policy.
33. Upon cross examination by Kashindi advocates for the 2nd respondent, the witness testified that he was Business Development Manager for the 1st respondent and that he only sued the 2nd respondent because they were liaison people with his employer. He admitted that the 2nd respondent's sole purpose was to take care of his statutory deductions and surrender the net salary to him. He also admitted that his claim is not with regard to pay issue but unfair termination.
34. The respondent called Rahil Puri, the Regional Sales Manager for Europe, as RW-1 who adopted his witness statement of March 23, 2021 together with the documents filed together with the defence and amended defence all as 1st respondent's exhibits.
35. Upon cross examination by Ratemo Advocate, the witness testified that there is no evidence to show the policies was served upon the claimant. He also testified that investigation were carried on the purported fraudulent receipt and the claimant admitted it via phone call sometimes in March, however no evidence of the same was tabled before court. He admitted that most of their meeting were conducted via Zoom even though they never provided for the same as such that the claimant was always available on Zoom meeting. He however contends that the receipts produced to support the expenses were not right. He denied asking the claimant to resign but admitted to requiring him to sign the mutual separation agreement within 3 days. He testified that a disciplinary meeting was conducted virtually but that the claimant did not come with a colleague or representative of his choice.



36. On re-examination he testified that, the claimant being on the management level was expected to know these polices. He also stated that he was the one that carried out investigation on the alleged fraudulent receipt with the help of a third party company and the report is at page 14 to 34 of the supplementary list of documents filed on May 13, 2022. He stated further that the claimant admitted to making claims of personal nature and producing receipts of the same as such he was suspended for such gross misconduct.
37. The second witness Nishtha Khanaa, the 1st respondent, Human Resource for business partners, testified as RW-2. She adopted her statement of March 23, 2021 and a further statement of May 12, 2022 which reiterated the defence and counterclaim.
38. Upon cross examination by Ratemo Advocate, the witness testified that she was notified by the advocate that the claimant was ready to deliver the respondent's properties and requested for courier fees and that they did not act on the said request. She admitted not sending the claimant the other respondent policies. She also stated that she directed the 2nd respondent to draft the mutual separation document and send to the claimant for execution within 3 days. She testified that as much as the contract provide for receipts of reimbursement to be send to the respondent by 5th of every month, there is no consequence of failing to send the same.
39. On re-examination, she clarified that the respondent's policies are found in a shared drive, which the respondent's employees are informed at the point of joining the company and therefore the claimant would have accessed it any time. She added that the claimant was directed on the place to send the properties upon termination but he failed to send.
40. Erastus Kwaka Omollo, the Managing Director of the 2nd respondent, testified as RW-3. He adopted his witness statement of October 31, 2020 which reiterated the contents of the 2nd respondent's defence and in addition testified that the 2nd respondent was outsource by the 1st respondent to only make statutory deduction and remit salaries to the claimant. He maintained that there is no employer-employee relationship between the claimant and the respondent and therefore there is no cause of action as against the 2nd respondent.
41. Upon cross examination by Ratemo Advocate, he testified that the 2nd respondent is not a party to the contract. He then admitted to signing the employment contract only as a median for the purposes of paying the claimant as captured under clause 20 of the employment contract. He testified that he is the one that drafted the mutual separation agreement and did so to help the 1st respondent. He testified that he is a certified public Accountant and he is the one that audited the claimant's receipts, subject of this case. He testified that he had commenced the investigation but finalized it when the case was already in court.
42. The suit was closed and all parties filed their submissions with the claimant filing on August 15, 2022, the 1st respondent on September 29, 2022 and the 2nd respondent on September 29, 2022.

Claimant's Submissions.

43. The claimant identified five issue for determination: whether the 2nd respondent was properly joined in this suit, whether the claimant's dismissal was unfair, whether the claimant is entitled to the reliefs sought, whether the 1st respondent is entitled to the counterclaim and set off and who should bear costs of the counterclaim and set off.
44. On the first issue, it was submitted that the 2nd respondent was properly joined in this suit because the employment contract was signed among three persons, the claimant on one part and both respondents



on the other part as such the contract was among three persons, even though the same contract was only signed between the claimant and the 2nd respondent. It was further argued that the 1st respondent does not have any known offices in Kenya as such the 2nd respondent is instrumental as it is the link between the claimant and the 1st respondent and will be of immense importance in the event the damages are ordered as the same will be recovered through the 2nd respondent. It is argued that by drawing the mutual separation agreement, the 2nd respondent participated in the termination of the claimant as such should bear the consequences of such actions.

45. On the second issue of whether the termination was unfair, it was submitted that for termination to be deemed fair, the employer is tasked under section 43(1) of the *Employment Act* to give valid reason for termination, while section 41 of the *Employment Act* insist on due procedure to be followed. If any of the above is not followed then the termination will be deemed unfair as held in the often cited case of *Walter Ogal Anuro v Teacher Service Commission* [2013] eKLR and the case of *Anthony Njenga Kuria v Bata Shoes Company Limited(K) Limited* [2017] eKLR where the court held that:-

“The primary statutory framework governing disputes relating to termination of employment is found in sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.8. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer 9. The above statutory provision lays a very low threshold of proof on an employee, but in any case a threshold which an employee must meet in the first instance when complaining of unfair termination or wrongful dismissal before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.”

46. In light of the above, the claimant submitted that it incurred all the expenses he requested for reimbursement and the only issue that arose is how the receipts were generated. It was argued that the respondent’s reason for termination was for gross misconduct that occurred in submitting fraudulent receipt. In the investigation report, the basis of the said allegation, the person who conducted the said investigation testified as RW-3 and admitted during hearing that he concluded his investigation on the November 20, 2020 when the claimant had been dismissed and the suit already filed in court, raising question as to whether the basis of termination had been established before the termination. It was further argued that the investigation was subjective because they were undertaken by Crowe Erastus and company Public Accountant who is the same as the 2nd respondent as admitted in hearing.
47. The claimant submitted that even though clause 20 of the employment contract bound the claimant to all other statements of employment particulars, job profile and any other terms and conditions governing such employment, the said terms ought to have been brought to the knowledge of the claimant and not assumed. To support this argument, he relied on the Court of Appeal decision in *Heritage Insurance Company Limited v Christopher Onyango and 23 others* [2018] eKLR. In the end it was submitted for the claimant that if any of the claims for reimbursement was not properly supported by documentation, the respondent ought to have at the very least disallow the claim and not take drastic measure of terminating the service of the claimant.
48. With regard to procedural fairness, it was submitted that a show cause letter was duly served on the claimant who responded and was later suspended on half pay to allow further investigations. Before the claimant could be summoned for any disciplinary hearing, his services were terminated vide the



letter of May 30, 2020. Therefore, the termination was unfair for failing to meet the procedural fairness test as was held in the case of *Hon Justice Martin Mati Muya v the Tribunal* appointed to investigate the conduct of Justice Martin Muya in Petition number 4 of 2020.

49. On the claim set out in the counterclaim, the claimant submitted it has been willing to send back the respondent's properties as they will not be of us to him. He argued that the respondent has not informed him where the documents are to be delivered locally and therefore that he has not failed to deliver the said properties on purposes but for want of delivery point.
50. In conclusion, the claimant submitted that it has demonstrated that his employment was cut short unfairly and urged the claim to be allowed as prayed.

1st Respondent's Submissions.

51. The respondent herein identified four issue for determination: Whether there was a valid reason for termination, whether the termination was procedurally fair, whether the claimant is entitled to the reliefs sought and whether the 1st respondent is entitled to the counter-claim and set-off.
52. On the first issue, it was submitted that section 43 of the *Employment Act* indeed mandates the employer to prove that it had a valid reason for terminating an employee. The standard of proof is on balance of probability and these is based on those matters the employer genuinely believed to exist at the time of termination as enunciated by Justice Makau in the case of *Josephat Munyao Kayulo v Teachers Service Commission* [2019] eKLR and in the decision by Manani J of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
53. Accordingly, it was argued that the respondent herein learned on the March 20, 2020 that the claimant was submitting forged receipts in his claim for reimbursement, which actions were in violation of clause 8 of the 1st respondent's travel policy which provide for summary dismissal if an employee is found liable for submitting false claims. It was argued that the claimant submitted manufactured and self-stamped receipts and documents for reimbursement, an issue that caused the respondent to issue him with a show cause letter dated April 1, 2020, which he admitted partially in the letter of response dated April 6, 2020. That further investigation revealed that indeed the claims were fraudulent and out a claim of Kshs 300,470 and US\$ 1,375, Kshs 221, 730 and US\$ 885 had been paid out with a balance of Kshs 78,740, Tzs 360,000 and US\$ 490 pending. It is submitted that the claimant admitted to using personal receipts and invoice to raise expense claims for monthly expenditure in cases where official receipts were not available. Therefore, that the said actions amount to gross misconduct and a recipe for termination.
54. On procedural fairness, it was submitted that the 1st respondent followed due process provided for under section 41 of the *Employment Act* in terminating the claimant's services. He argued that the claimant was issued with a show cause letter dated April 1, 2020 and a response received on April 6, 2020. That the claimant was then suspended on half pay and investigations began. While investigations were ongoing, the claimant requested for mutual separation terms and the respondent was agreeable to the same and the investigation were altered. A draft agreement was made and the claimant was required to sign within 3 days. After the said days, the claimant refused to sign and instead advised the respondent through its advocates to follow due procedure. That he was given a further opportunity by the letter of May 11, 2020 to consider the mutual separation agreement but no response came forth from the claimant informing the decision by the respondent to terminate the claimant's services vide the letter of May 30, 2020. He maintained that the claimant was given adequate opportunity to defend himself but refused to take it.



55. In conclusion, the respondent submitted that it had a valid reason for terminating the claimant and it duly followed due process before undertaking the said termination as such the termination was justified and the claimant is not entitled to the reliefs sought.
56. With regard to its counterclaim and set-off, the respondent submitted that the listed items are still in the claimant's possession and the value should be awarded to it, in the alternative and in the event the claim goes in favour of the claimant the same should be set-off against the said items which are all valued at Kshs 1,610, 503.68. To support their claim, they cited the case of *Samuel Uche Ajaegbu v Eagle Vet Kenya Limited* [2018] eKLR.

2nd Respondent's submissions.

57. The 2nd respondent on the other hand submitted on only two issue: whether it was properly enjoined and whether the reliefs sought should issue against it.
58. On the first issue, the respondent submitted that there was no employer- employee relationship between it and the claimant. It argued that for employment relationship to be determine there are test that must be established such as; control test, integration test and economic or business reality test which takes into account whether the worker is into business on his own account or works for another. To support this argument, they cited the case of *Christine Adot Lopeyio v Wycliffe Mwachhi/ Tere* [2013] eKLR, where Lady Justice M Mbaru expounded on the said tests.
59. Accordingly, that since the 2nd respondent did not have any direct control over the claimant and his services, he cannot be blamed for the eventual termination, an issue which he did not have control over.
60. It was argued that as much as the letter of employment had its name on it, it was categorical on the duties that can be undertaken by the 2nd respondent as captured under clause 20, which were limited to remitting statutory dues and paying the net pay to the claimant. It was submitted that in the entire claim against the respondent, there was no cause of action raised as against the 2nd respondent as such the 2nd respondent was not a necessary party herein therefore its name ought to be struck out.
61. In conclusion, the respondent herein cited the case of *Amalgamated Union of Kenya Metal Workers v Power Protection Limited* [2022] eKLR and submitted that since there is no employer-employee relationship, this court does not have jurisdiction to handle any claim as against it. He thus urged this court to dismiss the claim as against it with costs.
62. I have examined all evidence and submissions of the parties. The issues for this court's determination are as follows;
1. Who was the employer of the claimant?
 2. Whether there were valid reasons to warrant termination of the claimant.
 3. Whether the claimant was subjected to due process before his termination.
 4. Whether the counter claim against the claimant by the 1st respondent is proved.
 5. Whether the claimant is entitled to the remedies sought.

Issue No 1

63. On this issue, the 2nd respondent have indicated that they have no employment relationship with the claimant but were basically contracted by the 1st respondent to manage the payroll.



64. The claimant exhibited his letter of offer of payment dated September 2, 2019 written by the 2nd respondent. In the said offer, the 2nd respondents indicate that they were writing to the claimant as agreed with his back employer “Sterlite Technologies Limited”. The letter further stated that;-
- “The letter further stated that;-
- “As Sterlite Technologies Limited does have an office in Kenya, you will be employed by Outsource Eastern Africa Ltd, Nairobi – for the sole purpose of your individual statutory compliance in Kenya and only as a paying and compliance agent in that regard – specifically your employment taxes (PAYE), National Social Security Fund (NSSF), National Industrial Training Authority Levy (NITA) and Higher Education Loans Board (HELB) if applicable”.
65. My reading of this offer letter and which was signed by the 2nd respondent and the claimant, the 2nd respondent was responsible to the claimant for the 1st respondent but there were certain parameters specific to the 2nd respondent including statutory payments to be made.
66. If the contract was to be terminated then the 1st respondent was the one to terminate it as per clause 19 of the offer letter.
67. The 2nd respondent was therefore an agent of the 1st respondent and not an employee of the claimant.
68. The claimant has also admitted that the employer was 1st respondent and not the 2nd respondent. It is therefore my finding that the employer of the claimant was the 1st respondent.

Issue No 2

69. On this issue, the respondent averred that they had valid reasons to terminate the services of the claimant.
70. The claimant was terminated vide a letter dated May 30, 2020 where the respondent wrote to him indicating that he had been summarily dismissed from employment with effect from May 30, 2020.
71. The letter referred to the contract of employment but didn’t indicate the reasons for the dismissal.
72. Section 43 of the [Employment Act 2007](#) expects that before termination or dismissal the employer must establish existence of valid reasons.
73. The respondent however chose to dismiss the claimant without indicating for what reasons he was being terminated if any and reasons thereof cannot be ascertained and this contravenes section 43 of [Employment Act 2007](#) which states as follows;

“43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”



Issue No 3

74. On the issue of due process, it is evident that there was back and forth between the claimant and respondent which commenced on April 1, 2020 through a show cause letter.
75. The respondent expected the claimant to explain why he made wrongful business expense claims. He was to give an explanation by April 6, 2020.
76. The claimant made a reply to the show cause letter on April 6, 2020 denying the allegation of making wrongful expense claims.
77. The matter proceeded with the claimant submitting the documents to one Nshtha Khama. After the submission, the respondent proceeded to now write to the claimant asking for a mutual separation agreement to be signed between claimant and the 2nd respondent.
78. The claimant declined to sign the agreement. The claimant was therefore summarily dismissed. There is no indication that the claimant was subjected to any disciplinary hearing.
79. The disciplinary hearing envisaged is as provided for under section 41 of the [Employment Act 2007](#) which provides as follows;

“41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the 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 this explanation.
- (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”.

80. It is true that the claimant and respondent had been engaging and the respondent had wanted the claimant to sign a mutual separation agreement.
81. The claimant categorically declined to sign such agreement insisting on his innocence of any accusation and demanding due process if at all.
82. The respondents didn't invite the claimant to any disciplinary hearing. The fact that they had been seeking a mutual separation agreement was not a bar to a fair hearing for the claimant.
83. The 1st respondent actually through the then agent the 2nd respondent proceeded to write the mutual separation agreement and kept pushing the claimant to sign it.
84. The claimant declined. This then implied that the respondents should if convinced that the claimant had committed an offence subject the claimant to a disciplinary hearing. Thus this didn't.
85. I therefore make a finding that the claimant was not subjected to any fair disciplinary process.



Issue No 4

86. The 1st respondent have counter claimed against the claimant for certain work related implements costing Kshs 1,610,503.68/=. In response to this counter claim, the claimant indicated his willingness to return all the respondents items in his possession and also indicated that he had even asked the respondent to meet the courier services in order to deliver all of them and the respondent went mute.
87. The respondents witness even admitted in evidence that they had been requested by the claimant to meet courier services for delivery of the items.
88. It is therefore apparent that the counter claim is not merited and all the claimant has to do is to deliver the items in question at the respondent's costs as admitted.
89. I find the counter claim not viable and I dismiss it accordingly.

Issue No 5

90. Having considered all the evidence and submissions and complied with my findings above, I find this case in favour of the claimant and I award him as follows;
1. 1 month's salary in lieu of notice = 6,000 USD
 2. USD 3,000 being half pay withheld for April 2020
 3. Unpaid salary for May 2020 – 6,000 USD
 4. 6 month's salary as compensation for the unfair & unlawful termination = 6 x 6,000 USD = 48,000 USD
 5. Prorata leave for 9 months at rate of 2 days per each completed month of service
= 18 days = $18/30 \times 6,000$ USD
= 3,600
 6. Claim for house allowance not allowed as the agreement of contract indicated a gross pay of 92,000USD per annum an indication that the pay was consolidated.
 7. Payment of 2,834.30 USD as reimbursement for all pending claims not paid to claimant.
 8. The claimant should be issued with a certificate of service.
Total payable = 63,434.2 USD
Less statutory deductions
 9. The respondent will pay costs of this suit plus interest at court rates with effect the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ratemo for Claimant – present

Arunga for 1st Respondent – present and holding brief for Nyongesa for 2nd Respondent – present



