



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. E04 OF 2020

FRANCIS NDEKE KYALO..... CLAIMANT

- VERSUS -

COSMOS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the statement of claim on 06.10.2020 through Oundo Muriuki & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent unfairly and unlawfully terminated the claimant's employment.
- b) An order compelling the respondent to issue the claimant a certificate of service.
- c) Two months' salary in lieu of notice amounting to Kshs. 217, 772.30.
- d) Compensation for unutilised leave days amounting to Kshs. 50, 813.56.
- e) Compensation for unfair and unlawful termination equivalent to 12 months' salary Kshs. 1, 306, 633.80.
- f) Gratuity pay for the period 2003-2010 amounting to Kshs. 381, 101.53.
- g) Pro rata salary pay for 1st September 2020 amounting to Kshs. 3, 629. 54.
- h) Costs of the suit.
- i) Any other relief that the Honourable Court may deem fit and just to grant.

The respondent filed the memorandum of response on 09.11.2020 through Munyao Muthama and Kashindi Advocates. The respondent prayed that the claimant's cause be dismissed with costs to the respondent. The claimant filed on 13.11.2020 a reply to the statement of response.

At the hearing on 09.06.2021 it was recorded that after the filing of the suit the respondent had paid the claimant a sum of Kshs.283, 402.81 and the certificate of service had been issued. It was then ordered that the sum of Kshs.283, 402.81 will be deducted from the final award as appropriate. The computation of the Kshs. 283, 402.81 is set out in the "**Final Dues Calculation – Subject to Validation**" exhibited as document 1 on the claimant's supplementary list of documents filed on 13.11.2020. The Court will return (later in this judgment) to the effect of that payment and computation in terms of the said court order. The Court further finds that the issue of issuance of a certificate of service is not in dispute any more.

The claimant testified to support his case and the respondent's witness (RW) was one Inginda Bulimu Franser, the respondent's Sales Manager – General Health.

There is no dispute that the respondent employed the claimant as a Medical Representative in the respondent's Sales & Marketing

Department as per the letter dated 05.03.2003 and effective the same date. The Court returns on the **1st issue** for determination that the parties were therefore in a contract of employment. The letter set out elaborate terms and conditions of service. On termination the contract stated thus, **“At any time after completion of your probation period, either party may terminate this agreement by giving 30(thirty) days’ notice or salary in lieu of such notice. For period of service equal to or exceeding 3 (three) years, either party may terminate this agreement by giving 60 (sixty) days’ notice or salary in lieu of notice. This is without prejudice to the company’s right to terminate the employment summarily for lawful causes as defined in the Employment Act.”** The letter of appointment further provided for a clause on duties and it stated that the claimant would be based in Mombasa and his base town may be altered at the respondent’s discretion and further stated thus, **“(A detailed job description and responsibility will be outlined to you by the company as and when necessary.)”** The final dues calculation shows that the claimant’s last basic monthly pay was Kshs. 59, 385.00 with a monthly house allowance of Kshs. 9, 502.00 thus a monthly gross pay of Kshs. 68, 886.15. The claimant’s period of service was 05.03.2003 to 01.09.2020. At paragraph 8 of the statement of claim the claimant has pleaded that his monthly gross salary was Kshs.108, 886.15 and he earned commission on attainment of set team targets on monthly basis. The respondent has pleaded at paragraph 5 of the memorandum of response that the claimant earned a consolidated monthly salary of Kshs.77, 287.00 and not Kshs.108, 888.15 as claimed by the claimant. The evidence is that both parties have exhibited the claimant’s pay-slip dated 31.08.2020 showing total payments of Kshs. 112, 646.15 computed as follows:

- a) Basic pay Kshs.59, 384.65.
- b) House allowance Kshs.9, 501.50.
- c) Travel allowance Kshs.40, 000.00.
- d) Sales commissions Kshs.3, 760.00.
- e) Total payment Kshs. 112, 646.15.

In view of that undisputed payslip and excluding the sales commission, the Court finds that the claimant has established that his last monthly gross pay was **Kshs. 108, 888.15** and he as well earned monthly commission on attainment of set team targets. The Court finds those to have been the last claimant’s applicable terms of remuneration.

To answer the **2nd issue** for determination the Court returns that there is no dispute that the respondent terminated the claimant’s employment by the letter dated 01.09.2020 and effective the same date. The termination letter referred to the following:

- 1) The performance improvement plan (PIP) cover letter dated 28.02.2020 and the accompanying performance improvement plan template received by the claimant on 06.03.2020.
- 2) The PIP review meeting held on 04.08.2020 at 09.19am at the Cosmos Ltd Administration block reception meeting room.
- 3) The respondent’s letter to show cause on account of non-performance dated the same 04.08.2020.
- 4) The claimant’s written response to the letter to show cause by the claimant’s email dated 06.08.2020.
- 5) The invitation to disciplinary hearing letter dated 13.08.2020.
- 6) Minutes of the disciplinary hearing dated 18.08.2020 and signed and dated by attendees on 25th, 26th, and 28th August 2020 and consented to via email on 24.08.2020.
- 7) All other communication related to the issue.

The termination letter further stated that the disciplinary committee had fully considered the oral and written submissions from the claimant and all other reports and information presented during the disciplinary proceedings and concluded that the claimant was culpable for non-performance of his core duties as a Medical Sales Representative and in particular:

- 1) The PIP highlighted Specific, Measurable, Agreed, Realistic, Time-bound, Exact and Recorded (SMARTER) performance goals that the claimant was required to meet.
- 2) That the performance standards were agreed to by the claimant at the commencement of the PIP program.
- 3) That following a review of the claimant’s actual results versus performance standards mentioned above, the claimant had not met the performance standards in full as per the requirements of the PIP.
- 4) That the goals remained SMART (Specific, Measurable, Agreed, Realistic, Time-bound) throughout the period under review and therefore ought to have been as they were core to the claimant’s position of Medical Sales Representative.

The letter stated that the disciplinary committee had reasonable and sufficient grounds to believe that the claimant’s actions constituted non-performance and the respondent thereby terminated the claimant’s contract of service effective 01.09.2020. The letter stated that upon clearance the claimant would be paid final dues including:

- 1) Salary up to including 01.09.2020.
- 2) Two months' pay in lieu of notice.
- 3) Annual leave earned but not taken as at date of exit.
- 4) Pro-rate leave-travelling allowance where applicable.

The 3rd issue for determination is whether the termination was unfair. To urge a case for unfair termination the claimant has pleaded as follows:

- 1) On 28.02.2020 the claimant received the respondent's letter that the respondent would be monitoring the claimant's performance through PIP for three months from 01.03.2020 to 31.03.2020. The respondent's Human Resource Policy Manual requires only underperforming employees to be subjected to PIP and the claimant was unfairly placed on PIP because he was not such underperforming employee and he had a track record of commendable performance. Prior to the PIP, in his 17 years of service the claimant had not received a warning or concerns about alleged poor performance. He was therefore alarmed with the letter to undergo PIP.
- 2) Beginning early 2020 the respondent had been adversarial and antagonistic towards the claimant in view of the emails and letters with constant reminders and threats of possibility of termination of employment.
- 3) The respondent's policy is that Medical Sales Representatives work in teams as initiated by the respondent and the Representatives work collectively. The respondent did not issue targets nor monthly tracking figures for individual employees but rather provided countrywide targets for each team and periodic performance reports for each team. The claimant was unfairly singled out for PIP individually while some members in his team such as Consepther Igonyi also working in Coast region was spared. There were no measures instituted by the respondent to measure individual performance. The respondent also provided no metric or system of assessing the claimant during the PIP period. Nevertheless, the claimant agreed to subject himself to the PIP as refusal to do so would be considered insubordination on the part of the respondent.
- 4) The respondent promised but failed to provide all necessary tools during the PIP to enable the claimant to achieve the targets. First the respondent failed to provide free samples of its products for distribution to customers as was the practice and custom and samples were not provided throughout the PIP period. Second during the PIP the respondent withheld the monthly sum of Kshs. 10, 000.00 normally issued to him as float to facilitate the field work. The respondent resumed provision of the Kshs. 10, 000.00 float and free samples in July 2020 after the PIP period had lapsed.
- 5) The PIP started in March 2020 coinciding with the government's countermeasures against the global coronavirus pandemic such as curfews and cessation of movement into and out of high risk areas such as Mombasa, Kilifi and Kwale Counties. As a Medical Sales Representative stationed in Mombasa his work entailed travelling to the mentioned Counties which were declared high-risk areas resulting in lower sales rates in the duration of the PIP due to travel and other restrictions. In the circumstances the claimant and his team spent a lot of time working from home for most of the PIP period.
- 6) The PIP was to end on 31.05.2020 and by that date the claimant received no communication on extension of the PIP period. Later the claimant discovered that the respondent had quietly and unilaterally extended the PIP to June and July 2020.
- 7) The respondent failed to carry out the monthly assessments of his performance as had been stated prior to commencement of the PIP. The measurement system of his performance such as percentage achievement of the assigned tasks had not been provided.
- 8) In a surprise turn of events the respondent delivered to the claimant a show-cause letter stating his performance during the PIP had been poor and he had to explain to avert disciplinary action. He replied by email on 06.08.2020 stating he had significantly achieved his targets of stocking new products with clients, scheduling and reporting, customer call rates, competitor information and customer accounts. He was summoned to a disciplinary hearing on 18.08.2020. The hearing was unfair because although he was allowed to attend with an accompanying colleague, the Human Resource Policy Manual prohibited such colleague from testifying or offering exculpatory evidence. The hearing also failed to consider the effect of inability of the claimant to travel and meet clients in the wake of the Covid 19 pandemic. Further after instituting the PIP, the respondent failed to clearly convey to the claimant the areas where targets had not been achieved and requiring improvement. Thus the PIP was merely a setup to terminate his contract of service and he was terminated on 01.09.2020 and no meeting was held to explain the reasons for the termination.
- 9) He submitted a clearance form as required but he was not paid the promised terminal dues and the certificate of service was not issued. He made a demand by letter but no remedy came and he filed the suit.

For the respondent it was pleaded the termination was fair and not unlawful both in procedure and substance. The respondent pleaded as follows:

- 1) Under clause 6.2.5 of the respondent's Human Resource Policy Manual, on PIP, states that employees who do not meet set performance targets will be placed on a performance improvement plan (PIP) with the aim of improving their performance to meet set objectives. Further, the plan will be time bound and will be administered by the rating officer with support from the HR department. The clause further states that the PIP involves closely monitoring the employee's performance during the period as stated in the PIP; and, frequently providing the employee with feedback and recommendations for performance improvement. The clause concludes thus, **"If at the end of the period stated in the PIP, the employee has not met set targets, disciplinary action will be taken against the staff member in line with the provisions of the disciplinary policy up to and including**

termination.”

2) The respondent emplaced the claimant on a PIP by the letter dated 28.02.2020. The same was as a result of the evaluation of the previous year company performance and the need to have all individuals in the general health category meet to set standards. The PIP was to enable the claimant to meet results core to his role as a Medical Sales Representative. The Pip was running from 01.03.2020 to 31.03.2020. The PIP highlighted Specific, Measurable, Agreed, Realistic, Time-bound, Exact and Recorded (SMARTER) performance goals that the claimant was required to meet. The PIP document identified inconsistent sales target achievement with the agreed actions being sales target achievement per product, per region in line with monthly and yearly targets already cascaded; five new pharmacies stocking at least five packets each of the new products launched; and one hospital or institution to stock new products launched each month. PIP also identified few to no field or promotional activities with agreed actions being four chemist activities every month for three months with tangible results such as increased sales, stocking of additional Cosmos products, timely settling of accounts etc; two institutions or doctor activities every month for three months; undertake 45 doctor or clinical officers and pharmacy call rates per week; and field work discipline (punctuality, availability at work station, use of working tools, prompt turn –around to requests, positive and can-do attitude). The PIP also identified reply tool non-utilization with agreed action being detailed monthly schedule of following month sent by 25th of every month; and daily reporting on activities.

3) During the said period the claimant was required to provide monthly reports on his performance in relation to the set performance standards and to do so to his supervisor, sales manager, with a copy to the general manager –ethical sales and head of HR.

4) The claimant agreed to undergo the PIP. He agreed to the identified gaps and targets set. The Sales Representatives took leave in April 2020 due to Covid 19 pandemic and the PIP was extended to June 2020.

5) A performance improvement review was held on 04.08.2020 and the claimant’s performance found unsatisfactory. The letter to show cause dated 04.08.2020 issued conveying that the claimant’s overall score was “**1-not done**”. Per clause 6.2.5 of the Manual, the disciplinary process was initiated. The claimant replied per his letter dated 06.08.2020. Disciplinary hearing took place and minutes signed on 25th, 26th, and 28th August 2020 by attendees and confirmed by the claimant by email on 24.08.2020. The process culminated in the letter of termination dated 01.09.2020.

6) The PIP was as per clause 6.2.5. The claimant knew about the respondent’s performance policy and policy on PIP. The claimant knew his individual job description and he knew his individual targets and he should not hide behind the team performance. He gave his response to the PIP goals as set out in pages 31, 32, and 49 of his bundle of documents. The PIP document at page 11 and 12 of the claimant’s bundle provide for the specific targets that applied during the PIP. Despite the Covid 19 pandemic, the PIP targets remained unrevised. Tools (airtime and internet) were provided for the claimant to work remotely and to mount digital meetings and make all necessary calls – but he failed to use the tools to make the calls to achieve the targets. If the claimant expressed difficulty to travel inter-county, the respondent as an authorised service provider would have provided him with the necessary travel letter.

7) The claimant and other employees were placed on PIP. Of the 15 employees on PIP, 8 employees successfully completed the PIP; 5 employees including the claimant did not successfully complete the PIP; and 3 employees resigned during the PIP.

8) The disciplinary hearing was fair and the claimant made it clear he had opted not to be accompanied with a colleague.

9) The termination was based on fair procedure and valid reasons. There was no contractual or statutory provision that after the termination letter the respondent had to convene a meeting to explain to the claimant the reasons for the termination.

In his reply to the memorandum of response the claimant stated as follows:

1) He repeated his claims and prayers in the statement of claim.

2) He had 17 years of clean service.

3) During PIP he provided reports using Replsly Tool until June 2020 when the respondent stopped the use of Replsly tool and after which the claimant provided manual reports as and when due.

4) His performance being satisfactory at all material times, he was unfairly subjected to PIP. He was singled out and if all Medical Sales Representatives in General Health Category, then all individuals had to be so subjected. The decision to place him on PIP was unilateral respondent’s decision and not agreed upon.

5) The respondent invokes SMARTER acronym but during PIP there was no measurement tool, targets were not agreed upon, they were not realistic in the face of Covid 19 and were not time-bound with the pandemic disrupting all businesses.

6) The claimant undertook his duties and provided his reports promptly. He had no choice to accept or reject the imposed PIP. His reply to the letter to show cause was disregarded.

7) The claimant never took leave in April 2020 as alleged for the respondent but he worked from home as directed by the respondent. The extension of the PIP to June 2020 was never communicated. After 31.05.2020, the claimant continued to work without notice by the respondent that he was still on PIP. The respondent has provided no evidence to show the alleged

unsatisfactory performance by the claimant. The respondent has provided no tool to show how it measured individual performance. No evidence is exhibited on other employees alleged to have been subjected to PIP. As per his letter dated 06.08.2020 he utilised the tools and called clients and he worked diligently. The performance management policy was not invoked and applied fairly.

8) The claimant cleared but the respondent failed to promptly pay terminal dues and on 21.10.2020 the respondent paid Kshs. 283, 402.81 which was less than Kshs. 653, 316.93 as total terminal dues as per the claimant without the element of compensation for unfair termination.

9) The termination was not fair, procedural or lawful. The prayers should therefore be granted.

The Court has considered the elaborate pleadings made for the parties respectively. The Court has also considered the evidence and the submissions. The Court finds as follows.

First, the parties are in agreement that the PIP was provided for in the respondent's Human Resource Policy Manual. Clause 6.2.5 on PIP provides that employees who do not meet set performance targets will be placed on PIP. The claimant's case is that he performed satisfactorily and prior to the PIP he had not performed unsatisfactorily or failed to meet the set targets. The respondent has not exhibited documents in the nature of a warning letter, appraisal reports or other record of poor performance that may have prompted the emplacement of the claimant on PIP. The Court has again and again revisited the pleadings and the evidence and finds that indeed prior to the commencement of the PIP on 01.03.2020, there was no evidence of want of the claimant's performance in any material respect. The minutes of the disciplinary hearing held on 18.08.2020 deals with events after imposition of the PIP on 01.03.2020 and there is no mention on why the claimant was emplaced on the PIP. The Court finds that it was a precondition that the respondent satisfies itself that the claimant's performance needed improvement in identified material respect prior to imposing the PIP but that was not done. The Court finds that the imposition of the PIP and the resulting termination on 01.09.2020 cannot be said to have been founded upon a valid reason for termination as per sections 43 and 45 (2) of the Employment Act, 2007. In particular, and as urged for the claimant the Court returns that in view of failure to comply with that precondition justifying the imposition of a PIP, the reason for termination cannot be said to have related to the claimant's conduct, capacity or compatibility; or based on the operational requirements of the respondent. It was unfair when examined against section 45 (2) of the Act.

While affirming that finding, the Court has considered the evidence by RW during the cross-examination thus, **"I know the claimant. His weakness prior to PIP were about meeting targets and feedback on customer information. Prior to PIP in March 2020 the claimant's appraisals were at a time I was not there. I do not know. I say reports I got as a team there was poor performance in 2018 and 2019. His individual performance could be ascertained but no evidence filed to show he pulled down his team. PIP is reserved to poor performance. Prior to PIP nothing filed to show his poor performance. PIP was on way forward in view of his team's performance. For previous period prior to PIP nothing shows he was a poor performer."** By that evidence the Court finds that there was nothing against the claimant to justify emplacing him on PIP and as lamented by the claimant, prior to the PIP, there is no established tool or system instituted by the respondent shown to have been relied upon to measure the claimant's alleged wanting individual performance.

By that finding alone, the Court returns that the termination on 01.09.2020 was unfair. However, the Court will make further findings as follows.

Second, while the respondent appeared to invoke a letter to show cause and accord the claimant an opportunity at disciplinary hearing as envisaged in section 41 of the Employment Act, 2007, the Court has found that the procedural precondition agreed upon the parties in clause 6.2.5 of the Manual was breached because the claimant had not been shown to have failed to meet his targets prior to imposition of the PIP. The clause further required that the PIP to be administered by the rating officer with support from the HR department involving the close monitoring of the employee's performance during the period of the PIP and frequently providing the employee with feedback and recommendations for performance improvement. The Court has found that the claimant was not an employee liable for PIP and further finds that even though he submitted himself to the PIP, there was no evidence that he was closely monitored and feedback provided. Further, the evidence is that the PIP period, as per claimant's lamentations, went beyond the three months of 01.03.2020 to 31.05.2020 and the respondent has failed to demonstrate the circumstances of the alleged extension and the claimant's evidence that he was not notified about an extension is upheld. Taking all those circumstances and findings into account the Court returns that the termination was unfair procedurally for want of the respondent's compliance with the procedural stipulations of running a PIP as stipulated in clause 6.2.5 of the Manual. The procedure the respondent invoked to terminate the claimant was unfair and cannot be said to have been fair as envisaged in section 45(2) (c) of the Act because it was inconsistent with the provisions of clause 6.2.5 of the Manual - both in substance and procedure.

Third, the Court finds that the claimant's lamentation that the termination must have been predetermined is found valid to the extent that he was not eligible for PIP. Further, his case that no objective measurement system had been instituted to establish his individual performance is found valid. In particular clause 6.2.3.1 of the Manual on how to evaluate performance states that successful performance evaluation must be:

- a) Reasonable, based on fact and prevailing work situation.
- b) Relevant to work and not based on personality.
- c) Reliable.

The clause further states thus, **"While evaluating and assessing objectives the number of objectives achieved (quantity), methods of achieving objectives (quality), when objectives were achieved (timelines), how much direction and/or supervision was required and how challenging the objectives were, should all be considered."** Further, the Court has considered the effect of the Covid 19 pandemic as declared in Kenya sometimes in March 2020. The parties are in agreement that the Covid situation had an impact on the respondent and the claimant. Parties are at variance when the respondent alleges staff took leave in April 2020 and the claimant says the respondent's directive was that he works from home. There is no evidence that the claimant took leave and the Court finds that in the circumstances, he worked from home and as confirmed by the respondent, airtime and internet were provided. Material to this case are the guiding principles on how

the claimant's performance was to be managed. Clause 6.2.2 on tracking performance states, "**The purpose of tracking performance is to review performance against objectives and to delete, amend or add objectives based on the prevailing circumstances. During the tracking process, the supervisor takes the opportunity to communicate or re-emphasize the performance standards of the employee. The supervisor must be precise, constructive and continually refer to performance/measures.**"

Again, clause 6.2.3 on appraisal states, "**Performance Appraisal is a two-way process initiated by the employee. It is a means to finding out how the employee is performing against set objectives, and an assessment of all aspects of performance over the period under review.**"

The review meetings also provide the Rating Officer with an opportunity to offer coaching and any other support that may be required to enhance performance. It should not be considered as just another paperwork exercise, a disciplinary interview, a secret report, a bargaining process between manager and employee, a character assassination or monologue from the manager to the employee. The appraisal shall be guided by the performance appraisal form."

The Court has considered the stated provisions of the Manual and finds that the evidence is that they appear not to have been adequately or even sufficiently invoked and applied during the unfairly imposed PIP period. The targets appear not to have been reviewed even in the face of the Covid 19 situation and there appears to have been no re-emphasizing of performance standards, coaching and support especially during the imposed PIP period. The Court finds that there is no reason to doubt that the relevant float of Kshs.10, 000.00 had not been availed by the respondent until after the PIP period had lapsed and as was testified by the claimant. The evidence is that after the PIP was imposed on 01.03.2020, a review for the months of March, May, June and July was fixed for 5th and 6th August 2020. The minutes of the disciplinary hearing did not show steps taken on the part of the respondent to comply with the Manual's provisions. The Court therefore returns that the respondent appears to have failed to perform its obligations as provided for in the Manual with respect to appraisal and performance management generally and, in particular, with respect to performance measurement during the PIP period that it had imposed upon the claimant, albeit, irregularly so.

The respondent cited **Jane Wairimu Machira–Versus-Mugo Waweru and Associates [2012]eKLR** where it was held that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time, and, 2-3 months would be reasonable. The Court has found that in the instant case, no poor performance has been established on the part of the claimant prior to imposing the PIP on 01.03.2020. The entire PIP and the subsequent termination have therefore been found to have been unfair.

The **4th** issue for determination is whether the claimant is entitled to the prayers. The Court makes findings as follows.

- a) The Court has found that the claimant is entitled to the declaration that the respondent unfairly and unlawfully terminated the claimant's employment.
- b) The parties are in agreement the claimant is entitled to a certificate of service which has been issued.
- c) The claimant prays for two months' salary in lieu of notice amounting to **Kshs. 217, 772.30** and is awarded as the agreed notice period was 60 days.
- d) The claimant is awarded compensation for unutilised leave days amounting to **Kshs. 50, 813.56** as computed for the 8 months in the last year served and as per section 28 of the Act.
- e) He prays for compensation for unfair and unlawful termination equivalent to 12 months' salary Kshs. 1, 306, 633.80. The Court has considered that he had a long clean record of service – and the evidence was that he had earned the due bonuses demonstrating his or his team's satisfactory performance per the respondent's criteria for payment of bonuses. He desired to continue in employment. The aggravating factor was that the respondent emplaced the claimant on PIP whereas there was no evidence of his poor performance and thereafter the purported PIP was not executed as provided for in the Manual. After termination, the claimant appears to have cleared but the respondent failed to promptly pay the terminal dues or deliver the certificate of service – a behaviour the court finds to have been most aggravating and unfair for a very long serving employee. Those are factors under section 49 of the Act that would entitle the claimant to maximum compensation. However, the Court has considered the claimant's conduct condoning the respondent's action of irregularly emplacing him on PIP and to that extent the claimant partially contributed to his termination. Further the Court has considered the gratuity paid by the respondent but which in any event recognises the claimant's otherwise long and clean service. To balance justice for parties he is awarded 10 months' gross salary making Kshs.108, 886.15 x 10 thus **Kshs.1, 088,861.50**.
- f) The claimant prays for gratuity pay for the period 2003-2010 amounting to Kshs. 381, 101.53. The claimant has conceded to gratuity of **Kshs. 234, 284.40** as calculated for the respondent and which is hereby awarded.
- g) The last day at work was on 01.09.2020 and the Court awards pro rata salary pay for 1st September 2020 amounting to **Kshs. 3, 629. 54** as computed for the claimant.
- h) The claimant has succeeded in his claim and is awarded costs of the suit.
- i) The total amount awarded is Kshs.1, 595, 361.30 less Kshs. 283, 402.81 (already paid) making the sum payable **Kshs.1, 311, 958.49**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the respondent unfairly and unlawfully terminated the claimant's employment.
- 2) The respondent to pay the claimant the sum of **Kshs.1, 311, 958.49** (less PAYE) by 01.09.2021 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.
- 3) The claimant is entitled to a certificate of service as already issued.
- 4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 16th July, 2021**.

BYRAM ONGAYA, JUDGE