



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1815 OF 2015**

**SAMWEL ONDERI CHOI .....CLAIMANT**

**VERSUS**

**ABSOLUTE SECURITY LIMITED .....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. It is common cause that the claimant was in the employment of the respondent as a security guard from the 1<sup>st</sup> November 2011 to 1<sup>st</sup> July 2014 when this said employment was terminated by the latter. Charging that the termination was unfair, the claimant instituted the claim herein, seeking a galaxy of reliefs against the respondent.
2. The respondent filed a response to the claimant's statement of claim, denying the claimant's cause of action, and entitlement to the reliefs that he has sought. At the close of pleadings there was a joinder of issues with the matter consequently getting destined for hearing on merit.
3. When the matter came up for hearing before this Court both parties were heard on their respective cases. Directions were given for filing of written submissions. Parties complied.

**THE CLAIMANTS CASE**

4. The claimant sought and this Court allowed that his witness statements dated 24<sup>th</sup> June 2019, and 10<sup>th</sup> February 2020 be deemed evidence in chief. At the hearing therefore he only briefly touched on those aspects of his statements and or case that he felt required clarification.
5. It was his case that he came into the employment of the respondent on the 17<sup>th</sup> day of October 2011, as a security guard till the 1<sup>st</sup> July 2014. He contended that at all times during the currency of his employment he diligently, faithfully and industriously discharged duties as and when they were assigned to him by the respondent.
6. The claimant stated that on the 23<sup>rd</sup> day of June 2014, he was re-deployed to a new station within Loresho area and asked to report there that the same evening.
7. The claimant asserted that by reason of the foregoing premise, he indicated to his supervisor that since he did not know the new area well, finding his way to the client's office would be difficult and that he needed to be dropped at the claimant's premises by someone who knew the place.
8. The supervisor however did not provide him with means to reach at his new station. He struggled to reach there, constantly constrained to ask for directions to the station. The constant stops to ask for directions costed him time to an extent that he got late by forty (40) minutes.
9. He continued to execute his duties until the 1<sup>st</sup> day of July 2014, when he was served with a termination letter. The termination letter cited the delay in reporting to the new work station on 23<sup>rd</sup> June, 2014 as the reason for the termination.
10. The claimant contended that he was neither served with a show cause letter nor given a chance to defend himself. He was not called for any disciplinary hearing. Therefore, he was not subjected to any disciplinary process.
11. He alleged that during his employment, he was not allowed to proceed for his annual leave or paid in lieu of leave days not taken.
12. He further alleged that throughout the currency of his employment he was grossly under paid contrary to the wages bill orders. He was not given house allowance or provided with accommodation.

13. The claimant further stated that he worked overtime without pay, and during national public holidays without compensation.
14. He asserted that his termination was unfair and that in the process of terminating his employment, the respondent affronted the provisions of the Constitution and fair labour practices.
15. As at the time his employment was being terminated, he was earning Kshs.418 per a day. Shown the respondent's documents, he reiterated that he never went for any leave. The allegation by the respondent that he did on 1<sup>st</sup> September 2013 is untrue, and the purported signature on the leave forms is not his.
16. Under cross examination, the claimant stated that there was no complaint against him by the respondent's customers at any time.
17. The respondent's document (Appendix 2), a letter dated 3<sup>rd</sup> April 2017 was put to the claimant, which document he admitted to be his. He also admitted having authored the document (Appendix 3) dated 24<sup>th</sup> June 2014 explaining the circumstances of the day.
18. Pressed by Mr. Njoroge for the respondent to explain why he never took leave, the claimant explained that if one had to, his salary would be deducted. The claimant stated that when he appeared before the labour officer, he was express to him that he had never proceeded for leave.
19. Acknowledging that the labour officer did correspond to the respondent, the claimant stated that in the document dated 11<sup>th</sup> August 2014, the officer indicated his (the claimant's) demand to be payment in lieu of notice.
20. He stated in his evidence under cross examination that he was not paid for the month of June 2014. He further stated that he is claiming for 12 months' gross salary, compensation in light of how he was terminated. That contrary to the position taken by the respondent, the termination of the contract by the customer was not as a result of the conduct.

#### **RESPONDENT'S CASE**

21. The respondent's case is encapsulated in the memorandum of defence dated 11<sup>th</sup> August 2016, the witness statement of Evans Matwere (turned his evidence in chief by consent), and the documents that are annexed to the statement, which documents were produced as exhibits in the order they are on the list of exhibits. Therefore exhibit 1 – 7.
22. At the hearing the respondent's witness had a chance to make clarifications on the witness statement, and, be cross-examined and re-examined. The claimant's case is further found here.
23. Evans Matwere who testified on behalf of the respondent presented himself as the operations manager of the respondent company. He stated that the claimant was employed on the 1<sup>st</sup> November 2011 as a security guard, following his application – Exhibit 1.
24. The respondent's witness claimed that the claimant was not faithful and diligent in the discharge of his duties. He referred the Court to exhibit 2 this, the claimant's statement recorded on the 3<sup>rd</sup> April 2012, to support this. The witness asserted that the claimant had the habit of inconveniencing clients.
25. On the 23<sup>rd</sup> June 2014, the claimant was assigned duties along Loresho Crescent as a night guard. He was expected to report for duty at 6 pm or before to facilitate the handing over from the day guard. The claimant had earlier in the day been instructed by the respondent's supervisor to report earlier at around 5.50 pm to be introduced to the client. The claimant did not have any problem with this arrangement.
26. At around 6 pm, the respondent's client complained through the respondent's chief executive officer that the night guard had not reported for duty. The claimant had switched off his phone and only showed up some minutes to 7 pm. The conduct of the claimant irked the client who subsequently terminated the respondent's services.
27. The witness stated that the claimant was given an opportunity to defend himself, and his statement dated 24<sup>th</sup> June 2014, is testimony of this.
28. He stated that due to the claimant's budget, the respondent's client terminated the latter's services prompting a financial loss on its part. The claimant's explanation was not satisfactory he had to be dismissed summarily as a consequence, with effect from 1<sup>st</sup> July 2014.
29. The claimant was provided with an opportunity to take his annual leave. The respondent produced exhibit 5, application forms as testament to this. The witness asserted that at no time was the claimant underpaid. That pay deductions that were made on his dues were occasioned by his absenteeism.
30. That the claimant had through the labour officer sought for one month's salary in lieu of notice but which payment was not made as the dismissal was a summary dismissal.
31. The witness was cross examined by counsel Ondigi for the claimant. He stated that the claimant's conduct costed them the customer, a source where his salary came from. He further stated that consequently the claimant had no place where to work at.
32. Questioned on prove of the alleged termination of the contract between the customer and the respondent, the witness admitted that he did

not have any termination document in Court.

33. The witness testified further under cross-examination that 23<sup>rd</sup> June 2014, was the 1<sup>st</sup> day the claimant was reporting at his new station. He contended that the claimant and his supervisor had a prior arrangement to the effect that the latter was to pick the former from his place of residence, and take him to the new station.

34. He went further to state that the claimant knew the place as he had earlier on worked there as a reliever. However, he admitted that this was not captured in his witness statement.

35. The witness contended that he gave the claimant a chance to be accompanied by a colleague, but when the claimant appeared before him, the colleague did not show up. The disciplinary proceedings were conducted on the 24<sup>th</sup> June 2014, however, there are no minutes for the same.

36. The witness stated that the claimant was issued with a notice to show cause. However, the witness did not have a copy to demonstrate its existence.

37. The witness confirmed knowledge of the minimum pay wages, and stated that the claimant was at all material times remunerated within the parameters of the minimum wages that were payable during the material times.

38. He stated that the claimant was at all material times given house allowance.

39. Under re-examination, this witness stated that on 24<sup>th</sup> June 2014, when they sent another guard to the premises where the claimant had guarded on the 23<sup>rd</sup> June 2014, it was discovered that the customer had engaged services of another company.

40. That the claimant was given an opportunity to explain himself further, however on 25<sup>th</sup> June 2014 when he was supposed to, he did not turn up.

41. House allowance was 15% of his basic salary. Other allowances were only payable if the claimant had been assigned special duties.

#### **THE CLAIMANT'S SUBMISSIONS**

42. The claimant's counsel in his written submissions identifies two issues for determination in this matter. First, whether the termination of the claimant of the claimant's employment was unfair and wrongful, second whether the relief sought by the claimant can be granted.

43. It was submitted that the claimant's employment was terminated on the 24<sup>th</sup> day of June 2014 and a termination letter issued on the 1<sup>st</sup> July 2014 for allegedly reporting late by one hour, to a new station. However, he was not issued with a notice to show cause or extended a fair hearing including a disciplinary hearing prior to the dismissal.

44. Citing the holding in Walter Ogal Anuro =vs= Teachers Service Commission [2013] eKLR, Counsel submitted that a termination of employment can only pass the fairness test only if substantive justification and procedural fairness are established.

45. It was further submitted that section 43 and 45 of the Employment Act, requires the employer to demonstrate not only that there was a reason to terminate but that the reason was valid and fair. He buttressed this submission with the holding in William Kiarita Gacheru =vs= East Africa Packaging Industries Limited [2016] eKLR thus; -

***“The termination and dismissal from employment must be for a valid reason. The validity of the reason is tested against a matter or matters which the employer at the time of termination or dismissal genuinely believed to exist and which caused the employer to dismiss or terminate the services of an employee.”***

46. The claimant contended that the circumstances that led to the dismissal, could not birth a valid and fair reason for termination. The claimant was redeployed to a new station, he had never been there, he was directed to report there the following day, and he got late by 40 minutes, due to the fact that time was lost on the way as he had to severally stop to seek for direction. He was not facilitated to get to the new station by his employer.

47. Counsel submitted that the only defence raised by the respondent as regards the failure to facilitate the claimant, was that the claimant lived in Kangemi which is near Loresho where the new station is. This does not make sense.

48. The holding of the Court of Appeal in Pius Machafu Isindu =vs= Lavington Security Guards Limited [2017] eKLR was cited, thus: -

***“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination (section 43) – prove the reasons are valid and fair / section 45) – prove that the grounds are justified (section 47 (5) amongst the other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”***

49. And the holding in Benson Iddi Nyambu =vs= Mini Bakeries (Mombasa) Limited [2018] eKLR, 92;

***“In view of the finding that the respondent has failed to prove that the claimant absented himself from work without any lawful cause from 11<sup>th</sup> February 2015 to 20<sup>th</sup> July 2015, I now find and hold that she has failed to prove on a balance of probability that she terminated the services of the claimant for a valid and fair reason as required by section 43 and 45[2] of the Act and as such the summary dismissal of the claimant on 3<sup>rd</sup> March 2015 was unfair. Section 43 [1] of the Act provides as thus: -***

***“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”***

50. Counsel submitted that the summary dismissal of the claimant fouled the provisions of section 44 of the Employment Act, as the ground(s) upon which the dismissal was anchored did not fall within the catalogue provided for in the provisions.

51. That in breach of the procedural path provided for under section 41 of the Act, the respondent did not hear the claimant. The respondent was unable to prove that a disciplinary hearing took place as claimed. It was unable to demonstrate that the claimant was given a hearing. The claimant was never given a chance to be represented as contemplated by the Employment Act. That the right to be accorded a hearing and accompanied by a fellow employee or union representative during the hearing is sacrosanct, counsel relies in the holding in **Kenya Union of Commercial Food and Allied Workers =vs= Meru North Farmers Sacco Limited [2014] eKLR.**

52. He urges the Court to find that in the dismissal both substantive and procedural fairness were absent.

53. On the reliefs, it was submitted that the dismissal being wrongful/unlawful and unfair for want of substantive justification and procedural fairness, the Court should make a compensatory award pursuant to the provisions of section 49 (1) (c) of the Employment Act. The circumstances of this matter demand for the maximum 12 months' gross salary compensation provided for in the section. He puts reliance on the case **of Absolom Ajusa Magomere =vs= Kenya Nut Company Limited [2014] eKLR.**

54. The claimant was dismissed without first being issued with a one month's notice, counsel submitted. He is entitled to notice pay. He placed reliance in the decision in **Robai Musinzi =vs= Safdar Mohammed Khan [2012] eKLR,** where the Court stated: -

***“..... this Court notes that an employer may terminate a contract of employment without notice if she pays the employee a sum equal to the amount of remuneration which would have accrued to the worker during the period of notice. There having been a contract between the parties, this Court finds a duration of one month notice and or one month's pay in lieu of notice being reasonable in the circumstances and I will award the sum of Kshs.11,000.00 for the same.”***

55. The claimant is entitled to Kshs.15,708.00 therefore. This pursuant to section 36 of the Employment Act.

56. On the claim of underpayment, it was submitted that the claimant's daily earning of Kshs.418 were way below the salary prescribed under the various regulations of wages (General Amendment) order in force during the claimant's employment – (2011 – 2014). To buttress this, counsel cites the provisions of section 48 (1) (a) of the Labour Institutions Act. The Court should direct the respondent to pay the claimant the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid as calculated in the memorandum of claim.

57. Counsel also submitted on the relief sought on house allowance. (Kshs.75,395.40). he stated that section 31 of the Employment Act and regulation 5 of the Regulation of Wages [Protective Security Services) Order 1998, placed an obligation upon the respondent to pay the claimant monthly house allowance, besides the salary. According to the regulations he was entitled to one thousand shilling per a month or fifteen per cent of his basic minimum monthly wage whichever is higher. The respondent never paid this as evidenced by the pay slips and the admission made by its witness under cross-examination. That the claimant is entitled to the relief, reliance was placed on the decision in **Andrew Waithaka Kiragu =vs= Grain Pro Kenya Inc. Limited [2017] eKLR.**

58. It was submitted that the claimant proved that during his employment with the respondent, he never proceeded for leave. That the leave form that the respondent tendered as evidence was not authentic, the signature thereon does not belong to the claimant. The document was a forged one. He supports the claim under this citing the case of **Gilbert Mariera Makori vs- Equity Bank Limited [2016] eKLR** where the Court held: -

***“The respondent denied that the claimant had outstanding leave of 60 days for 2010 and 2011. It did not produce any evidence to prove that the claimant took leave for those years and that the only outstanding leave is the 3 days it has offered to pay through written submissions. It is not for the claimant to prove her outstanding leave. This is a statutory responsibility of the respondent as provided under section 74 (i) (f) and 10 (6) and 10 (7) of the Employment Act.”***

#### **THE RESPONDENT'S SUBMISSIONS**

59. The respondent submitted that on the material day the claimant reported on duty late, upsetting the respondent's customer, who consequently terminated his contract with the respondent. That following this, on the 24<sup>th</sup> June 2014, the claimant was accorded an opportunity to defend himself which he did through a letter dated 24<sup>th</sup> June 2014. That the respondent considered the claimant's explanation together with his past conduct and made a decision to summarily dismiss the claimant for gross misconduct.

60. That the claimant later approached the labour officer seeking that the respondent be directed to pay him one month's salary in lieu of notice. That since the dismissal was a summary dismissal, the payment would not be made.

61. Taking the position that the dismissal was a summary one, counsel for the respondent submitted that the Court of Appeal in Kenya Ports Authority =vs= Fadhil Juma Kisuwa [2017] eKLR, gave judicial attention to the law relating to summary dismissal and stated: -

***“As a general rule, no employer has the right to terminate a contract of service of an employee without notice. However, under section 44 for specific reasons, the employer can summarily dismiss an employee without notice or with a shorter notice than that to which the employee is entitled. An employee, by his conduct may leave no doubt that he is in fundamental breach of his obligations under the contract of service.”***

62. It was further submitted that under section 44 of the Employment Act, misconducts that can lead to a justified, summary dismissal is enumerated.

63. It was contended that section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair dismissal. According to the counsel this section places the burden of prove on the employee not only to prove that his services were terminated but also that the termination was unfair and wrongful. That it is when the employer is called upon under section 43 (i) to prove the reason or reasons for dismissal.

64. It was submitted that the claimant had not discharged the evidential burden. He premised this submission on the following facts, first that the claimant knew that he was to report to the new station but he never availed himself to be introduced to the new client. That the claimant in his own pleadings admits to have carelessly and improperly performed his duties, which is a ground for summary dismissal, second that he admitted that he was late in reporting to duty. Third the claimant did not heed to the command of his supervisor to report by 5 p.m. Fourth, that the claimant’s own letter dated 24<sup>th</sup> June 2014, is a demonstration that he was accorded a hearing.

65. Counsel argues that there is no requirement for an oral hearing. He relies on the holding of the Court of Appeal in the Appeal case Murgani Civil No. 108 of 2009. of Kenya Revenue Authority =vs= Menginya Salim

66. On the reliefs sought by the claimant counsel stated that none of them is available to him. One month’s salary in lieu of notice cannot because the dismissal was summary.

67. Regarding housing allowance, section 31 (2) of the Employment Act has given an employer three options, first to provide housing, second pay house allowance or pay a consolidated salary. The claimant was paid a consolidated salary, as demonstrated by the pay slip. At no time did the claimant complain about the consolidated salary.

68. That at paragraph 15 of the statement of claim, the claimant is seeking pay for leave not taken in 2014. That it should not be forgotten that he was terminated in June 2014, therefore in that year he only worked for 6 months. He is bound by his pleadings; he cannot be heard to agitate for leave pay for any period outside this. That there was clear evidence placed before the Court to demonstrate that the claimant was paid all his dues including annual leave pay for 2014.

#### **DETERMINATION**

69. From the pleadings filed herein and the parties’ respective pieces of evidence before this Court, the following issues present themselves as issues for determination, thus;

- a) Who bears the onus of prove in matters like the one before this Court?
- b) Was the termination of the claimant’s service procedurally fair?
- c) Was the dismissal of the claimant’s employment substantively fair?
- d) Is the claimant entailed to the reliefs sought?
- e) Who should bear the costs of this suit?

70. The respondent submitted that the onus of prove lies on the claimant (the employee), to prove not only that his services were terminated, but also that the termination was unfair or wrongful. (Emphasis mine). He cited section 47 (5) of the Employment Act. To me this line of submissions is a product of a misappropriation of the provision and that which has come out of the judicial attention that has been, on this in various matters.

71. Section 47 (5) of the employment Act, stipulates;

***“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 (emphasis mine) 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.”***

72. It is therefore not so unclear that the employee is obligated to prove the fact of dismissal or termination. Thereafter the employer must prove that the dismissal / termination was fair in the sense that it was anchored on a fair reason and that a fair procedure was followed.

**(ii) Was the dismissal of the claimant from employment procedurally fair?**

73. The counsel for the parties herein have taken a stand that the dismissal was a summary dismissal. However, they diverge at the point, as to whether the dismissal was procedurally fair.

74. Procedural fairness addresses the procedure adopted by the employer to effect the termination - Walter Ogal Anura vs= Teachers Service Commission [2013] eKLR. This is what section 45 (2) (c) dictates.

75. Section 41 of the Employment Act, 2007 supplies the structure for procedural fairness, it provides: -

**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 Court, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) have and consider any representation which the employee may on grounds of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."**

76. Counsel for the claimant submitted that notwithstanding that the burden of prove was on it, the respondent did not demonstrate that, a disciplinary hearing took place, the claimant was not given a chance to defend himself and invite a representative of his choice at the supposed hearing. The claimant was not invited to show cause.

77. The respondent did not tender any documents to support the disciplinary proceedings or that the claimant was given a notice to show cause.

78. Counsel for the respondent on procedural fairness submitted that the claimant was informed of the reasons for termination. This was set out in the letter dated 1<sup>st</sup> July 2014.

79. To my mind, for purposes of determining fairness of the procedure employed in termination or summary dismissal of an employee, the starting point should be the happening immediately after the employer's contemplation of the move to summarily dismiss or terminate an employee, up to issuance of the termination or dismissal letter.

80. The provision does not specify whether the representation shall be orally or in writing. However, I agree with the part of Appeal in Kenya Revenue Authority vs= Munginya Salim Murgani Civil Appeal 108 of 2009, thus;

**"However, in our view, the fairness of a hearing is not determined solely by the oral nature. It may be conducted through an exchange of letters as it happened in the matter before us and we are satisfied that it was a hearing. In the case of LOCAL GOVERNMENT BOARD vs= ARLIDGE (1915) A.C. 120, 132-133, SELVERAJAN vs= RACE RELATIONS BOARD [1975] 1 WLR 1686, 1694 and in R vs= IMMIGRATION APPEAL TRIBUNAL ex parte JONES (1988) 1 WLR 477, 481, it was held: -**

**"The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.".....**

**Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made"**

81. However, this does not obliterate the statutory right of an employee, to the presence of another employee or shop floor union representative as contemplated in section 41 (1) of the Employment Act, and the importance thereof.

82. Where a Court is faced with an allegation that an employee made written representation as it is in this, it must be satisfied that the written representation was on the contemplated termination or summary dismissal, and the grounds forming basis for the contemplated action. It goes without doubt therefore that prior to the representation the employer must make the employee aware of the contemplated action and the grounds.

83. According to the claimant his explanation was only limited to why he got late to the client's premises, for that was what he was asked to give. The explanation therefore had nothing to do with a contemplated action of summary dismissal and the grounds that were to form basis thereof.

84. The respondent did not demonstrate that it notified the claimant that act of summary dismissal was contemplated and invite the him to offer a representation. The respondent therefore failed to establish that the written explanation was in regard to a contemplated decision to summarily dismiss, and the ground forming premise for the action.

85. No credible evidence streamed from the respondent's testimony or material before Court, to the effect that the claimant was accorded the opportunity to have present another employee for purposes of representation as contemplated in section 41 of the Act. The respondent's witness stated, and I am not convinced, that there were disciplinary proceedings on the 25<sup>th</sup> June 2014, when the other employee who the claimant had identified to be present did not turn up. Actually, his evidence as to when the hearing really took place was contradictory. It is

not clear whether it was on the 24<sup>th</sup> or the 25<sup>th</sup>.

86. My doubt is further heightened by the comment that RW1 in his capacity as an operations manager of the respondent made on the 24<sup>th</sup> June 2014, on the written statement of explanation by the claimant dated 24<sup>th</sup> June 2014, thus;

***“please terminate this guard as his record indicates wanting and causing several inconveniences***

***24/06/14”***

This leaves no room for one to believe that after this day (24/06/2014) there was any form of proceedings. The fact of the claimant was sealed on 24<sup>th</sup> June 2014.

By reason of the foregoing premise, I am not convinced that, the statement by the claimant of 24<sup>th</sup> June 2014 was in regard to the action of summary dismissal that the respondent was contemplating, the claimant was invited to make any representation in the manner contemplated in section 41 of the Employment Act and there were disciplinary proceedings undertaken where the claimant had an opportunity to call a colleague to be present, as alleged by the respondent’s witness. I conclude therefore that the dismissal was not procedurally fair.

***(iii) Whether the dismissal was substantively fair***

87. Section 45 of the Employment Act stipulates;

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment is unfair if the employer fails to prove;

a) That the reason for termination is valid;

b) That the reason for termination is a fair reason;

c) Related to the employee’s conduct, capacity or compatibility; or

(ii) Based on the requirements of the employer.

88. Section 45 (5) presents Courts with a platform to interrogate whether an employer’s decision was just and equitable.

89. In determining appropriateness of a dismissal, this honourable Court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of validity or fairness of the reason for dismissal rests with the employer. This, as this Court held in ***Lydia Moraa Obara =vs= Tusker Mattresses Limited [2021] eKLR.***

90. The dismissal of the claimant was summary. According to section 44 of the Employment Act summary dismissal occurs when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by statutory provision or contractual term.

91. Apparently in this matter there was no dispute that there existed an employer-employee relationship between the parties. However, no contract document was tendered in evidence from which a term for issuance of a notice of termination can be gauged. Therefore, the statutory provision – section 35 of the Employment Act sets in.

92. In determining validity and fairness of the reason for summary dismissal of an employee one must take into account the provisions of section 44 (3) & (4) of the Employment Act, 2007, which provides:-

***“(subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”***

93. Dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious nature. Indeed, summary dismissal is often referred to as the “*capital punishment*” of the employment relationship.

94. By employing the term fundamental breach, the provision demands that the conduct of the employee be repudiatory in character. In the employment contract an employee may be said to have repudiated a contract where his/her conduct and the character it reveals, is such as to undermine, or seriously impair, the essential trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship – see ***Hunter Engineering Co. =vs= Syncrude Canada Limited, 1989, Can LII 129 (SCC).***

95. There must be demonstration by the employer on a balance of probabilities real misconduct rather than simple dissatisfaction with performance or concern as to potential misconduct.

96. To decide whether a misconduct constitutes a valid and fair reason for summary dismissal the Court must consider the nature of the

misconduct, and the consequences arising from the misconduct, within the totality of the employment contract, including the nature and history of employment relationship – *Geluch vs= Rosedale Golf Assn. 2004 (Can LII 145666 (ON SC))*.

97. Section 44 (4) of the Employment Act, lists misconducts that may amount to gross misconduct so as to warrant a summary dismissal, whether an employer is justified in dismissing on any of these grounds requires an assessment of the context of the alleged misconduct.

98. The respondent's counsel submitted that looking at the conduct of the claimant that led to the dismissal, one should come to a conclusion that, the conduct falls within the circle of those conducts that can warrant a summary dismissal. Counsel urged Court to consider the impact of the claimant's conduct on the business of the employer. He contended the respondent's witness duly established by his evidence that the respondent lost a client as a consequence.

99. Having chosen to rely on an alleged consequence on its business, to establish that the misconduct was of a degree immense enough to justify a dismissal, the respondent was bound to prove that indeed its service to the client was terminated.

100. The respondent did not place before me any document to prove that the relationship between it and the client occurred. In fact, the termination letter disabuses this submission and the oral testimony by the respondent, that it suffered a termination of services to its client. The termination letter only talks of an ultimatum having been issued by the client.

101. Considering the context of the alleged misconduct (being late for 40 minutes), namely that the delay was occasioned by the fact that the claimant was not facilitated to his new station, that I believe his evidence that he lost time trying to locate the new station, that there were no prove of earlier incidents of lateness on his part, and that his supervisor was not presented to give evidence to establish he had given the claimant any instructions and that there was that arrangement between him and the claimant that RW1 purported to testify on, I am not convinced that the conduct can be categorized as gross misconduct as contemplated in section 44 (4).

102. Imperative to state that, regarding the happenings on the alleged date of the offending conduct of the claimant, the respondent's witness largely presented hearsay before me.

103. In the upshot I find that the alleged misconduct was not of a degree that would amount to gross misconduct, with a consequence of attracting the "capital punishment" of an employment relationship -summary dismissal.

104. The summary dismissal was not substantively fair.

#### **What reliefs are available to the claimant**

105. Having found that the dismissal was neither substantively fair nor procedurally fair, I now turn to the reliefs sought by the claimant.

#### **(i) Compensation for unfair termination**

106. Pursuant to the provision of section 49 (1) (c) of the Employment Act, the claimant seeks to be compensated to an extent of the maximum compensation awardable thereunder, namely, gross salary for 12 months. He finds support in the decision in *Abisalom Ajusa Magomere vs= Kenya Nut Company Limited [2014]*.

107. This Court is convinced that in the circumstances of this matter the compensatory relief should be granted to the claimant considering that procedural fairness and substantive justification were absent in the summary dismissal of the claimant, the circumstances in which the termination took place, and in this I have in mind that on the material day the claimant got to work late by 40 minutes, and this goes to his contribution to the termination. I award the claimant compensation pursuant to the provision in the sum of Kshs.62,832.00 being 4 (four) months' gross salary.

#### **(ii) Notice Pay**

108. Section 49 (1) [a] of the Employment Act states: -

***“where in the opinion of the labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following:-***

***(a) the wages which the employee would have earned had the employee been given notice to which he was entitled under this Act or his contract of service.”***

109. This read with section 36 of the Act forms basis for an award of one month's salary in lieu of notice, in the circumstances that the dismissal was without notice. Under this head, I award the claimant Kshs.15,708.00 as sought in the statement of claim.

#### **(iii) Underpayments**

110. According to the claimant for the period May 2012 – April 2013, the salary of Kshs.418/= per a day was below the salary that was prescribed under the regulation of Wages (General Wages Amendment) Order that was in force then. From the statement of claim, the claimant pleads that for this period a prescribed salary was Kshs.459.30, therefore there was an under payment of Kshs.41.30 daily. Translating to a total of Kshs.14,868.50.

111. For purposes of section 90 of the Employment Act, 2007, 2007 which places forth a limitation of time for purposes of filing matters arising out of the Act or a contract of service. The section provides: -

***“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall be or be instituted unless it is commenced within 3 days next after the act, neglect or default complained or in case of continuing injury or damage within twelve months next after the cessation thereof.”***

112. I note that the claimant’s claim herein was filed on the 12<sup>th</sup> October 2015. Consequently, in line with provisions afore-stated, I take a view that any claim for the alleged unfair payment, for the period 1<sup>st</sup> May 2012 – 11<sup>th</sup> October 2012, was time barred as at that time of filing of the claim. Therefore, in considering a period for which a payment may be ordered, this period shall be excluded.

113. On the claim for under payment, the claimant placed reliance on the provision of section 48 1 (a) of the Labour Institutions Act which provides that: -

***(1) “Notwithstanding anything contained in this Act or any other written law, the minimum rates of remuneration or conditions of employment established in a wages order constitutes a term of employment of any employee to whom the wages order apply and may not be issued by agreement.”***

***(2) An employer who fails to –***

***a) Pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or***

***b) Provide an employee with the conditions of employment prescribed in the order, commits an offence.***

***c) If an employer is found guilty of an offence under sub-section (2) the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.”***

114. Counsel for the respondent argued that the claimant did not complain to the labour officer of any underpayment when he presented the dispute to him. Counsel referred to the respondents exhibit No. 7 and that he never at all complained about any underpayment until after dismissal.

115. I do not agree with the respondent’s counsel’s line of thought. Section 47 (3) of the Employment Act, provides that: -

***“The right of an employee to present a complaint under this section shall be in addition to the right to complain to the industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.”***

116. The fact that he did not raise all the complaints before the labour officer is not a foreclosure for him to crave for other reliefs in Court.

117. I do not construe an employee’s failure to protest an underpayment to his employer as a waiver of his / her entitlement.

118. For purposes of the part of the year 2012, that is to say November -December, the Regulation of Wages [General Amendment] Order, 2012, that were through Legal Notice NO 71, and which came into operation on the 1<sup>st</sup> May 2012, is applicable. It provided for minimum daily wages inclusive of House allowance at Kshs. 428.00 for night watchmen. Therefore, it is not difficult for one to conclude that for this period there was no underpayment.

119. The next Regulation of Wages [General][Amendment] Order, came into Operation on the 1<sup>st</sup> May, 2013, namely **The Regulation of Wages [General][Amendment] Order, 2013**. Therefore, for January-April 2013, there was no underpayment as that rates applicable were those provided for by the 2012 Order.

120. This Order [2013], provided a rate of Kshs. 487.90. Therefore for the period May 2013 till 1<sup>st</sup> of July 2014, when the Claimant was terminated, there was an underpayment of salary by Kshs. 69.90, translating to a cumulative figure of Kshs. 908.70.

***(iv) House allowance***

121. It is clear that the claimant is seeking for an alleged house allowance that was not paid for the entire 32 months, when he was in the employment of the respondent. Before I get into whether this relief is available or not to the claimant it is imperative to state that by operation of the provisions of section 90 of the Employment Act, a claim for alleged unpaid house allowance for the period 17<sup>th</sup> October 2011 to 11<sup>th</sup> October 2012 had become time barred as at the time this matter was commenced. If I were to make an award under this head, the award can only be for 20 months.

122. The respondent’s witness asserted that the salary that the claimant was earning was a consolidated salary, inclusive of house allowance. That the pay slip that was placed before this Court exemplifies this. I am unable to discern this from the pay slip.

123. I have hereinabove indicated that the wages, according to the Regulation of Wages Orders that were applicable at the material time provided for daily rates that were inclusive of house allowance. I agree therefore with the position fronted by the Respondent that the

Claimant's salary was a consolidated on. The prayer for unpaid house allowance is therefore declined.

**(v) Leave Pay**

**124.** The claimant alleged in his pleadings and submitted that throughout his time of employment he never proceeded for leave. To counter this, the respondent tendered in evidence of leave application form indicating that on the 27<sup>th</sup> August 2013, the claimant had applied for leave (annual) and that the same was approved. The claimant asserted that the form was not authentic. That the signature thereon is not his'. At the juncture the respondent produced a form to prove that leave was applied for and approved, the evidential burden shifted to the claimant. I am not convinced that he discharged the same. I am inclined not to award any sum under this head.

**(vi) Costs**

**125.** It is trite law that costs follow the event. Costs in this matter are therefore awarded in favour of the claimant.

**126.** In the upshot, Judgement is hereby entered in favour of the claimant as follows: -

- (i)** It is hereby declared that the termination of his employment was both substantively and procedurally unfair.
- (ii)** Compensation pursuant to section 49 (1) (c), in the sum of Kshs. 62,832;
- (iii)** One month's salary in lieu of notice – Kshs. 15,708;
- (iv)** Underpaid salary – Kshs. 908.70.
- (v)** Costs of this suit.
- (vi)** Interest.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

**In Presence of**

**Odhiambo for the Claimant**

**Njoroge for the Respondent**