



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1257 OF 2018

MARY MWAURA.....CLAIMANT

VERSUS

CAP YOUTH EMPOWERMENT INSTITUTE..... RESPONDENT

JUDGMENT

Introduction

1. Through its letter of appointment dated 22nd February 2017, the Respondent offered to employ the Claimant and the latter accepted to be employed, as a Youth Entrepreneurship Coordinator, on the conditions and terms that were put forth therein *inter alia* that the employment was a fixed term one that were to commence on 1st March 2017 to remain in effect until 31st January 2018, when an evaluation could be done to determine whether it would be renewed or not. On the 25th April, 2018, almost three months after the contract period had lapsed, the Respondent issued a termination letter to the Claimant. This did not settle down well with her. Taking a position that, at the time of the termination her contract had been renewed following a positive evaluation that was carried out shortly before the lapse of the contract period, she consequently was an employee and therefore covered under the expansive protections accorded by the Employment Act, and that the termination was unfair, she brought this claim. The Respondent on the other hand denies the claim and contends that her services were terminated in accordance to the law. It seeks the dismissal of the claim, contending that the reliefs sought cannot be availed to her.

This is where the dispute originates and resides.

Claimant's case

2. The claim herein was instituted vide the Memorandum of Claim dated 23rd July 2018. Therewith the Claimant contemporaneously filed a witness statement of same date, and a number of documents. The Claimant gave an oral testimony in Court on 11th August 2021, testimony that was for purposes of clarifying contents of the witness statement and the documents that the Court adopted as her evidence in chief and exhibits respectively, by consent of the parties.

3. The Claimant prays for judgement against the Respondent for:

1. A declaration that the termination of the Claimant by the Respondent was unlawful thus null and void.
2. Reinstatement of the Claimant to her position forthwith with all the entitlements payable in full.
3. In the alternative to prayer 2 above, damages for unlawful dismissal in the following terms:
 - (i) Salary from the date of the unlawful dismissal at Kshs. 200,000/= per month to 31st December 2018
 - (ii) Unclaimed leave days being 12 days unclaimed in 2017 and 21 days unclaimed in 2018.
 - (iii) Three months' salary in lieu of notice at Kshs. 200,000/= per month.
 - (iv) Costs of this suit and interest in prayer 3(i-ii) above.
 - (v) Damages for unlawful termination.
 - (vi) A certificate of service as per section 51 of the Employment Act and;

(vii) Any other further and better reliefs the Honourable Court may deem just and fit to grant.

4. The claimant, avers that she had served the Respondent in her capacity as a Youth Entrepreneurship Coordinator. She earned a monthly pay of Kshs. 200,000/=. She maintains that she performed her duties diligently, with utmost professionalism and in compliance with the law and the Respondent's rules and regulations. She states that she was never a subject of any disciplinary issues during her tenure.

5. The claimant states that according to the letter of appointment, her contract was to come to an end on 31st January 2018, however it was subject to renewal upon a favourable evaluation of her performance, during the period 1st March,2017 and 31st January 2018. The Respondent conducted an evaluation on or about 12th January 2018 to determine whether the contract would be renewed or not. She asserts that the respondent communicated that her evaluation was positive and that she was to receive a renewal letter in due course.

6. The claimant avows that she continued working diligently for the months of February and March 2018, with full knowledge that her contract had been renewed. She was accordingly paid her monthly salary for these months.

7. The claimant states that to her dismay and contrary to her expectation, the Respondent conducted a further evaluation without her knowledge in the month of April 2018. She avers that she was asked to respond to the results of the further evaluation. She started bearing verbal pressure from the Respondent to resign. Absent of any reasons as to why the Respondent wanted her resignation, she declined to. She got constrained to ask for a formal communication from the Respondent on its desire that she resigns.

8. The claimant avers that on 25th April 2018, she received a termination letter from the Respondent. It stated that her contract would not be renewed on grounds that the organization had decided to **reorganize their entrepreneurship sub program to devolve primary responsibility to field staff hence the coordinating and support role the claimant had been playing was to cease.**

9. She takes a position that the Respondent had declared her redundant without following the requisite statutory provisions and as such was unfairly and unlawfully terminated. She contends that she was unaware of the alleged reorganization and was not consulted on it, or given any opportunity to participate in events related thereto.

10. To make matters worse, the claimant states, that despite the declaration of redundancy, she noted that the Respondent proceeded to invite applications to fill the position she held in May 2018. She highlights that this was even before her contemplated departure date, an action which negated the reasons she was given for the termination of her contract and exposed the reason given as camouflaged.

11. At the hearing, the Claimant was cross examined by Counsel for the Respondent Mr. Nganga. She admitted that the letter of appointment, did set forth that her employment was on a contract basis, that was to run from 1st March,2017 to 31st January, 2018. Further that the renewal of the contract was subject to an evaluation. The evaluation was done in January 2018 however she did not get a communication regarding extension of the contract.

12. That the letter dated 25th April,2018 was a termination letter. Preceding this, there had been no letter promising her a renewal of the contract. That clause 20 of the contract provided for a termination notice. The notice contemplated thereunder was issued to her.

13. Referred to the Respondent's exhibit number two, a pay slip, she admitted that she was paid Kshs. 183,665 for the notice month. Respondent's exhibit number three, is the payment cheque. She stated that from the pay slip one can see that she was paid in lieu of leave, Kshs. 61,666.67.

Claimant's Submissions

14. The claimant's counsel submitted that the actions of the Respondent were in total disregard of Article 41 of the Constitution and sections 40, 43, 44 and 45 of the Employment Act. He submitted that termination of an employee's contract of service does not pass the fairness test unless the employer demonstrates to an acceptable standard that it was done on the basis of valid and fair reason[s] and upon following fair procedure. He relied on the Court of Appeal case of **Pius Machafu Isindu =vs= Lavington Security Guards Limited (2017) eKLR** to bolster his argument.

15. Counsel submitted that the Claimant was not accorded an opportunity to make a representation as provided for under Section 41 of the Employment Act. He also argued that the Respondent did not adduce any evidence to prove that mandatory procedure set out in the provision was followed prior to the Claimant's termination.

16. He relied on the Court of Appeal decisions in **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited =vs= Mohammed Noor, Civil Appeal No. 199 of 2013** where the right to hearing before dismissal for a cause was held to be mandatory or else the separation is unfair and unlawful.

17. Counsel also relied on the case of **National Bank of Kenya =vs= Samuel Nguru Mutonya [2019] eKLR** where the court of Appeal held that Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity. He argued that none of the procedures outlined in the section were undertaken which in turn meant that the Claimant's termination was not procedural.

18. Further reliance was placed on the decision of **Walter Ogal Anuro =vs= Teachers Service Commissions [2013] eKLR** where the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

19. Regarding the remedies sought, counsel submitted that Section 49 of the Employment Act provides for a wide range of remedies for wrongful dismissal and unfair termination as read with Section 50 of the Employment Act. Relying on the decision in, ***Joshua Otiogo Apiyo vs Modern Coast Express Limited [2019]eKLR***, counsel submitted a compensatory award of 12 months gross salary should be extended to the claimant.

20. He argued that the Claimant has obviously suffered irreparable loss and damage from the actions of the Respondent and as such should be awarded damages. On costs, he stated that as per the provisions of Section 27(1) of the Civil Procedure Act, costs follow the event and the Respondent should be directed to pay the costs of the suit.

Respondent's case

21. The Respondent filed its Response to Claim and Witness Statement by its Executive Director, - Mr. Ndung'u Kahihu- dated 29th September 2018, and 14th September 2018, respectively. At the hearing of this matter, the witness statement was deemed the Respondent's evidence in chief, and the documents that were filed under its list of documents dated 19th July 2021, as exhibits 1, 2, & 3. The Respondent avers that the Claimant's contract was for a fixed term commencing on 1st March 2017 and terminating on 31st January 2018 renewable upon evaluation. He states that the evaluation had not been done until April 2018 and it revealed an unsatisfactory performance by the Claimant during the period under evaluation, leading to a non-renewal of the contract.

22. The Respondent argues that there was no automatic renewal of the contract. He clarifies that the evaluation carried out on 12th January 2018 as argued by the Claimant was a general one for all staff and was not meant to consider the renewal of her contract. He also states that no communication was made to the Claimant following this evaluation that she would get her contract renewed.

23. The Respondent avows that at no time was the Claimant declared redundant nor was her position dissolved. He also states that the Respondent did not advertise her position to, rather the advertisement was for the recruitment of regional coordinators.

24. The Respondent also states that the termination letter was worded in a way that the Claimant would not be faced with difficulties as she sought employment elsewhere despite the reason for nonrenewal being her poor performance.

25. The respondent maintains that the Claimant was paid a sum of Kshs. 200,000/= equivalent to 1 month's pay to ease her termination process. He also argued that given the termination was due to the lapse of the fixed term, the Claimant was not entitled to any notice or pay in lieu thereof. He also states that the Claimant's outstanding leave days were 9.5 and that she was paid a sum of Kshs. 61,666.66/- for them.

26. The respondent contends that the termination was neither unfair nor unlawful. That upon her departure, there was reorganization of operations which created a working group that absorbed the Claimant's former duties, hence there is no position for her to be absorbed into anymore. It concludes that the Claimant is free to collect her Certificate of Service at any time.

27. During the hearing, the Respondent called upon Mr. Ndung'u who testified and produced exhibits that supported his case. Cross examined, he stated that the Claimant responded to the evaluation that he had done.

Respondent's Submissions

28. Counsel for the Respondent submitted that the Claimant's employment contract was in writing and any addition or variation thereof had to be in writing. He argued that the Claimant did not have any documents whatsoever to indicate said renewal.

29. On termination by notice, counsel submitted that the Claimant had confirmed receipt of her termination letter on 25th April 2018 which letter indicated that her employment would come to an end on 30th May 2018. He argued that this amounted to one month's notice.

30. Counsel also submitted that the Claimant confirmed that she had received her pay for the month of May and that of the leave days not taken.

31. He concluded that the Claimant's prayers are not merited in the circumstances of the suit.

Determination

32. From the pleadings filed herein by the parties, their respective evidence comprised in the witness statements, their oral testimony in Court and the documents that they placed before this Court as exhibits, I consider the following issues as the issues that I should decide on in this matter, thus;

(i) Whether by any way, the claimant's contract of employment was renewed.

(ii) If the answer to (i) above is in the affirmative, whether the contract of employment was terminated with procedural and substantive fairness.

(iii) What reliefs if any are available to the Claimant in the circumstances of the matter?

(iv) Who should bear the costs of this suit?

33. As regards whether or not the contract of employment was renewed, the parties herein took positions that were heavily opposed to each other, as distinct as day and night are.

34. The claimant asserts that her contract of employment was constructively renewed and therefore courtesy of the renewed contract, she got placed under the expensive protection accorded to employees under the Employment Act, 2007, and the Constitution of Kenya. On the other hand, the respondent contends that the claimant was evaluated to determine her suitability for a renewed contract, in April 2018. She was found to be unsuitable. The contract that had commenced on the 1st of March 2017, running up to 31st January 2018, was not extended thereby.

35. It is not in contestation that through its letter of employment dated 22nd February 2017, the Respondent offered to employ and the Claimant agreed to be employed upon the terms and conditions that were put forth in the said letter. The life of the employment relationship that was birthed, was set to be for that period 01st March 2017 until 31st January 2018. Its renewal depended upon a favourable evaluation on the claimant's performance during this period of the contract.

Clause 7 of the letter of employment provided thus;

“Your employment with the organization commences on 01st March 2017 and it shall remain in effect until 31st January 2018 when an evaluation will be done to determine whether it will be renewed or not.”

36. The Claimant asserted that prior to the date (31st January 2018), that had been indicated as the last date of the contract, she was evaluated and subsequently told by the officer who did the evaluation that the exercise was a success for her and therefore she was to get a letter of renewal of the contract shortly thereafter.

37. That it is upon this premise that she continued working for the respondent, and earning salary for the months of February, March and April 2018.

38. Through an email dated January 8, 2018 by one Regina Mwangi – Human Resource Officer, the Claimant was required to share her deliverables and achievements to one Mr. Dennis using the templates that had been shared previously. The deadline for this was marked as 10th January 2018. The annual review was slated for Friday 12th January 2018. The email was tendered as evidence.

39. The Respondent asserted in its pleadings and by the evidence of its witness that the evaluation that was done on 12th January 2018, was not a general one for all staff and was not meant to consider her for renewal. However, the witness for the Respondent states not that the indicators used in this evaluation on the Claimant were any different from those it used in the alleged valuation of April 2018. Owing to the fact that the Claimant had shown expressly throughout, that her position as regards renewal of the contract was anchored on the evaluation, reasonably it was expected that the Respondent produces the report on the evaluation in court and or testifies to the evaluation and the result thereof. The burden of proving the reason of termination and validity thereof, falling on it legally. This it did not do.

40. The Respondent asserted that the evaluation of April 2018 was the one that was specifically done to assess the claimant for suitability for a renewed contract. It further contended that it bore a result that did not favour the claimant. One could expect the Respondent to put forth an evaluation report or any document showing the outcome of the exercise. The respondent did not. It only decided to tender only three documents, the letter of appointment dated 22nd February 2017, a pay slip for May 2018, and a pay cheque No. 05576. From the Claimant's documents I note that the witness who testified for the Respondent had on the Thursday April 12, 2018 via email forwarded a document to the Claimant, which document was titled, Review of the EDP Coordinator, in response to the document, the Claimant gave her reactions in blue.

41. The email correspondences between the Claimant and the Respondent's witness indicate that there was to be a Friday discussion between them on the document. What came out of the discussion was at all material times in this matter, commencing the pleadings, through to the witness statement and testimony in court, not disclosed to court.

42. From the material before me, I am unable to see any document conclusive of the fact that the Claimant was evaluated and found to be unsuitable for a renewed contract.

43. From the very onset, the Claimant came out clear that her claim was heavily anchored on the first evaluation and the verbal communication that she believed that she had been evaluated positively. The Respondent's tone in its pleadings was that the Claimant's assertions on this were unfounded. I am of the view that all through the Respondent was put on notice that production of the result of the evaluation was imperative.

44. It was submitted by counsel for the Respondent that the Claimant was under duty to produce the report to prove her assertions. I do not agree with this line of submissions. The evaluation was done by the Respondent, the Respondent asserts that it did not favour the Claimant, and one gets a clear impression that at all material times the report or a document from which one can deduce the result of the evaluation, has been in the possession of the Respondent. It is not the respondent's case that the report or document was at any time, given to the Claimant for one to expect her to produce it in evidence.

45. When one keenly looks at the texture of the Employment Act, on matters documents and accessibility of documents, he or she shall clearly see that the duty to prepare, maintain and provide accessibility to the documents, relating to employment of employees' contracts of service and / or other matter specifically provided for in the Act, is laid on the shoulders of the employer.

46. To my mind this is a result of an appreciation by the framers of the Act, of the imbalanced power between an employee and an employer in an employment relationship, therefore bleeding a situation where it would be almost insurmountable for an employee to get the documents

as and when she requires the same.

47. It is in this context for example that Section 10 (7) of the Act provides that, if in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in Subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. Equally Section 14 of the Act places a duty upon an employer to provide the employee with reasonable opportunities of reading or accessing documents.

48. In sum, it lay upon the Respondent to place before Court, the adverse evaluation outcome report or document, to prove that the Claimant was not suitable for a renewed contract and disapprove her position that the contract was renewed.

49. Of the evaluation document/report, this Court is of the view that the same was, relevant to this case and material to its outcome. It at all material times was in possession, custody and control of the Respondent, and that the Claimant has tendered evidence that reasonably allows one to presume the contents of the unproduced document that she on the assurance hereinabove stated, continued discharging her duties and earning salary. The failure by the Respondent to place the document before the Court, notwithstanding the premises hereinabove brought out, leads to only one conclusion, that the unproduced document is unfavourable to the interest of the Respondent. I draw an adverse inference therefore.

50. The contract of employment between the Claimant and the Respondent, had a specific life time. It commenced on a specific date and was to end on a specific date. Renewal of the same was an option dependent on a favourable evaluation on the claimant. From the contents of Clause 1 of the letter of employment, one would reasonably expect that the evaluation could be conducted before the lapse of the contract period. If indeed the contract was not renewed upon the alleged reason that the evaluation was not favourable, then one would expect to see a letter to the Claimant expressing this.

51. The reason that the Respondent advanced in the pleadings as the reason upon which the Claimant's contract was terminated is different from the one that appears on the termination letter. The Respondent's witness in his oral testimony tried to justify the variance, the justification is not convincing to this Court. It really makes little or no sense at all. The risk that would be attendant to concealment of a true reason of termination of an employee's contract, would be too grave to not only the employer, but the unsuspecting citizens too.

52. In the upshot, I am convinced that the intention to renew the contract was expressed to the Claimant, and as she stated, upon the renewal, which was a product of a favourable evaluation, she was flagged on, to continue working as she waited for a formal communication regarding the same.

53. Counsel for the Claimant submitted that the Claimant's employment contract was in writing and any addition or variation had to be in writing. The facts and circumstances of this matter are clear, the contract did lapse on the date that was put forth in the appointment letter. Where a contract has lapsed by effluxion of time, one cannot talk of a variation of or an addition to the same. Counsel missed a point here.

Was the contract terminated with procedural and substantive fairness?

54. Having found that the contract was renewed, I now turn to the issue as to whether or not in the termination there was present both procedural and substantive fairness.

55. It was submitted on behalf of the Respondent that assuming the contract was renewed, then it was terminated in accordance with clause 22 of the employment contract. Here below, I shall shortly demonstrate that this submission is not in accord with the current employment and labour relations regime. It is not enough for an employer to state that a notice was given and payments made to the employee.

56. In matters, summary dismissal and unfair termination of employment contracts the Employment Act, 2007 places heavy legal obligations on employers, the obligations speak to existence of the concept of procedural and substantive, fairness, in our legal framework and the need for the same. In *Pius Mpalaifu Isinyu vs= Lavington Security Guards Limited [2017] eKLR* the Court of Appeal stated;

“13. There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations 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 / dismissal (Section 43); prove reasons are valid and fair (Section 45), among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under Section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble.....”

57. The total unit of fairness contemplated in the Act has in it two components, procedural and substantive fairness. Absent of any of the two in a dismissal of an employee or termination of employment contract, will render the termination or dismissal unfair.

58. The reason for the termination of the contract of the Claimant's employment is that which the Respondent did put forth in its letter dated 25th April 2018. It cannot be taken to be any other. As it appears the reason is a no-fault reason on the part of the Claimant, it is a reason based on operational requirements of the Respondent. The letter reads in part;

“This is further to our discussion with you. I regret to inform you that we shall not be able to renew your contract with the organization. We shall be reorganizing our entrepreneurship sub programme to devolve primary responsibility to our field staff. The coordinating and support role you have been playing will therefore no longer exist.”

Counsel for the parties, have not submitted on the nature of the termination that was, and if it is, as I have found above, the procedure that

ought to have been followed by the Respondent. However, this impedes me not, to make a finding on it.

59. In terminations on account of operational requirements of an employee, the procedure to be adhered to is not that that obtains in Section 41 of the Employment Act but section 40. Section 40 (1) of the Act provides;

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

(i) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of termination on account of redundancy.

(ii) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.

(iii) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time, to skill ability and reliability of the particular class of employees affected by the redundancy.

(iv) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.

(v) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash.

(vi) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

(vii) The employer has paid an employee declared redundant; severance pay at the rate of not less than fifteen days' pay for each completed year of service.”

60. Worth stating that the Respondent having taken the route it did in its pleadings, did not address the Court on their adherence to the substantive and procedural requirements of Section 40 of the Employment Act.

61. From the Court of Appeal decision in ***Civil Appeal No. 46 of 2013, Kenya Airways =vs= Aviation & Allied Workers Union Kenya & 3 others***, it is clear that for any termination of employment under redundancy to be lawful, it must be both substantially justified and procedurally fair.

62. Procedural fairness under Section 40 of the Act comprises two aspects issuance of notifications in the prescribed manner and within the required period, consultations between the employer and the employee, consultation is implicit in the provision of Section 40 (1) and in accord with the ILO Convention No. 158 – Termination of Employment Convention, 1982. Second is the selection criteria. The employer must come up with an objective process of identifying the persons to be affected by the redundancy, based on a clear and identifiable criterion;

63. There was, not placed before me material in demonstration that the two notices contemplated in Section 40 of the Employment Act, were issued. There is no prove that there were any consultations between the Claimant and the Respondent.

64. The termination of the Claimant's contract of employment on the account of operational requirements of the Respondent was not procedurally fair.

65. 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 operational requirements of the employer.

66. Section 43 of the Act, in a claim arising out of a contract of service places duty upon an employer 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. The situation obtaining in this matter does not favour the Respondent at all. In its pleadings, it did give a reason for the termination of the contract, that the initial contract was not renewed. Hereinabove and for the reasons brought forth, the Court has found that there was a

renewal of the contract, contrary to the Respondent's assertion. The reason for the termination, alleged in its pleadings was not proved.

67. It is in the letter of termination where the reasons for termination of a contract of employment must obtain. The reason advanced in the termination letter is radically different from that in the Respondent's pleadings, and as I have stated herein, due to the path the Respondent took in its pleadings, the respondent got blurred from seeing the real reason for the termination as brought out in the termination letter and lead evidence towards demonstrating that that was the reason for the termination. That indeed a situation obtained in the organization that led to the Claimant's job to cease or her duties unrequired.

68. There is a conflict between the reason for termination cited in the Respondent's pleadings, and that on the termination letter. A reasonable person looking at this situation will conclude that all these was as a result of lack of a valid reason for the termination of the contract.

69. It has not escaped my mind that the witness for the Respondent testified that the termination letter was coached in the manner it was deliberately to assist the Claimant. They did not want to prejudice her future career life or search for employment. In essence the witness was saying that the reason obtaining on the letter of termination was not the actual reason that led to the termination. This speaks to lack of a valid reason for termination.

70. Having carefully considered the material placed before me, and the oral testimony by the Claimant and the Respondent's witness, I am inclined to believe the Claimant, that the termination letter was issued in the manner it was, when she refused to do a resignation letter.

71. In the upshot, I find that the termination was substantively unfair.

Of what reliefs can be availed to the Claimant if any.

72. The Claimant has sought inter alia, an order for reinstatement to her position, with all the benefits associated thereto. The termination of the employment contract came into effect on the 30th May 2018. From then to now is almost three years and four months. An order for reinstatement cannot be considered, after a lapse of three years from the date of dismissal or termination. Sometimes the wheels of justice in our system grind so slowly to an extent that statutory rights, and reliefs awardable to a successful litigant get prejudiced. The matter here is a classic example of this. Having said this, I do not find it necessary to delve into the other considerations under Section 49 (4) of the Employment Act, 2007. The Court is unable to consider and award an order for restatement by operation of the law.

73. The Claimant conceded under cross-examination that she was paid for the unclaimed leave days, and one month's salary. The Respondent stated that the one month's salary was a gratuitous pay.

74. Section 49 of the Act, allows this Court to award a compensatory relief. The Claimant calls this an award of general damages. The circumstances of this matter are in the nature that I am persuaded that a grant of the relief will serve justice. The circumstances, include, the Respondent's failure to come out candidly on the reason for termination, failure to tender before Court vital documents giving rise to an impression that the termination was prompted by ill will, and the extent of non-compliance with the law. By reason of this premise, I award the Claimant Kshs. 400,000 being two month's gross salary, pursuant to the provisions of Section 49 (1) (c) of the Employment Act, 2007. In arriving at the applicable number of months and the sum, I have considered as required by Section 49 (4) (m) of the Act, the ex-gratia payment that the Respondent paid and received by the Claimant, and the reasonable expectation of the Claimant as to the length of time the renewed contract was to remain effective.

75. In the upshot, Judgment is hereby entered in favour of the Claimant for;

- a) A declaration that the termination of the contract of employment was both substantively and procedurally unfair.
- b) A compensation pursuant to the provision of Section 49 (1) (c) of the employment Act, - Kshs. 400,000, being two months' gross salary.
- c) Certificate of service to issue pursuant to the provisions of Section 51 of the Employment Act.
- d) Interest at Court rates on (b) above from the date of filing this matter till full payment.
- e) Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of

Ms. Kirolich for the Claimant.

Mr. Ng'ang'a for the Respondent.