



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1146 OF 2017

PETERSON MURIUKICLAIMANT

VERSUS

FLAME TREE AFRICA LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claim herein finds its origin in the dismissal of the claimant, from his employment. The claimant charging that the dismissal was absent of any fair and valid reason for, and that due procedure was not followed before, the termination, has approached the seat of justice, seeking for a couple of reliefs against the respondent.

2. The matter was finally heard on 30th July, 2021 after which the Court made directions as to filing of these submissions. Parties complied.

CLAIMANT'S CASE

3. At all material times, the claimant was in the employment of respondent, having been employed as a sales agent on or about 13th November, 2014. The claimant stated that according to the terms and conditions of his employment he was supposed to undergo a three (3) months' probation period from the afore-stated date. Therefore, subject to a successful completion of the probationary period, he expected his confirmation to come in on or about 13th February, 2015. However, this didn't happen until on or 6th January, 2016, when he received a confirmation letter.

4. The claimant asserted that at all material times between March, 2015 and the date when his employment was terminated, his salary went through his bank account, but the pay slips only started being issued by the respondent in April 2016.

5. He stated that under the contract of employment he was entitled to a basic salary of Kshs. 10,000, a travel allowance of Kshs. 6,100 and a commission of 3% on his monthly sales.

6. What was an otherwise smooth relationship between the claimant and the respondent, got into head winds sometime in July 2016, when the respondent decided to transfer the claimant from Thika to Nairobi, a decision that was never communicated in writing but orally. He further stated that he delayed moving to his new station due to logistical challenges, owing to the fact that the respondent's Central Region's Area Manager, one Amos Kithinji, who was to facilitate the movement was on leave then. Instead of reporting to Nairobi on 1st July 2016, he did on 11th July, 2016. He did not embark on his work immediately since he had to clear with the Thika office.

7. Though entitled to, the claimant was not paid his commuter allowance for the month of July, 2016.

8. The claimant contended that, on the 1st of August, 2016, the respondent's National Sales Manager, Moses Maingi, and the Marketing Manager, Jane Njoroge, without consulting him changed his job description from that of a sales agent to merchandising.

9. The claimant stated that his salary started coming in, in a manner that was not in accord with the terms of his employment. In September, 2016 he was paid Kshs. 6,100.00 only, and in October, 2016, he only received Kshs. 5,100.00

10. He stated that he took his leave on 21st October, 2016 and the same was to end on 15th November, 2016. On the 10th November, 2016, the claimant got to the office to inquire about his salary arrears, only to be informed that he had been dismissed.

11. The claimant tendered as evidence, the documents here below in fortification of his case thus:

- (i) Equity Bank statements for the period 23rd January, 2016 to 24th February, 2017 (Exh.1).
- (ii) A letter of appointment dated 6th January, 2016 (Exh.2).
- (iii) A letter dated 29th March, 2016 (Exh.3).
- (iv) A pay slip for the month of April, 2016. (Exh.4(a)).
- (v) A pay slip for July, 2016. (Exh.4(b)).
- (vi) A certificate of service. (Exh.5)
- (vii) Demand letter dated on December, 2016. (Exh.6).

12. Cross examined by counsel for the respondent, the claimant stated that earning of the commission was subject to him meeting the targets. Earning of the same had no specific dates. All his earnings were subject to statutory deductions which averaged to Kshs.4000.

13. He further went on to answer that the average of Kshs. 28000, that he has mentioned in his pleadings as his monthly earnings was just but an average figure. His monthly earnings were not of a specific figure.

14. The claim for five and half months' earnings, is anchored on the average of Kshs.28000. Referred to an email dated 23rd November 2016, the claimant admits that he wrote the email and that therein he acknowledged and appreciated a payment for three and half months' pay. These months were part of the five and half months. However, he alleges that he was forced to write the email. He was not paid for the three and half months. Cross examined further, he conceded that he has not pleaded coercion in his pleadings.

15. He stated that his claim for leave is for the year 2014-2015. For this period, though he asked for leave, the same was not given.

16. He maintained that his average commission for 2014-2015, was Kshs. 16000 and that entries on his bank statements were testament to this.

17. He was not issued with a termination letter from the respondent but a certificate of service only. Prior to the termination, he was never issued with any warning letters as alleged by the respondent.

18. Under re-examination by his counsel, Mr. Kimathi he stated that in the month of February 2016, he earned a total of Kshs. 27,346. On March 31st 2016 he was paid a salary of Kshs. 18000 exclusive of the commuter allowance, and in April 2016, Kshs. 22,458 therefore plus the allowance, the total earnings for that month would be 28,458.00.

19. None of the warning letters has his signature in acknowledgement of receipt of the same, he asserted.

THE CLAIMANT'S SUBMISSIONS

20. The claimant's counsel in his written submissions, proposes the following issues as issues for determination in this matter, namely;

- (i) Was the termination of employment of the claimant lawful and procedural?
- (ii) Should this Court take into consideration the minimum wage when the claimant was employed in computation of dues?
- (iii) Should the Court take into consideration the commissions earned by the claimant in computation of dues? And if in the affirmative, what should be the baseline?
- (iv) If the termination was unlawful, what quantum of damages is payable for the same?
- (v) How many months was the claimant not paid by the respondent?
- (vi) Is the claimant entitled to a month's pay for leave not taken into the year 2014 – 2015?
- (vii) Is the claimant entitled to a month's pay in lieu of notice?
- (viii) Should the respondent bear the costs of the suit?

WHETHER THE TERMINATION WAS LAWFUL AND PROCEDURAL

21. The claimant submits that his termination from employment was unfair, unlawful and unprocedural. Section 41 of the Employment Act, provides for a mandatory procedure that an employer must adhere to whenever he or she wants to terminate the employment of an employee for whatever reason. The procedure applies even in situations of summary dismissal.

22. Reliance was placed on the holding in the case of *Mary Chemweno Kiptui vs= Kenya Pipeline company Limited [2014] eKLR*, thus;

“Section 41 of the employment Act is couched in mandatory terms where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

23. It was submitted that respondent acted in breach of the provision. The claimant testified to the procedure, indicating that he was neither given a notice that the respondent was contemplating dismissing him, nor any hearing before the dismissal.

24. In reaction to the warning letters that the respondent’s witness tendered as evidence, counsel submitted that it is not difficult for one to come to a conclusion that they are documents that should not be relied upon, for the reasons, first that there is no evidence that they were ever received by the claimant, second that they are suspicious and incapable of believe, as revealed by the letter dated 1st October, 2021, which letter makes reference to a meeting that can be discerned to have taken place after the date of same. On this point the submissions are tied up that the letters were an afterthought, and were only intended to cover up the respondent’s mis-steps.

25. According to counsel for the claimant, the letter dated 24th November, 2016, produced by the respondent was meant to create an impression that the claimant was given a hearing, however it should be noted that the witness is not the author of the document and that he admitted that he (the witness) did not attend the meeting referred to in the letter, and therefore he wouldn’t authenticate the contents of the same.

26. The respondent’s witness admitted that the claimant was never given a chance to answer to the charges and he had personally never attended a disciplinary hearing for the claimant.

27. Counsel concludes that, by reason of these premises, the dismissal was not procedurally fair.

28. It is contended that throughout the currency of the employment of the claimant, he was being underpaid. The Court is urged to take judicial notice of the fact that as at the time of employment, the minimum wage prescribed was Kshs. 17,101.80, and at the time of termination, Kshs. 20,528.00. The salary that the claimant was earning of Kshs. 10,000.00 was therefore an illegality.

29. Counsel for the claimant submits that though there was a dispute as regards the total commission the claimant was earning monthly, through the documents he placed before the Court the he was able to demonstrate that averagely he would earn Kshs. 13,000.00 as commission monthly. In anticipation that this Court shall award a compensatory sum, it is urged that this figure be considered to be a component of gross salary for purposes of computation. On this, reliance is placed on the holding in *Catherine Waihera Rukorio & another vs= Mediamax Network Limited [2012] EKLK*.

30. On the reliefs sought, it is submitted that the claimant is entitled to a compensatory award, and in so awarding, the Court should take into account, the basic salary, the average monthly commissions earned, and the transport allowance. That the computation should be done at twelve (12) months’ gross salary. Under the head, the claimant should be awarded Kshs. 475,536.00.

31. It was submitted that the claimant was not paid his dues for half of November 2014, December 2014, January 2015, February 2015, September 2016 and October 2016.

32. The a foregoing premise notwithstanding, the claimant in same submissions, submits that the respondent’s Exh.1 demonstrates that the dues for November 2014 to February 2015, were paid and therefore the claim for unpaid dues for these months is abandoned.

33. That therefore outstanding are the dues for September and October 2016, which amount to Kshs. 68,065.00 in arriving at this figure the claimant has applied what he terms minimum wage.

34. It was further submitted that the respondent’s witness admits that the claimant did not proceed for leave in the year 2014 – 2015. Therefore, he is entitled to be compensated for that. Applying his formula, “the minimum wage”, he seeks to be paid Kshs. 38,254.50.

35. The claimant was not given any notice, he was therefore entitled to a one month’s salary in lieu of notice.

THE RESPONDENT’S CASE

36. Upon being served with the claimant’s pleadings, the respondent entered appearance and subsequently filed a response to the claimant’s claim. In his response the respondent denied the claimant’s claim, and his entitlement to the reliefs sought.

37. At the hearing the respondent presented one Moses Maingi to testify on its behalf. This witness did urge Court to adopt the contents of his witness statement dated 23rd July 2021 as his evidence in chief. The same was so adopted by consent. The witness pointed out to Court that the respondent had filed a list of documents dated 23rd July 2021. By consent he produced the documents that were filed thereunder as Exhibits 1 – 5.

38. The witness stated that the claimant was employed by the respondent as a sales assistant in November 2014, but as per the company policy he was placed under probation for 3 months. That his position lasted until March 2015. Salary was agreed at Kshs. 10,000.00.

39. That in order to motivate its employees, the respondent company came up with a scheme of paying its sales employees, a commission upon the meeting certain targets. The commission would only be paid to a sales employee if the targets were achieved.
40. It was contended that the claimant never achieved any targets and therefore he was not entitled to any commission.
41. The witness stated that sometimes in mid-2016, the claimant's performance started going down. The witness cited an incident to fortify that. That on 27th June, 2016, the respondent gave him a motor vehicle belonging to one of the sales representatives, who was proceeding for leave, for temporary use. When the representative resumed work, the claimant refused to hand over the motor vehicle and use his motor cycle. When the same was taken away from him the claimant failed to perform his duties as required, prompting a warning letter to be issued against him.
42. The witness stated that on the 10th to 16th September, 2016, the claimant failed to report to duty without proper justification and permission. The respondent got constrained to issue a second warning letter dated 20th September, 2016.
43. On the 4th October, 2016, a meeting was held in the training room, whereby the claimant agreed to be transferred from Eastlands Region to Central Region. Thereafter he failed to report, without informing his supervisor of his whereabouts. This occasioned issuance of a third warning letter dated 1st October, 2016.
44. The claimant exhibited continuous rudeness to both his colleagues and supervisor. the claimant was called for a disciplinary meeting on 24th November, 2016, before a panel of 5 members. He was required to explain his absenteeism and failure to submit his reports on sales.
45. The witness stated that the claimant was then asked to sign his letter of dismissal, a thing he refused to do. That unfortunately the meeting headed nowhere as the claimant stormed out of the training room.
46. That the claimant was also given a cheque "prior" by the respondent being his final payment of his dues which included a one month's salary in lieu of notice. He refused the cheque and demanded for cash. It is upon this that Mr. Githinji paid him in cash Kshs. 35,000.00 in presence of the panel. Therefore, the claim for payment of dues lack foundation.
47. He stated that the claimant was not a diligent worker. He was incompetent.
48. Procedural fairness was observed, the witness asserted.
49. The witness in his testimony in part, admitted that the claimant did not proceed for leave and that therefore he was supposed to be paid for this. That the payment should include, in component, the basic allowance, the commission earned and commuter allowance.
50. That the claimant was dismissed because he had attained 3 warning letters. He stated that he had information from the Human Resource Department that the claimant was given the warning letters but he declined to acknowledge receipt of the same by appending his signature thereon.
51. The witness stated that he was not present in the disciplinary meeting, therefore he cannot tell the happenings in the course of the proceedings.
52. Cross-examined by Mr. Kimathi, counsel for the claimant, the witness confirmed that the letter dated 6th January, 2016 was a confirmation letter. He however, stated that he would not know why the letter was not issued immediately the probation period lapsed.
53. That in addition to an email by the respondent, the letter dated 29th March, 2016 confirmed change of clause 3 of the appointment letter.
54. The claimant was supposed to achieve sales of Kshs. 500,000 in order for him to earn commission. He admitted that 3% of Kshs. 500,000 is around Kshs. 15,000. That salary and commission are normally taxed and that is why he was paid Kshs. 11,346 for January 2016 as commission.
55. That contrary to what he had stated in his witness statement, that the claimant did not meet his targets, from January 2016 – August 2016, the claimant earned commission, therefore definitely he did meet his targets.
56. Asked about Exhibit 3, the warning letter, he stated that the subject matter was the refusal to release the motor vehicle.
57. He asserted that the claimant did not have any logistical challenges in moving from Thika to Nairobi. He was facilitated and transportation of his goods effected. However, the witness did not have the specific details.
58. Yes, the claimant was not paid one month's salary in lieu of notice. He was given a cheque, he refused to take it. The amount for pay in lieu of notice was Kshs. 17,705.
59. That though he stated that Kshs. 35,000 was paid, he could not confirm what the money was settling.
60. That Exhibit 5 – refers to a meeting held on 4th October, 2016. The date of the letter is earlier than the date of the meeting, he admitted.

61. Under re-examination, the witness stated that the Kshs. 35,000 was salary for 3 1/2 months. This should be looked at in the context of the email – Exhibit 1.

62. When this Court sought for clarification from the witness, the witness said that, there was no show cause letter issued to the claimant. That disciplinary proceedings were conducted by the Human Resource Department on 24th November, 2016, not 25th November, 2016 as mentioned in Ruth's statement.

63. The witness confirmed that he did not know how the claimant was invited to the disciplinary hearing. The witness stated further that they did not have a document that would assist the Court discern what the charges against the claimant were.

THE RESPONDENT'S SUBMISSIONS

The respondent made a very brief four paragraphed submissions stating that the claimant has not proved his case to the requisite standards and therefore his claim should be dismissed. He then makes submissions on the various reliefs that the claimant has sought.

64. It is submitted that the claimant was terminated, not dismissed. That he declined to collect his final dues of Kshs. 17,700. The Court is urged to consider the fact that prior to the termination he had been served with three warning letters. The termination was lawful therefore.

65. On the salary claimed for 5 1/2 months the respondent submits that this was paid and the claimant acknowledged the same through an email. As regards one month's salary in lieu of notice, the respondent submitted that the same was available but the claimant failed to collect the same.

66. Just like in its witness' testimony, the respondent in its submissions does admit that the claimant did not take his leave and therefore entitled to compensation in respect thereof.

67. The respondent urges this Court to dismiss a larger part of the claimant's claim, only allowing the same to the extent admitted as hereinabove stated.

DETERMINATION

68. From the material placed before me by the parties, I consider the following issues as the issues for determination in this matter, thus;

- (i) Whether the termination of the claimant's employment was procedurally fair?
- (ii) Whether the termination of the claimant's employment was substantively fair.
- (iii) Subject to (i) and (ii) above, what reliefs can be availed to the claimant?

WHETHER THE TERMINATION OF THE EMPLOYMENT WAS PROCEDURALLY FAIR.

69. It is common cause that the claimant's employment was terminated, what is not is, whether it was done lawfully and fairly. In our jurisdiction, in various matters, judicial attention has been given on matters fairness in termination of an employee's employment, where the concept flows from, its components, and the implications in situations where it is absent.

The total unit of fairness, is procedural fairness plus substantive fairness.

70. In interrogating procedural fairness, the starting point has always been section 41 of the Employment Act, 2007. The section provides;

“(1) Subject to section 42 (1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct for 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 shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) of the Employment Act, hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection (1) make.”

71. This procedure is mandatory and it can be summarized as hereunder;

- (i) Once an employer conceives an intention to dismiss an employee, then the intention should be brought to the attention of the latter.
- (ii) The reason(s) that has stirred the intention to terminate the employment, must be disclosed to the employee.
- (iii) The employer has to ensure that both the intention to dismiss and the grounds that the employer intends to base the termination

on are expressed to the employee in a manner that the latter can clearly understand.

(iv) The employee's right to have another employee (where he is not a member of a union) or a shop floor union representative, (where he is a member of a union) present, must be brought to his attention and an invitation to exercise this right extended, and

(v) Before taking a decision to terminate the employment or summarily dismiss the employee, hear and consider representations [emphasis mine] from the employee and or the representative or the other employee on the grounds shall form basis for the decision.

72. This provision is in appreciation of the imbalanced power between employees on the one hand and the employers on the other hand.

73. It should be read not in isolation from the provision of the Constitution of Kenya, and more applicably Article 50, and the provisions of the Fair Administrative Actions Act, but in conjunction.

74. In his testimony under cross-examination, the respondent's witness admitted that the claimant was not given a notice to show cause letter. In my view it is normally in such a letter an employer puts forth his contemplated action to dismiss and the grounds that form basis for the contemplation. It is here that the claimant's right contemplated in section 41 of the Act should be brought out.

75. When this Court sought clarification from the witness, the witness frankly stated that the respondent has not placed before Court, any material from which one can discern the grounds that formed the basis for the termination.

76. The respondent's witness's statement dated 23rd July 2021 was turned, the respondent's witness' evidence in chief. Paragraphs 12 & 13 of the statement has struck my attention; it is imperative that I reproduce them;

“12. He was then called to sign his letter of dismissal which he blatantly refused to do so. Unfortunately, the meeting would not bear any fruits as the claimant stormed out of the training room where the meeting was being held stating that he had other cases to undertake elsewhere.

13. He was also given a cheque prior by the respondent being his final payment of dues which included one month's salary in lieu of notice and he refused to take the same demanding payment in cash with allegations that the cheque would bounce.”

77. From these, two things emerge, that the dismissal letter was ready before the disciplinary procedure took place, or would be concluded. Second that the cheque for the terminal dues was equally prepared before the disciplinary proceedings alleged would kick off. This leads to an inescapable conclusion that the decision to terminate was predetermined and the purported disciplinary proceedings cosmetic.

78. I have also considered the statement by one Ruth Mwaura, it is of same tone, and reflection.

79. There were not any disciplinary proceedings minutes tendered in Court. The witness who testified on behalf of the respondent, was clear, he did not know what happened in the meeting.

80. By reason of these premises, I hastate not to find that the termination was not procedurally fair. Section 45 (2) of the Employment Act dictates the implication attendant to a situation where fair procedure has not been adhered to, the termination or summary dismissal becomes unfair.

(ii) WHETHER THE DISMISSAL WAS SUBSTANTIVELY FAIR?

81. Section 45 of the Employment Act provides;

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

a) 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.

(i) Related to the employee's conduct, capacity or compatibility;

(ii) Based on the operational requirements of the employer; and

c)”

82. Section 45 (5) give Courts authority to interrogate whether an employer's decision was just and equitable. This is a platform which is not constrained, but which must be exercised judiciously, otherwise an unfortunate consequence will set in, the Court being seen as substituting the employer's view, with its own.

83. In determining the appropriateness of the dismissal, this Court is enjoined to consider the totality of the circumstances of this matter and

the fact that the burden to prove validity and fairness of the reason for dismissal rests with the employer.

84. As I have indicated hereinabove, the respondent's witness came out frankly that there was no show cause letter issued to the claimant or any correspondence, communicating the contemplated action and the grounds upon which the contemplation was based. It is in the show cause letter or that correspondence that one can discern the reason for dismissal.

85. One would expect the respondent's pleadings to hint at the reason for the dismissal, then the hint gets expounded at the hearing through a witness's evidence. The hint is not present in the response to the claimant's memorandum of claim.

86. The respondent's witness stated that there was a dismissal letter which the claimant refused to sign. The alleged dismissal letter was not presented before this Court. This, I find strange. To the respondent's defence this was a vital document. It was from here that the Court would deduce what the reason(s) for dismissal was and weigh them for ascertainment of validity and fairness. The Court was deprived of the opportunity to.

87. It was alleged on behalf of the respondent that there was a disciplinary meeting that was held to discuss the conduct of the claimant. Minutes from this meeting are not before the Court.

88. To "prove" that there was a disciplinary meeting, the respondent filed a "statement by one Ruth Mwaura" as an exhibit. The Court was not told who this Ruth Mwaura is in the respondent entity. The Court was not told why she was not availed to testify on the matters she has raised in the statement, and more specifically considering that the witness who testified on behalf of the respondent admitted that he was not in the meeting and that he was not aware of what happened in that meeting.

89. In an adversarial system like ours, it will be an abdication of my duty as an imperial arbiter, if I was to consider the contents of that statement. The contents therein have not been tested through cross-examination by the adversary.

90. The respondent placed before this Court, alleged warning letters. The claimant denied their existence and having received them. The last warning letter was purportedly written on the 1st October, 2016. The 1st paragraph thereof read;

"Reference is hereby made to the meeting held on 4th October, 2016, in the training room in presence of the Human Resource Manager and the merchandisers supervisor where you agreed to be transferred from Eastlands Region to Mount Kenya."

I find it strange and difficult to understand how the letter would predate a meeting that is alleged to have already taken place, a meeting forming the subject of the letter. Asked about this glaring anomaly, the respondent's witness did not offer any explanation. One can only gain an impression that the letter was hurriedly prepared for purposes of this matter.

91. All the "warning letters" had a space for the employee's (read claimant's) acknowledgement and date for the same. None of them is signed by the claimant as an acknowledgement of receipt of the same. There was no evidence as regards how, when and where they were served upon the claimant.

92. By reason of these premises, this Court is not able to say with certainty what the reasons for dismissal were. The respondent failed to put forth the specific reasons for the dismissal, prove their validity and fairness.

93. In conclusion, the dismissal was substantively unfair.

OF THE RELIEFS

94. Having found that the dismissal was both procedurally and substantively unfair, I now turn to the reliefs sought by the claimant.

95. From the onset, let me point out that the claimant, on the various reliefs and sums he has sought thereunder, has applied what he terms wages pursuant to the relevant wage orders that were applicable at all the various material times. He has not used the claimant's earnings as they were at the time of his dismissal.

96. I have carefully considered the claimant's pleadings, nowhere in them does he raise an issue of underpayment and/or, state that in his case reliance shall be put on the wage orders and not the earnings at the time of his dismissal. In fact, all the figures put forth in the memorandum of claim, are based on the specific earning he has placed in paragraph 10 of the memorandum.

97. I am not convinced that a departure from pleadings is a thing that can be allowed by this Court. In **ELRC CAUSE NO. 94 OF 2016 – ARISTIDE MARAGE NYANG'AU =VS= LAVINGTON SECURITY LIMITED** faced with a similar situation as herein, this Court stated;

"68. From the onset, it is important to state that the whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to convene the evidence of the trial to matters relevant to those issues, and ensure that the trial proceeds to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from pleadings. Put in another way, a party should know in advance, in broad outline the case he will have to meet at the trial."

98. In considering amounts awardable to the claimant, I will use the gross salary as at the time the life of the relationship between the

claimant and the respondent came to an end.

COMPENSATION FOR UNFAIR TERMINATION

99. I am alive to the fact that compensation under section 49 (1) (c) of the Employment Act is at the discretion of the Court. It is not automatically grantable. Where a Court decides that it is to grant the relief to a successful litigant (employee), the extent of the grant is too at the discretion of the Court. In the circumstances of this matter, I am inclined to award the claimant, compensation under the stated provision of the law.

100. Section 49 (1) (c) of the Employment Act is clear on what is to be used in computation of the amounts awardable under the relief. It is either gross salary or wages. In the instant case, what is applicable is gross salary. The section provides;

“The equivalent of a number of months’ wages or salary not exceeding twelve (12) months based on the gross monthly wages or salary of the employee.”

101. Gross salary is the term used to describe all the money the employee has made which is without any deduction like income tax. It is however, inclusive of bonus, overtime pay, holiday pay and other differentials. Some of the components of gross salary would include basic salary, house allowance, special allowance, medical allowance, car allowance and conveyance allowance. See ***George Otieno Rambo vs= Nation Media Group Limited ELRC Cause No. 184 of 2016.***

102. From the material placed before me, the components of the claimant’s earning while in employment were, the basic salary of Kshs. 10,000, travel allowance of Kshs. 6,000 and commissions. The commissions were not of a fixed amount. They were earned. It is here that the Court must do a balancing act, not to enrich the claimant unjustifiably and prejudice the respondent. I have considered the highest commission that was ever earned by the claimant and the lowest too, being Kshs. 16,000 and Kshs. 13,000 respectively, that there is no guarantee that the commission would not go higher than the highest figure or lower than the lowest commission that was ever earned. I am forced to pick a conservative average of Kshs. 8,000 as a monthly commission that I will apply in arriving at the gross salary and computation of the compensation.

103. Therefore, I take the gross salary of the claimant as Kshs. 24,000 – the basic salary, the travel allowance and commission.

104. Considering the manner in which the claimant’s employment was terminated, and the respondent’s failure to observe procedural and substantive fairness, a compensation of four months gross salary to the claimant commends itself to me. Therefore, pursuant to the provisions of section 49 (1) (c), of the Employment Act, I award the claimant Kshs. 96,000.

ONE MONTHS SALARY IN LIEU OF NOTICE

105. The respondent admitted that the claimant was not given a one month’s notice prior to the dismissal. In its submissions, the respondent indicates that the claimant is entitled to one month’s salary in lieu of notice as sought. The claimant is awarded Kshs. 16,000.

UNPAID LEAVE

106. It is admitted by the respondent both in the testimony of its witness, and in its submissions, that the claimant never proceeded for leave in the year 2014 – 2015. He is therefore entitled to compensation. Consequently, I award the claimant Kshs. 16,850 under this head.

107. In the upshot, Judgment is hereby entered in favour of the claimant against the defendant for;

- a) A declaration that the termination of employment of the claimant was procedurally and substantively unfair.
- b) Compensation pursuant to section 49 (1) (c) of the Employment Act, Kshs. 96,000 representing 4 month’s gross salary.
- c) One month’s salary in lieu of notice Kshs. 16,000
- d) One month’s compensation for unpaid untaken leave Kshs. 16,850.
- e) Interest on [b] [c] and [d] at Court rates from the date of filing suit, till full payment.
- f) Costs
- g) The payments to be subjected to the relevant statutory deductions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF

MR. MUREITHI FOR THE CLAIMANT.

NO APPEARANCE FOR THE RESPONDENT.