



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 546 OF 2016**

*(Before Hon. Justice Ocharo Kebira)*

**JOHN MAIRURA OMOGO.....CLAIMANT**

*VERSUS*

**MIREMA SCHOOL.....RESPONDENT**

**JUDGMENT**

**Pleadings**

1. The Claimant filed a memorandum of claim herein dated 10<sup>th</sup> February 2016, thereby instituting this claim against the Respondent, and sought for the following reliefs:

- (i) A declaration that the dismissal of the Claimant from employment was unfair and unlawful.
- (ii) The Respondent does pay the Claimant his full terminal benefits that include 12 months gross salary compensation for loss of employment as particularised in paragraph 6 above.
- (iii) A certificate of service.
- (iv) Costs of these proceedings.
- (v) Interest on the above at court rates.

2. The memorandum of claim was filed contemporaneously with the Claimant's witness statement and a bundle of documents that the Claimant wanted to place reliance on in support of his claim.

3. The Claimant pleaded that he came into the employment of the Respondent on or about the 22<sup>nd</sup> May 2013, as an Accountant. That his employment was terminated on 8<sup>th</sup> January 2015, in a manner that he considered unfair and unlawful.

4. Upon being served with summons to enter appearance, the Respondent did enter appearance and file a memorandum of response and counter-claim dated 14<sup>th</sup> November 2016. Like the Claimant did, in filing his pleadings, the Respondent too contemporaneously with the filing of the memorandum of response and counter-claim, filed a witness statement and a bundle of documents.

5. The Respondent denied the Claimant's claim as put forth in the memorandum of claim and denied his entitlement to the reliefs that he sought therein.

6. Upon being served with the response and counter-claim, the Claimant filed a reply to the response and defence to the counter-claim, reiterating the contents of the memorandum of claim, denying the contents of the response, and counter-claim. Consequently, at the close of pleadings, the matter got destined for hearing on merit and indeed it was heard on the 10<sup>th</sup> November 2021.

7. Imperative to state that further to the bundle of documents alluded to hereinabove, the parties did each file further documents with leave of court.

## **The Claimant's case**

- 8.** The Claimant's case is encompassed in his pleadings, the witness statement referred to hereinabove which was at the hearing adopted as part of his evidence in chief, the documents that he filed and that were admitted as his documentary evidence, and the oral testimony that he made at the hearing.
- 9.** The Claimant stated that he is an accountant by profession, and that through a letter of appointment dated 22<sup>nd</sup> May, 2013, the Respondent offered to employ him as an accountant, at a salary of Kshs. 63,417 per a month. The employment was to take effect from 11<sup>th</sup> March, 2013. He accepted the offer.
- 10.** The Claimant testified that he worked with the Respondent up to 8<sup>th</sup> January 2015, and that between the time he took up the employment and this day (08-01-2015), there had not been any complaint against him concerning the discharge of his duties or at all, and that there were no warnings against him.
- 11.** He testified that on the 8<sup>th</sup> January 2015, at around 8.30 a.m. he was called to the residence of the Respondent's director, which was within the school compound. When he got there, he found all the directors of the Respondent and the external auditor present.
- 12.** The school director, one Mr. Mutegi then asked him whether he had ever proceeded for leave since he joined the employment of the Respondent, and when he answered in the negative, Mr. Mutegi directed that him to proceed for one, as investigations were being carried out against him.
- 13.** The Claimant stated that there was no disclosure what the investigations were all about. He was further instructed not to get back to work until he was called to.
- 14.** The Claimant further states that as at that time he had not received his salary. After one week he went to his bank to check whether the Respondent had remitted the same only to find that it hadn't.
- 15.** He got prompted to call the school manager, Ms. Lorna who informed him that the directors had resolved that his salary payment be effected through a cheque.
- 16.** He waited for communication from the Respondent, it never came. In the month of March 2015 one of the Respondent's staff called him and notified him that his son who was then a standard 8 pupil in the Respondent's school, was not in class, but in the school cell.
- 17.** The claimant stated that he immediately went to the school (Mirema School) and indeed confirmed that the son was not in class. He found him confined in one of the classes, without a teacher. When he sought to know the reason from the School manager, she told him that his son was not in class for non-payment of school fees. He was forced to report this matter to the Kasarani Education Office.
- 18.** He asserted that the School manager was so harsh on him, but for the sake of his son he took it easy, and promised to settle the fees immediately he got another job.
- 19.** The Claimant stated that after his son cleared his KCPE, his wife and him went to the school to pick him up. While at there, the school manager called his wife to her office. According to his wife, the manager told her how immoral the Claimant was. Further that he had been stealing money from the school.
- 20.** The Claimant wrote a letter demanding an explanation from her on this allegation, and the position of his employment with the Respondent. He never received any response.
- 21.** The Claimant testified that besides the December salary, he was owed Kshs. 30,000 that had not been paid for the earlier months.
- 22.** The Claimant stated that he was not given a termination letter. He asserted that the Respondent has exhibited letters that it never gave him.
- 23.** He referred to the interdiction letter, dated 15<sup>th</sup> February 2015, and asserted that he was seeing it for the first time. He left the school on 8<sup>th</sup> February 2015, it would not be true therefore that the letter was given to him.
- 24.** He did not receive the alleged invitation to appear before a disciplinary committee on the 15<sup>th</sup> February 2015. He stated that the alleged invitation is specific on the date when he was to appear before the committee, a Monday. However, checking on a calendar, the date fell on a Sunday.
- 25.** The Claimant referred to another letter dated 17<sup>th</sup> February 2015, the letter is part of the documents that were placed forth by the Respondent before this Court. He says that the letter purported to make reference to an earlier letter that invited him to a disciplinary meeting. He never received this letter. He points out that the letter purported to invite him to a meeting for the 29<sup>th</sup> February 2015. The year was a leap year, without a 29<sup>th</sup> day of February.
- 26.** He further stated the next letter is purported to be written on 29<sup>th</sup> March 2015, a letter which he never received.

27. The 1<sup>st</sup> letter was purportedly written by Lennah Matheri, while the others by Ninah Akpal. The latter was not an employee of the School, when the Claimant was working there.
28. The termination and the fact that the Respondent failed to pay him his dues, subjected him to a situation where he; was unable to pay his rent; accumulated school fees, forcing him to change schools for his children; lost Kshs. 288,000 which he had contributed to a scheme for land purchase, when he failed to make his monthly contributions of Kshs. 6,000; and, defaulted to repay his loans, causing his name to be listed with the Credit Reference Bureau.
29. His son used to pay Kshs. 15,000 per a term. The Respondent changed and started demanding for an exorbitant fee, without a reason.
30. Cross-examined by counsel Ogeto for the Respondent, the Claimant stated that he was employed on 11<sup>th</sup> March 2013, at a salary of Kshs. 63,417 per a month. The salary was being paid through the bank.
31. He further stated that as at the time of separation he had not been paid salary for December 2014 and that there was a balance unpaid for the month of November.
32. Cross-examined on the letter dated 15<sup>th</sup> December 2014 the Claimant reiterated that he was never issued with the same. He further stated that according to the letter dated 5<sup>th</sup> February 2015, he was supposed to appear for a disciplinary meeting. However, he did not, as the letter was not served on him.
33. Shown the letter dated 17<sup>th</sup> February 2015, he stated that the letter equally invited him to a meeting, and that letter was never served on him. It was not possible therefore for him to attend a meeting he was not notified of.
34. He stated that his son was in the School for three years. He cleared paying school fees for him.
35. He further stated that he was head of the finance department of the Respondent's School. Doing bank reconciliations and keeping books of accounts was part of his duty. When he joined the workforce of the Respondent, he found parents paying fees in cash and through cheques. He sat the management down and impressed upon them that the best practices required parents to bank the fees themselves and surrender banking slips to the School.
36. The only cash that would be received was pocket money for safe custody for the pupils. He was not receiving any cash from parents therefore, in terms of fees.
37. He stated that he would advise the management on matters, financial management. He was a reportee to the management. For instance, if there was money needed to be withdrawn, he would prepare a budget, which had to be sent to the external auditor for oversighting before, the management would sanction any withdrawal.
38. Referred to the Respondent's documents and more specifically the document relating to students, beneficiaries of discounts or scholarships, the Claimant admitted that the name of his son with a balance of Kshs. 75,480 obtained thereon. He said that he has not cleared the school fees (Kshs. 75,480) with a reason.
39. Cross-examined on the reliefs he is seeking, the Claimant reiterated that he is entitled to unpaid salary, compensation for unfair and unlawful termination and three (3) months' salary as he deserved a notice which he was not given. He further stated that he never proceeded for leave throughout his employment with the Respondent.
40. Referred to document-appendix 1 of the Respondent's documents, he stated that he signed the same for the sake of his son whose standard eight exams were approaching. As employees, they used to pay only Kshs. 15,000 per a term for their children, the document does not reflect this.

#### **The Respondent's case**

41. The Respondent presented two witnesses to testify on its behalf and in support of its defence and counter-claim. The 1<sup>st</sup> witness for the Respondent was Ms. Nina Akpal. She presented herself as a director of the Respondent, and that she had worked with it since the year 2012.
42. The witness urged the Court to consider the contents of her witness statement as part of her evidence in chief. She too urged the Court to admit the following documents as the Respondent's documentary evidence; letter dated 15<sup>th</sup> December 2014, invitation letter dated 5<sup>th</sup> February 2015, reminder of invitation dated 17<sup>th</sup> February 2015, dismissal letter, fees arrears agreement dated 16<sup>th</sup> September 2015 and response to demand letter dated 11<sup>th</sup> January 2016.
43. The witness testified that on 23<sup>rd</sup> May 2013, she was made aware that a new accountant had been appointed. At this time, she was working on strategy, and mostly online. She stated that in December 2014, she was made aware that there were concerns regarding how the accounts of the School were being kept.
44. The witness stated that she was then working from the United Kingdom. She remembered that at one time she asked the Claimant to give her a financial report. The Claimant did, and when she subsequently asked him to make a clarification on some matters, he gave her a 2<sup>nd</sup> report that was in content contradictory with the 1<sup>st</sup> one.

45. She stated that when she subsequently got in touch with the School manager, she [the school manager] informed her that action had been taken against the Claimant. He had been interdicted.
46. She stated that she later, in late December 2014, came back into the country. In January 2015, she fully got into the management of the School as the director in charge of administration. This docket included Human Resource Management and Finance.
47. Aware that there was a pending matter concerning the claimant, they proceeded with the termination process.
48. The witness stated that the letter dated 15<sup>th</sup> December 2014 (appendix 1) and 5<sup>th</sup> February 2015 (appendix 2) were invitation letters for a disciplinary hearing. The letter – appendix 4 was a reminder to the Claimant.
49. She stated that through its letter dated 15<sup>th</sup> March 2015, the Claimant was summarily dismissed from his employment. He never appealed against the dismissal. He never attended the disciplinary hearing.
50. The witness added that 29<sup>th</sup> February 2015, does not exist on the calendar for that year. She however stated that the indication of the date on the letter was an error on her part.
51. She stated that as at the dismissal of the Claimant, he had fees arrears of Kshs. 75,450, for his son, and that the money has not been settled. The Claimant signed an agreement dated 16<sup>th</sup> September 2015, committing himself to pay. He never did.
52. The witness asserted that her observations on the financial records revealed inconsistencies and when she asked the Claimant for an explanation, she did not get any. This led the Respondent to instruct an auditor to look into the records and advice.
53. The witness asserted that she is told that before the interdiction, the Claimant was given a chance to explain himself before the directors.
54. She contended that during the tenure of the Claimant, the School experienced financial challenges to an extent that paying its suppliers became difficult. An audit report was undertaken before he was dismissed.
55. The witness claimed that when it became apparent that he was being terminated, the Respondent got concerned with the plight of his son who was waiting to do his exams. They had to call for a meeting with the Claimant to have a conversation over the same and this is how the fees balance payment was agreed on.
56. She alleged that the letters were issued when he was a parent. He could pick them but decline to sign in acknowledgment.
57. The witness was cross-examined by counsel for the Claimant. Referred to the letter of appointment (appendix 1), she reiterated that she was aware of the recruitment of the Claimant.
58. The letter was signed by Lennah Mathegi who is no longer with the School. The witness stated that she is not aware whether besides the terms and conditions on the letter of appointment, there were any other supplied to the Claimant.
59. She stated that the Claimant was supposed to work from Monday to Friday, 7.20 p.m. – 5.30 p.m.
60. Referred to and questioned on the letter that purported to invite the Claimant to a disciplinary hearing, the witness admitted that 15/02/2015 was a Sunday, not a Monday, adding that, that was an error on her part. She did admit that the 29<sup>th</sup> February 2015, reflected on the letter dated 17<sup>th</sup> February 2015, does not exist on the calendar for that year.
61. The witness asserted that the Respondent dismissed the Claimant on an account that he failed to appear not only on that day (29<sup>th</sup> February 2015) but also on all the other days when he was required to.
62. She stated that notwithstanding that the 29<sup>th</sup> February 2015 did not exist, all the correspondences by the Respondent referred to this day.
63. On the alleged contradictory reports, the witness admitted that she did not place them before Court, to prove their existence.
64. When the witness took up her role in the School fully, the Claimant had already left.
65. The auditor was given the instructions to audit, by the other two directors of the Respondent.
66. The 2<sup>nd</sup> witness for the Respondent was one Mr. Basweti Kiago. He was called to testify on an audit report that was filed in court, under the Respondent's supplementary list.
67. The witness stated that on 30<sup>th</sup> November 2014, he was called by the School manager and subsequently instructed to do an audit on the School's accounts for a period of 18<sup>th</sup> months. The report is dated 30<sup>th</sup> November 2014 – Exhibit 8.
68. The report was intended to help the School run smoothly. He alleged that he asked for books of accounts, petty cash vouchers, and reconciliation records from the Claimant, but he was not given.

69. At the second last page of the report, he made recommendations.

70. Cross examined by Mr. Otenyo counsel for the Claimant, the witness stated that his instructions to audit were verbal. Further that before he commenced the audit exercise, he had come into the School a while earlier and informed the Claimant to avail the documents to him. Surprisingly he did not.

71. The fact that documents were asked for and that they were not availed are facts never captured in an audit report.

72. Pressed further on the instructions and how they were received, the witness stated that written instructions were given to his employer one Mr. Peter Gitei, and that he was carrying out the audit as an employee of Peter.

73. He stated that he tabled the report on the 30<sup>th</sup> November 2014. He admitted that the stamp impression on the report and more specifically the part of the date has been changed by pen to read a different date.

74. His observations under cash book management did not capture the loss if any, incurred by the Respondent.

75. Under re-examination by counsel for the Claimant the witness stated that the stamp date was the date when he was informed that the report was required in court. He had to change the date to year 2014 for that is when it was prepared.

### **Analysis and Determination**

76. There is no contention that the Claimant was an employee of the Respondent and that his employment came to an end on or about the 8<sup>th</sup> January 2015. However, in controversy is how and why, the contract of employment came to an end.

77. Considering the pleadings, the documents and testimonies placed before this Court by the parties, I consider the following issues as the issues for determination: `

*(i) Whether the termination of the Claimant's employment was procedurally fair;*

*(ii) Whether the termination was substantively fair;*

*(iii) Whether the Claimant is entitled to all or any of the reliefs sought;*

*(iv) Whether the Respondent has proved the counter-claim;*

*(v) What reliefs is the Respondent entitled to if any under the counter-claim?*

*(vi) Who should bear the costs of the suit and or the counter-claim.*

### ***Whether the termination of the Claimant's employment was procedurally fair.***

78. This issue can only be adequately looked into by approaching it in two phases. First, by understanding and determining how the termination occurred; second, getting into whether or not the statutory procedure for summary dismissal or termination of an employee's employment was followed.

79. The Claimant asserted in his pleadings and evidence, and reiterated it in his submissions, that on the 8<sup>th</sup> January 2015, he was called to the director's residence, whereat he was directed to proceed on leave, and only resume duty upon being called back.

80. On the other hand, the Respondent's 1<sup>st</sup> witness who testified on how the Claimant's contract of employment came to an end, had a totally different account from that advanced by the Claimant. The witness contended that the Claimant was by letter first interdicted and subsequently summarily dismissed.

81. In demonstrating that the Claimant was first interdicted, and subsequently for cause dismissed summarily, the witness (RW1) placed reliance on various letters purportedly issued to the Claimant. All those letters are letters that for reasons that shall emerge shortly hereinafter, failed to attract the confidence and trust of this Court, to see them as genuine letters, tendered to aid the cause of justice.

82. The Respondent's 1<sup>st</sup> witness, testified that she received information that the Claimant had been interdicted. At that time, she was out of the country. The directors of the Respondent who would have been directly involved in the decision leading to the alleged interdiction were not called to testify on this contentious issue. There was no record placed before the Court to demonstrate that there were deliberations on the issue of interdiction and that there was a decision to interdict from which the purported letter of interdiction dated 15<sup>th</sup> December, 2014 flowed. The witness's testimony on this was hearsay.

83. This, coupled with the fact that I have serious reservations on the letters that the Respondent placed before this Court, I am prepared to accept the Claimant's version as the true account as to how the contract of employment was terminated.

84. Having said this, I now move to the second phase of the issue. Section 45 of the Employment Act commands that no employer shall

terminate the employment of an employee unfairly. Section 45 (2)(c) gives the reason why an employer contemplating terminating an employee's employment or summarily dismissing him or her must engage a fair process, a default in engaging such a process will render the termination or summary dismissal unfair. The employee shall be put in the path of entitlement to one or more of those remedies provided for under section 49 of the Act, as a consequence.

85. Section 41 of the Employment Act provides an answer as to what fair procedure entails:

***“1. Subject to section 42 (2), an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

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

86. On this, this Court in the case of **Daniel Ochieku Achochi -vs- Dynaplast Limited, ELRC NO. 533 of 2016**, stated:

***“20. It is clear therefore that once an employer conceives an intention of terminating an employee's employment or summarily dismissing him or her, an employer shall:***

- a) Clearly indicate his intention to the employee, and the reason forming basis of the intention, and the intended action.***
- b) Express to the employee that he has a right to be accompanied by a colleague (where the employee is not a member of a union) or a shop steward (where the employee is a member of the union), and allow it to happen, when the employer shall be explaining the grounds to the employee and receiving representations on the grounds from the employee.***
- c) Accord the employee and or his colleague an opportunity to make representations on those grounds.***
- d) Make a reasoned determination, which must take into account the representations by the employee and or his colleague.”***

87. The fair procedure contemplated under section 41 of the Act therefore entails three components; information, hearing and consideration. Absence of any of these components in the process leading to the termination of an employee's employment or summary dismissal of an employee shall render the process unfair.

88. The Respondent was under an obligation to prove that this procedure was followed. In an attempt to discharge this burden, the Respondent placed before the Court a couple of letters, purported to have been issued to the Claimant. One of those letters was the letter dated 05<sup>th</sup> February, 2015, titled, Invitation to Disciplinary Hearing; the letter read in part:

***“Following your misconduct as per our letter of interdiction dated 15/12/2014, we are writing to inform you that you are required to attend a disciplinary hearing on Monday, (emphasis mine), 15<sup>th</sup> February 2015 at 10:30 a.m. the meeting will be held on the School premises. At this hearing, the panel will consider the following allegations of misconduct against you;***

- 1) Not attending the Mirema School management meeting to update it on financial matters.***
- 2) Not updating Mirema School management of the cause of its financial crisis .....***

89. The witness admitted that the date that was put on the letter for hearing did not fall on a Monday but a Sunday. She stated that this was an error on her part. The letter was misleading on the day for the hearing. The letter would be said to be having the allegations against the Claimant, but the bigger question is, was he informed of the same? Information on the contents of the letter would only be possible if the letter reached the Claimant. It was imperative for the Respondent to prove that the letter was delivered to the Claimant.

90. The Claimant denied having ever seen or received this letter. The Respondent's witness pressed to demonstrate that the letters were delivered, only gave a sketchy answer. *“The Claimant was a parent in the School, he would be given the letters whenever he came to School but would refuse to sign.”*

91. The answer on the delivery of this letter and that of 17<sup>th</sup> February 2015, lacked specificity as to when and by whom they were delivered. Sight should not be lost of the fact that the Claimant was last in the premises of the Respondent's School as an employee on 8<sup>th</sup> January, 2015.

92. The foretasted letter of 5<sup>th</sup> February 2015, referred to the letter of 15<sup>th</sup> December 2014, stating that this letter had disclosed the misconduct to the Claimant, imperative to capture what the letter stated in part:

***“Following your misconduct of not updating and advising the Mirema School management regarding finance, the management has decided to interdict you effective immediately pending investigations of your conduct in office.***

**Also, the management demands an explanation in writing from you to show cause why disciplinary measures should not be taken against you. This should reach the Human Resource office within the shortest time possible upon receipt of this letter.....”**

93. The Claimant denied ever receiving the letter. The Court takes judicial notice of the fact that in Kenya, in the month of December schools are normally on holidays. So, when was this letter delivered to the Claimant? The Respondent’s witness did not demonstrate.

94. The letter dated 17<sup>th</sup> February 2015, purported to be a reminder to the Claimant of the letter dated 5<sup>th</sup> February 2015 and an invitation for him to attend a hearing on Monday, 29<sup>th</sup> February 2015, left an egg on the face of the Respondent. The purported date for the hearing, 29<sup>th</sup> February 2015, is a date that does not exist on the calendar of that year. Under cross-examination the witness admitted that much.

95. The long and short of the foregoing premises is that the Court gains an impression that the letters were an afterthought, crafted only for purposes of this suit, in an attempt to demonstrate that the statutory procedure was followed in bringing the Claimant’s employment to an end. Unfortunately, this attempt failed, with a consequence of exposing the Respondent as a party whose evidence or material is untrustworthy.

96. To this end, I find that the termination of the Claimant’s employment was unprocedural, rendering the termination unfair.

**Whether the termination was substantively fair.**

97. Now I turn to the substantive aspect of the termination. In **Dismas Maende Osiche -vs- Dambusters (Dambsters Bar & Restaurant) Limited** ELRC Cause No. 465 of 2016, this Court stated:

***“In determining whether or not a termination of an employee’s employment or a summary dismissal of an employee from employment was fair or not, it should be borne in mind that the whole unit of fairness has two components, procedural and substantive fairness. Absent of any of these components renders the termination or dismissal unfair, opening the path for the aggrieved employee to be entitled to one or more of those reliefs provided for under the Employment Act, 2007.”***

98. Section 43 of the Employment Act places upon the employer the burden of proof of the reason 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 of the Act.

99. Section 45 of the Employment Act provides that termination of employment by an employer can only be said to be fair if the employer proves that the reason for the termination was fair and valid, related to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.

100. The Respondent’s witness categorically stated that the Claimant was summarily dismissed because he failed to attend the disciplinary hearing. The purported dismissal letter dated March 2015, gives the reason for dismissal as:

***“Following the recent audit of Mirema accounts, and your non-attendance to the disciplinary hearing scheduled on Monday, 15<sup>th</sup> February 2015 at 10:30 a.m. and the rescheduled-on Monday 29<sup>th</sup> February 2015, the management has decided to relieve you of your duties effective immediately.”***

101. From the evidence by the parties, as herein before brought out, the alleged 15<sup>th</sup> February 2015 was not a Monday as purported by the letter, but a Sunday. The 29<sup>th</sup> February of 2015 does not exist on the calendar of year 2015. The inescapable conclusion here being that there was no meeting on the 15<sup>th</sup> February 2015, and “29<sup>th</sup> February 2015”. The Claimant would therefore not be accused and sanctioned of failing to attend meetings that were never. No reasonable man can say that this reason for summary dismissal was valid and fair.

102. Through its letters, which this Court has found were afterthoughts, the Respondent brings forth the accusations against the Claimant. They are not the same accusations that come out in the purported dismissal letter.

103. The Respondent did not produce any minutes of the meetings of the days referred to in the letters. They did not demonstrate therefore that the contents of the dismissal letter flowed from the proceedings of any disciplinary hearing.

104. Looking at the evidence presented as a whole, I am convinced to state the Respondent did not act in equity and justice.

105. In sum, the termination of the employment of the Claimant lacked substantive fairness. I so find.

**Of the Reliefs**

106. The contract of employment was one in the nature that required a notice to be issued before its termination, pursuant to the provisions of Section 35 of the Act. It was not issued. I have further considered the terms of the employment contract, it provided for a termination notice of one month or payment in lieu thereof. Having found that the summary dismissal was not justified, I am prepared to agree with counsel for the Claimant that the Claimant is entitled to a notice pay. However, I do not agree with him that the entitlement should be equivalent to 3 [three] months’ salary in lieu of notice. I award him one month’s salary in lieu of notice, for that is what he was entitled under the contract.

107. The Claimant claimed for an unpaid salary for the month of December 2014 namely Kshs. 63,417, and a balance of Kshs. 10,000 for his November 2014 salary. His evidence on this claim was not challenged at all. I consequently find no difficulty in awarding the Kshs. 73,417

sought under this head.

**108.** The Claimant further claimed for a compensatory award under the provisions of section 49 (1)(c) of the Employment Act. Having found as I have hereabove that the termination was procedurally and substantively unfair, I hold that he is entitled to the relief under the provision. I am conscious that an award of the same and the extent thereof is discretionary, depending on the circumstances peculiar to each case but within the confines of the factors put forth in the section. I have considered that; the termination was procedurally and substantively unfair, the extent of the Respondent's deviation from what the law required of it, the fact that the Respondent crafted documents with a deliberate intention to defeat the course of justice, the length of period that the Claimant was with them, and that the Claimant did not contribute to the termination situation and find that an award of seven months' gross salary, therefore Kshs. 443,919, would suffice as compensation under the provision.

**109.** Lastly, the Claimant sought for compensation for leave days worked but which were never paid for. He contended that for the 2 years he was in the employment of the Respondent, he did not proceed for leave. Looking at the letter of employment, it does not specifically provide for the number of leave days that the Claimant was entitled to thereunder. Resort has to be made to what the Employment Act provides, therefore. Section 28 of the Act provides for 21 leave days annually. The Respondent did not lead any evidence to demonstrate that the Claimant did take leave, to rebut the Claimant's position that he did not proceed for leave. This claim was made expressly in the Claimant's pleadings. It was expected that the Respondent would lead evidence to challenge it. The Respondent never did. The Court is left with only one option, to agree with the Claimant that he is entitled to the relief. I compute the award using 21 days not 30 days as the Claimant wants. He is consequently awarded Kshs. 88,183.8.

#### **Of the counterclaim**

**110.** I agree with counsel for the Respondent that the Respondent proved its counter-claim. The Claimant signed an agreement dated 16<sup>th</sup> September 2015, binding himself to pay the fees arrears of Kshs. 75,450 in respect of his son who was then schooling in the Respondent's school. He is estopped from asserting that he is not bound by the same.

#### **Conclusion**

**111.** In the upshot Judgment is entered herein for the Claimant in the following terms;

- a) One month's salary in lieu of notice, Kshs. 63,417.**
- b) Unpaid salary for part of November 2014, and December 2014, Kshs. 73,417.**
- c) Compensation pursuant to section 49 (1) (c) of the Employment Act – 7 months, Kshs. 443,919 gross salary.**
- d) Unpaid leave, Kshs. 88,783.0.**
- e) Costs.**
- f) Interest at court rates from date of this Judgment till full payment.**

**112.** On the counter-claim:

- a) Judgment is entered for the Respondent for the sum of Kshs. 75,450.**
- b) Interest shall run from the 16<sup>th</sup> September, 2015 till date of this Judgment.**

**113.** The Respondent shall pay the Claimant the sums herein above awarded, less the sums awarded under the counter-claim, and statutory taxes.

**114.** Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

Mr. Ogeto for the Respondent.

Mr. Otenyo for the Claimant.