



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 461 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

ENOCH THIONG'O KIBATHI.....CLAIMANT

VERSUS

DIRECTLINE ASSURANCE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was instituted by a statement of claim dated 9th March 2016 and filed in Court on 22nd March 2016 alleging unfair and unlawful termination, non-payment of dues and other benefits. The Claimant prays for –

(a) Breach of contract

(30,000 x 27 months) Kshs.810,000.00

(b) 12 months' salary for unfair compensation

(30,000 x 12 months) Kshs.360,000.00

(c) Unpaid house allowance

(4,500 x 43 months) Kshs.193,000.00

(d) Gratuity/Service pay

(30,000/26 x 15 x 3.5 years) Kshs.60,577.00

(e) General damages of discrimination

(f) Interest on (a), (b), (c), (d) and (e) at court rates

(g) Costs of this suit.

2. The Respondent filed its response on 17th May 2016 and prayed for dismissal of the suit with costs.

Claimant's Case

3. The Claimant avers that he was first employed on 1st April 2011 as Assistant Records Clerk for Kairu & McCourt Advocates at a monthly salary of Kshs.25,000. That due to his outstanding work, the salary was reviewed in January 2013, from Kshs.25,000 to Kshs.30,000. That on 1st January 2014 he was transferred to Directline Assurance Company Limited and assumed office on the same day. The contract was to run for three years but renewable by mutual agreement.

4. The Claimant further avers that on 21st October 2014, the Respondent served him with a notice to show cause and immediately thereafter

formed an improperly constituted disciplinary committee to hear and determine the alleged complaint in violation of the provisions of the Employment Act and employment contract.

5. That the hearing violated the provisions of the Employment Act, Human Resource Management Professional Act and the principles of natural justice. That the Head of Human Resource had no practicing certificate, no representation from the Claimant's department and the Claimant was denied the right to call a fellow employee to the hearing.

6. That the Respondent's action of terminating him flouted the Constitution, provisions of the Employment Act and principles of natural justice in that the Claimant was not served with a warning letter. That the Claimant had no opportunity to appeal, was denied the opportunity to be heard and the proceedings were rushed.

7. That on 22nd October 2014, the Human Resource and Administration Manager summoned the Claimant and ordered him to return the termination letter and write a resignation letter instead if he wanted his dues paid.

8. That the resignation letter was written under duress and coercion.

Respondent's Case

9. The Respondent denied the contents of paragraphs 3, 4, and 5 of the statement of claim, that it does not recruit and/or employ personnel on behalf of Kairu and McCourt Advocates and the two are separate entities. That the Claimant's employment commenced on 1st February 2014 when he was employed as an Assistant Records Clerk as per the contract of employment dated 1st February 2014 between the parties. That the initial contract was for a fixed term of 3 years and thereafter as mutually agreed in writing and the Claimant's salary was consolidated at Kshs.30,000 per month.

10. The Respondent further avers that it issued a notice to show cause because the Claimant was unable to discharge his duties namely –

- Retrieving and delivering physical files to various departments against an approved printed request.
- Ensure that all physical files are collected and returned to the Registry.
- Refiling of the physical files in the proper cabinets in an organised and systemic manner.
- Responding to file requisition from various departments
- Assisting in retrieval of archived files at the filing room on referral cases when need arises.

11. That the Claimant was unable to handle file requests, retrieval and collection for his assigned team as expected.

12. That the Claimant was constantly on the phone attending to personal phone calls during working hours and could not be found when needed to request for files. That the Disciplinary Committee which heard and determined the complaint against the Claimant was properly constituted in conformity with the policy of the Respondent, the law and contract.

13. That the Claimant was summarily dismissed for wilfully neglecting to perform work namely –

- i) Failing to handle files requests, retrieval and collection for teams as expected;
- ii) Blatantly ignoring file requests from the Registry Manager;
- iii) Refusing to deliver file requests to a point almost getting physical when given work;
- iv) Being constantly on phone, attending to personal phone calls during working hours;
- v) Inability to stand in for colleagues when need arises.

14. It is also averred that the Claimant was paid one month's salary in accordance with the provisions of the Employment Act. That the Claimant worked for the Respondent for only 8 months and 21 days and thus had no right under the Employment Act to claim for unfair termination.

15. That the Claimant's demand and notice to sue was duly received.

16. The Claimant filed a reply to the statement of response which reiterated the contents of the statement of claim.

Evidence

17. Both witnesses adopted their written statements and were cross examined. CW1, the Claimant confirmed on cross examination that he started working of the Respondent on 1st April 2011 but had no written contract to that effect. That he responded to the notice to show cause

in writing but had no documentary evidence. That he was invited for a disciplinary hearing and given a termination letter and has no record of it. He confirmed having written and signed a resignation letter dated 21st October 2014.

18. CW2's evidence mirrored that of the Claimant and was not supported by documentary evidence. He confirmed that he was paid all his dues.

19. **RW1, Lilian Ouko** confirmed that her records showed that the Claimant resigned on 21st October 2014. That she was not an employee of the Respondent then. That the Claimant's file had no termination letter. That the Claimant did not respond to the show cause letter and the file had no record of the alleged disciplinary proceedings.

20. Documents on record show that the Claimant was engaged by the Respondent on 1st February 2014, was issued with a notice to show cause on 21st October 2014, he resigned on the same day and the resignation was accepted on the same day. Both parties pleaded that disciplinary hearing took place on the same day but disagree on the mode of separation. Whereas the Claimant alleges termination, the Respondent alleges resignation. However, in its pleadings, the Respondent admitted that the Claimant was summarily dismissed for wilfully neglecting to perform work.

Claimant's Submissions

21. The Claimant isolated one issue only, namely whether the Claimant resigned or was terminated.

22. The Claimant submits that contrary to the Respondent's evidence that the Claimant resigned, and no disciplinary proceedings took place, the Respondent's pleadings corroborate the Claimant's position the indeed a disciplinary committee was constituted and heard the alleged complaints against the Claimant and he was summarily dismissed by a letter dated 21st October 2014.

23. It is submitted that it is trite law that a party is bound by its pleadings. The decision in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** which cited the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** was relied upon for the proposition.

24. The decision in **Raila Odinga & Another v IEBC & 2 Others [2017] eKLR** was also relied upon to buttress the argument on pleadings: That the evidence of CW2 was corroborated the evidence of the Claimant though not supported by any documentary evidence.

25. The decision in **CMC Aviation Ltd v Cruiser Ltd (No. 1) (1978) KLR** was relied upon to demonstrate that pleadings are not evidence until they are proved or admitted.

26. It is submitted the submitted Claimant was terminated and did not resign as alleged.

27. On termination, the Claimant submitted that he was given a notice to show cause on 21st October 2014, invited for a disciplinary hearing at 2.00 pm and thereafter received a termination letter. The decision in **Margaret Lihabi Ngaira v Winfrida Ngumu Charles [2016] eKLR** was cited as authority. Reliance was also made on Sections 43, 45 and 47(5) of the Employment Act on the burden of proof and justifying the reason(s) for termination lies with the employer.

28. The decision in **Jared O. Otete v Factory Guards Limited [2014] eKLR** was relied upon for the remedies available for unfair termination under Section 49 of the Employment Act.

29. On the claim in damages for breach of contract, the Claimant submits that he had a fixed term contract, with the Respondent and the contract had no rights beyond the expiry date. That because it was unlawfully terminated, the Claimant was entitled to compensation for the 27 months of the unexpired contract at Kshs.810,000. Reliance was made on the decision in **Donas Lombom & 7 others v Civicon Limited [2016] eKLR** where the Court awarded the Claimant salary for the unexpired period of their respective fixed term contracts.

30. Finally, on house allowance, the Claimant seeks a total of Kshs.193,000 being 15% of the monthly salary for 43 months he had worked for the Respondent.

Respondent's Submissions

31. The Respondent identified these issues for determination:

32. On resignation or termination, it is submitted that the Claimant resigned vide a letter dated 21st October 2014. That this position was supported by the evidence of RW1 and the documents produced by the Respondent. The decisions in **CMC Aviation Ltd v Cruisair Ltd (No. 1) [1976 – 80] KLR** is used to illustrate the character or nature of pleadings, and the essence of proof.

33. It is further submitted that party is bound by its pleadings. That the Respondent's pleadings clearly state that the Claimant resigned. That the Claimant led no evidence of his termination.

34. As regards unfair and unlawful termination. It is submitted that the Claimant had been in employment for only 8 months and is thus disqualified by Section 45(3) of the Employment Act, 2007 which makes reference to the 13 months of employment.

35. On breach of contract, the Respondent submits that the Claimant resigned voluntarily and cannot sue for breach of contract and in any event the Claimant would not be entitled to the unexpired term of the contract of employment by dint of Section 49(10)(c) of the Employment Act which limits compensation for unfair termination to a maximum of 12 months' salary. That neither the law nor the contract of employment provides for payment for the unexpired term of the contract. The decision in **Andrew Mwaniki Gachoba v National Oil Corporation of Kenya [2018] eKLR** is relied upon to urge the Court not to award damages for the unexpired term of the contract.

36. It is further submitted that in **Dunas Lombom & Others v Civicon Ltd [2016] eKLR** relied upon by the Claimant where the Court awarded Claimants for the unexpired term of the contract, the same did not exceed 12 months and the Court did not award compensation for unfair termination.

37. It is submitted that the Claimant is not entitled to gratuity and severance pay. Since he was a member of the NSSF and as well as a pension scheme operated by the Respondent.

38. The decision in **Elijah Kipkoros Tonou v Ngara Opticians t/a Bright Eyes Ltd [2014] eKLR** on service pay.

39. On unpaid house allowance, the Respondent relies on clause of the employment contract.

40. Finally, as regard general damages for discrimination, the Respondent urges that the Claimant adduced no evidence to substantiate the claim of discrimination.

41. In sum, it is submitted that the Claimant's claim lacks merit and should be dismissed with costs to the Respondent.

Analysis and Determination

42. After careful consideration of the pleadings, evidence on record and submissions, the issues for determination are: -

- (a) For how long the Claimant was an employee of the Respondent;
- (b) Was the Claimant terminated or resigned;
- (c) Whether the Claimant is entitled to complaint for unfair termination;
- (d) Whether the Claimant is entitled to the reliefs sought.

43. The Claimant asserts that he was employed by the Respondent on 1st April 2011 at Kshs.25,000 per month and the salary reviewed to Kshs.30,000 per month in January 2013. The Claimant led no evidence to prove this allegation and the same was denied by the Respondent.

44. The Respondent stated that it is a different entity from Kairu & McCourt Advocates where the Claimant allegedly worked from 1st April 2011 until 21st January 2014 when the contract was purportedly reviewed.

45. The only relationship between the Claimant and the Respondent on record is the one evidenced by the contract dated 1st February 2014, a fixed term contract for 3 years. The contract does not state that it was a new contract or renewal of a previous contract. It is noteworthy that the contract had a probationary and training period of 6 months as well as evaluation/appraisal at the end of the probationary period. It is unclear why the Respondent would subject its employee to probation twice assuming the probation contract was a second one.

46. From the evidence on record, it is the finding of the Court that the Claimant was employed by the Respondent effective 1st February 2014 for a fixed term contract of 3 years.

47. It is not in dispute that the Claimant worked for the Respondent for 8 months only. The Respondent submits that the Claimant has not served the mandatory 13 months provided by Section 45(3) of the Employment Act. Under the Section, persons in the Claimant's position have no right to complain for unfair termination. However, this Court is guided by the holding of the High Court in **Samuel G. Momanyi v Attorney General & another [2012] eKLR** that Section 45(3) of the Employment Act is unconstitutional. Lenaola J. (as he then was) expressed himself as follows: -

It has been argued by the Petitioner that Section 45(3) is in conflict with Articles 48 and 50(1) of the Constitution which guarantee the rights to access to justice and the right to a fair hearing. It is his further argument that it is discriminatory of certain kinds of employees that only those who have served for over thirteen (13) months can file a claim for unfair termination of their services and yet there is no magic about the thirteen (13) months.

It is instructive that the Attorney General failed to respond to the Petition and yet this particular issue would have required his answer because it is weighty and serious. He has not and the implications will shortly become obvious ... I wholly agree and as I have shown above, Section 45(3) is unreasonable and has the opposite of what the object of the Employment Act was intended to be.

48. The Learned Judge declared that Section 45(3) of the Employment Act was inconsistent with the provisions of the Constitution of Kenya.

Particularly Articles 28, 41(1), 47, 48 and 50(1) since it purported to deny the Petitioner the rights and freedoms enshrined in the Constitution.

49. The Court is guided by this decision and upholds the findings Learned Judge. This decision was relied upon by Ongaya J. in **Linus Barasa Odhaimbo v Wells Fargo Ltd [2013] eKLR**.

50. Finally, although the issue before the Court of Appeal in **Samuel G. Momanyi v SDV Transami Kenya Ltd [2017] eKLR** was not the unconstitutionality of Section 45(3) of the Employment Act, the Court was in agreement with the findings and holding of Rika J. where the Learned Judge had expressed himself as follows: -

“The Judgment of the High Court in the view of this Court, can only apply to unfair termination claims, filed after 18th May 2012. The judgment is not intended to unsettle vested rights, and revive unfair termination claims decided before 18th May 2012. Every law of the Legislature, however repugnant to the Constitution, until expressly declared invalid by the Court, has not only the appearance and semblance of authority, but the force of law. This was the case with Section 45(3) of the Employment Act, 2007, prior to 18th May 2012.”

51. The Court of Appeal was unequivocal that –

“We entirely agree with the learned Judge’s rendition of the law and find no reason that would warrant this Court’s interference.”

52. This Court is of the view that the Claimant is entitled to complain about the alleged unfair termination and is thus properly before the Court.

53. As to whether the Claimant resigned or was terminated, the parties have diametrically opposed positions. While the Claimant alleges the he was terminated, the Respondent’s position is that he resigned upon receipt of the notice show cause.

54. On termination, the Employment Act 2007 provides for the various aspects of the process from the required notice under Section 35, the reason(s) for termination and procedure under Sections 45 and 43 and the burden of proof for the parties.

55. In nutshell, Employment Act has provisions that underline the essence of substantive and procedural fairness in termination of employment contracts and courts have enforced these requirements robustly and firmly. See the Court of Appeal decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, **Standard Group Limited v Jenny Luesby [2015] eKLR** as well as **Kenafic Industries Limited v John Gitonga Njeru [2016] eKLR** and **Naima Khamis v Oxford University (E.A) Limited [2017] eKLR**.

56. These decisions are emphatic that for a termination of an employment contract to pass the fairness and lawfulness test, it must meet the threshold for substantive and procedural fairness.

57. In **Naima Khamis v Oxford University (E.A) Limited (supra)** the Court of Appeal stated that –

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.

In a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer (section 47(5) of the Act).”

58. I now proceed to apply the above principles to the instant case. In the instant case the Claimant was issued with a show cause letter on 21st October 2014.

59. He resigned and the resignation notice was accepted on the same day through a letter dated on 21st October 2014. The Claimant avers the on the same day, he was invited to a disciplinary hearing and issued with a termination letter dated on 21st October 2014. The Respondent admits that the complaint against the Claimant was heard and determined by a properly constituted Disciplinary Committee. It avers that even if the Human Resource and Administration Manager did not have a valid practising certificate, it is did not invalidate her representation at the Disciplinary Committee. In addition the Claimant was not barred from calling a fellow employee at the disciplinary hearing.

60. That in a strange twist, on 22nd October 2014, the Claimant was summoned by the Human Resource and Administration Manager to return the termination letter. He was then ordered to draft a resignation letter and backdate it to 21st October 2014. He testified that he did so due to his financial position which was dire.

61. A similar explanation was given by **CW2, Mr. Harrison Mwarumba Mbui** who averred that he worked at Kairu and McCorut Advocates from 1st February 2012 and later at Directline Insurance Company Limited until 21st October 2014 when he was terminated.

62. Intriguingly, neither the Claimant nor the Respondent produced the termination letter as an exhibit. RW1, Lilian Ouko testified that the Claimant resigned and was not terminated, that the office file had neither a termination letter nor record of minutes of the Disciplinary Committee. RW1 confirmed that she was not an employee of the Respondent in 2014.

63. The Claimant's version of the drama on 21st October and 22nd October 2014 is given credence by the Respondent notwithstanding its denial of having terminated the Claimant. For unexplained reason, the Respondent's list of documents dated 13th May 2016 indicated that the termination letter dated 21st October 2014 was part of the bundle as item number 3. However, a subsequent list of documents dated 6th August 2019, 3 years, later omitted the termination letter was one of the documents.

64. The Respondent's admission through its list of documents dated 13th May 2016 would appear to confirm that indeed a Disciplinary Committee heard and determined the allegations made against the Claimant and a termination letter issued to the Claimant but he surrendered it the following day at the instigation of the Human Resource and Administration Manager. RW1 did not deny the explanation by the Claimant.

65. As the Claimant submitted, it is trite law that a party is bound by its pleadings. In **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** the Court of Appeal adopted with approval the sentiments of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002**, where Aderemi J.S.C. stated that –

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

66. The Respondent made a similar argument, that a party is bound by its pleadings and relied on the words of Madan J. (as he then was) in **CMC Aviation Ltd v Cruisair Ltd (No. 1) [1976-80] KLR** on the nature of pleadings.

67. Finally, paragraph 12 of the statement of response states that the Claimant was summarily dismissed for wilfully neglecting to perform work.

68. From the above, it is the finding of the Court that the Claimant was terminated by the Respondent. The alleged resignation was intended to camouflage the termination and relieve the Respondent from liability.

69. As to whether the Claimant is entitled to complaint for unfair termination, Section 45 of the Employment Act applies to any employee whose complaints fits within the four corners of the provision as follows;

45. Unfair termination

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

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

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

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

(c) that the employment was terminated in accordance with fair procedure.

70. The Claimant was accused of misconduct that on 18th October 2024, the Registry Manager requested him to deliverer files but he refused to answer him and almost got physical with the Manager, failure to stand in for colleagues and being constantly on the phone.

71. From the evidence on record the Claimant responded to the show cause letter, was invited for disciplinary hearing that afternoon and a termination letter issued thereafter but the letter was returned the following day at the behest of the Human Resource and Administration Manager. The Respondent did not controvert this evidence.

72. The particulars catalogued by the Respondent in its statement of response implicates the Claimant's conduct and operational requirements of the Respondent as the reasons for termination. Since the Respondent led no evidence on termination, it does appear to the Court that the averments were most likely extracted from the termination letter dated 21st October 2014 which the Respondent did not avail to the Court even after filing a document indicating that it was among the list of its documents.

73. Having admitted that the Disciplinary Committee which heard and determined the complaint against the Claimant was properly constituted in accordance with the policy of the Respondent, the law and the contract, and admitted that the Claimant was summarily dismissed, the Respondent was obligated to avail a record of its proceedings and the outcome. It is bound by its pleadings as adverted to elsewhere in this judgment.

74. In addition, Section 41 of the Employment Act requires the employer to do certain things before terminating an employee on the grounds of misconduct, poor performance or physical incapacity –

- (i) Explain to the employee, in a language the employee understands, the reason for which the employer is considering termination
- (ii) The employee is entitled to have another employee or a shop floor union representative of his choice present during this explanation
- (iii) 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 make (See **Loice Otieno v Kenya Commercial Bank [2013] eKLR**)

75. I now proceed to determine whether the Respondent's conduct on 21st October 2014 met the threshold provided by Section 41 of the Employment Act. It is not disputed that on 21st October 2014, the Respondent appointed a Disciplinary Committee comprising of the Human Resource and Administration Manager, Claims Manager and the Registry **Manager**.

76. Second, that the notice to show cause required the Claimant to respond to the charges levelled against him by close of business on the same day. According to the Claimant, the letter was delivered to him at around 11.00 am when he received a call from the Human Resource and Administration Manager and he responded to the show cause letter within one (1) hour. He averred that the proceedings took place that afternoon. The Claimant denied the allegations and requested to summon his colleagues to testify on his behalf but the request was declined and was given a termination letter 30 minutes later.

77. It is evident that the Respondent took the Claimant through the disciplinary process in a mechanical manner so as to appear to have complied with the law. The process can be faulted in various respects;

- a) The show cause letter did not inform the Claimant that he was entitled to have a colleague or union representative of his choice at the hearing. He attended the hearing alone.
- b) The show cause letter gave him till the close of business on the same day to respond. This was indisputably insufficient to respond to the allegations substantively and even contact the witness he would have called to confront the allegations.
- c) The Claimant testified that his request to call witnesses was declined.
- d) The Respondent did not avail a record of the proceedings even after having admitted that the Disciplinary Committee was properly constituted.
- e) The Respondent did not avail evidence that it heard and considered the Claimant's representation before termination

78. From the foregoing, the Court has no doubt in its mind that the Claimant was not accorded a fair hearing. The purported disciplinary hearing on 21st October 2014 was a sham.

79. The essence of Section 41 of the Employment Act is to ensure that an employee is fully aware of particulars of the charges facing him/her and has sufficient time to rebut those allegations and is heard in the presence of a representative of his choice. The provision is underpinned on the need to give the employee a fair hearing before termination. It also ensures that the employer is well aware of the employee's standpoint on the charges. It therefore follows that an employer who takes an employee through the process mechanically cannot be said to have complied with the provision, as was the case in the instant case. The Respondent may have had a valid and fair reason to terminate the Claimant but used a flawed procedure which vitiated the termination.

80. Flowing directly from the above, it is the finding to the Court that the Claimant was unfairly terminated and is thus entitled to complain for unfair termination.

81. On reliefs, the Claimant prays for

- a) Breach of contract (30,000 x 27 months) Kshs.810,000.00**

82. The claim appears to be founded on the fact that the Claimant was employed under a 3 year contract from 1st February 2014 to 31st January 2017, the remaining duration of the contract. In other words, these are anticipatory earnings.

83. Although the contract of employment is contract analogous to any other, it is governed principally by the Employment Act and other relevant statutes and in the event of an unfair or unlawful termination, the remedies are provided by the Employment Act. Damages for breach of contract is not one of them. Relatedly, since the contract between the parties was terminable by a notice of 30 calendar days by either party or salary for the same period in lieu of notice, a claim for anticipatory salary is not sustainable. (See **Hema Hospital v Wilson**

84. In **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**, the Court of Appeal held that

“Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law.”

85. Significantly, the contract of employment between the parties had a termination clause as was the case in **Andrew Mwaniki Gachoba v National Oil Corporation of Kenya (supra)** on compensation for unexpired term of a contract.

86. The claim is **declined**.

b) 12 months' salary for unfair compensation (30,000 x 12 months) Kshs.360,000.00

87. Having found that the Claimant's termination was unfair, the Claimant becomes entitled to the reliefs under Section 49 of the Employment Act. In determining the level of compensation under Section 49(1)(c) of the Act, the Court is guided by the factors set out in Section 49(4) of the Act as well as previous decisions.

(i) First, the Claimant served the Respondent for a period of 8 months and wished to continue.

(ii) Secondly, the Claimant had just completed the probation and training period as provided by Clause B of the contract of employment.

(iii) Thirdly, there is no evidence on record that the Claimant had a previous warning or notice to show cause. Fourthly,

(iv) the Claimant contributed to his termination.

88. Taking these factors into account, the Court is satisfied that the equivalent of two (2) months' salary is fair. The Court awards **Kshs.60,000**.

c) Unpaid house allowance (4,500 x 43 months) Kshs.193,000.00

89. Although house allowance is a statutory right under Section 31(1) of the Employment Act, the obligation of the employer to provide reasonable accommodation for the employee at his cost or pay the employee sufficient sum for rent, in addition to the salary or wage, this provision does not apply if the contract of employment contains a provision which consolidates as part of the basic wage or salary of the employee an element intended to be used by the employee as rent or which enable the employee to have housing accommodation. (Section 31(2) of the Act).

90. Clause 4 of the contract of employment between the Claimant and the Respondent provided that the Claimant's salary was consolidated and the parties agreed that the remuneration would enable the Claimant provide himself with reasonable housing accommodation.

91. Consequently, the Claimant's prayer for house allowance is **dismissed**.

d) Gratuity/Service pay (30,000/26 x 15 x 3.5 years) Kshs.60,577.00

92. Whereas gratuity is a contractual obligation on the part of the employer, severance pay is only payable in cases of redundancy under Section 40(1)(g) of the Employment Act which was not the case in the instant case. (See **Nixon Mandala Malongo v Clifford Okello Rachuonyo & Another [2014] eKLR** on severance pay).

93. The contract of employment between the Claimant and the Respondent dated 1st February 2014 had no provision for payment of gratuity to the Claimant. In addition, the Claimant led no evidence of a redundancy. Accordingly, the claim for gratuity/severance pay is **declined**.

e) General damages of discrimination

94. The Claimant led no scintilla of evidence that he was discriminated by the Respondent or any other person. The claim is **declined**.

95. **In conclusion judgment is entered for the Claimant for the sum of Kshs.60,000 with costs.**

96. **Interest at court rates from the date of judgment till payment in full.**

97. **It is so ordered.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF DECEMBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE