



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

CAUSE NO. 2283 OF 2016

(Before Hon. Justice Ocharo Kebira)

JOYCE MUKOLWE

CLAIMANT

VERSUS

MUSTEK EAST AFRICA LIMITED

RESPONDENT

JUDGMENT

1. The Claimant herein was employed as a Business Development Assistant by the Respondent from 24th March 2014 to 4th April 2016 at a monthly salary of Kshs. 35,000. She claims that her employment was abruptly terminated. She charged that the termination was in a manner that had all the characteristics of one that was unfair, unlawful, and a product of unfair labour practice on the part of the Respondent, consequently instituting the claim herein seeking for a number of orders and reliefs against the Respondent.

2. The Respondent denies the allegations by the Claimant, asserting that any action that was taken by it concerning her employment, was at all material times justified and within the law. It holds that the Claimant's Claim herein is one bereft of any merit.

Claimant's Case.

3. The Claimant herein, instituted this claim against the Respondent, vide a memorandum of claim dated 7th November 2016. In it, she has sought a number of orders and reliefs against the Respondent, thus;

(a) A declaration that the Respondent's conduct in handling the Claimant's employment period amounted to unfair, unlawful and constructive dismissal and in breach of the Employment Act and principles of Employment law.

(b) Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months net salary totaling to Kshs. 585,840.00 with interest thereon at Court rates from the date of Award until payment thereof in full.

(c) Refund of all the unlawful deductions made from the Claimant's salary by the Respondent during her employment period.

(d) One month's salary in lieu of notice of Kshs. 48,820.00

(e) Service pay @ 15% for every year worked from April 2014 to April 2016.

(f) Unpaid leave days from 2012 to 2016.

(g) Certificate of service.

(h) Costs of the suit plus interest thereon from the date of Award.

(i) Any other relief that this honourable Court may deem fit to and just to grant in the circumstances.

4. When this matter came up for hearing before this Court on the, 12th October, 2021, the Claimant adopted her witness statement herein dated 27.11.2016 as her evidence in chief. She moved the Court to admit the documents that she had filed under a list of documents to be

admitted as her documentary evidence. The documents, without any contest from the Respondent, were deemed produced as exhibits 1-4 in the order they are in the list.

5. The Claimant gave a brief oral testimony thereafter, making clarifications on the items of her witness statement and documents that required clarification, before being cross examined by counsel for the Respondent.

6. It was the Claimant's case that she came into the employment of the Respondent on or about the 1st April 2014, in the capacity aforesaid.

7. The Claimant asserts that she worked for the Respondent faithfully and diligently with utmost dedication for its betterment and by March 2016, her net pay had increased to Kshs. 48,820. Despite continuously serving the Respondent faithfully and diligently, the Claimant avers that through its Managing Director, the Respondent engaged in unfair labor practices to her detriment.

8. The Claimant states that some of the above practices included not providing a relevant job description to the Claimant for the work that she had been employed to do. She avers that she was continuously tossed from one job to another at the Managing Director's will without any certainty as to which work, she was to do and how she was to do it.

9. The Claimant testified that on or about the 1st August 2015, the Respondent amended the terms of her employment without consulting her. The terms of employment that were brought on board were not to her benefit but detrimental to her. She produced a document titled employment contract amendment as one of her exhibits.

10. The implication of the amendment to the employment contract was to the effect that it established targets to be met, and gave the Respondent authority to deduct her salary whenever the same were not met. The targets were set without her being involved.

11. The Claimant further stated that as a result of the amendment, she was tasked to do sales of software, notwithstanding that she was not employed as a sales person and that she did not have any training on the same. The Respondent did not train her on this new role.

12. She further stated that whenever she was late, her salary would be deducted for the lateness. The Respondent did set up a WhatsApp-group, any message done thereto by the managing Director but not responded to immediately would automatically attract a deduction of her salary.

13. She testified that the deductions are reflected on the pay slip that she tendered in as her exhibit 1. There are other unlawful deductions that can be discerned from her said pay slip, notably "staff purchases", other deductions for Kshs. 11,000, lateness deductions, Kshs.550, and telephone deductions. The Claimant contended that she was not late to work at any time. She did not understand why, and how the deducted figures were arrived at.

14. The Claimant avows that the Respondent forced her to work overtime without pay and would threaten to terminate her employment if she did not. She also states that she suffered perpetual insulting and abuse by the Managing Director. Her working relationship with him was terrible.

15. She further states that on 4th April 2016, the Human Resource Manager and one Mr. Waweru called her, and indicated to her that the managing Director, had directed that her services be terminated. Then, the managing Director was out of the country. They gave her a termination letter. The termination was without any prior notice. She was not given an opportunity to be heard. She was not given any reason for the termination.

16. Cross examined by counsel for the Respondent, the Claimant stated that for the month of March, 2016, she was paid Kshs. 17,900 only. Her pay slip would reveal this, however, she did not have it in Court. She asserted that in April she was not paid any money.

17. Asked about the amended contract, she stated that she signed the same, she was forced to. She asserted that she complained to the Human Resource Manager about the prejudicial terms of the amended contract.

18. Further in her evidence under cross examination, the Claimant stated that on her pay slip for the month of March, 2016 it is clearly indicated that she was deducted Kshs. 11,000, and another sum for lateness. She acceded to the proposal by counsel for the Respondent that she had not filed any bank statement in Court. Pay slips for other months too.

19. She asserted that professionally she is a secretary, with a training in secretarial studies. She was given an additional role as a warranty clerk. Up to the time of separation, she was working as a sales Manager of a product. She was tasked to source for clients and do demos to them with the technical team, for the particular product.

20. To the amended contract there are additional notes. Item three thereof creates a penalty of Kshs. 10,000.

21. The Claimant further stated under cross examination that the Managing Director forced her to sign the amended contract. That she did not sign the document freely, can be discerned from the fact that she took along time to sign it. From the date of the contract to the date she executed the same, there was a period of two months in between.

22. She asserted that at all material times she was not given a job description.

23. She stated that according to her March 2016, pay slip, her basic salary was Kshs. 35,000. Her March 2016 pay slip had a stamp on it whilst that of April didn't have.

24. The Claimant upon being referred to the Respondent's documents admitted that her name appears on the list at page 33-34 thereof. The list is on a bank transfer document for Kshs. 1,423,000.

25. She stated that in the month of April, she was not working with the Respondent. Questioned on her claim for unpaid leave, she stated that she did take a few leave days. In 2014 she took 4 [four] days. In 2015, she took 9 [nine] days and in 2016 she took none. Her entitlement was 21 days annually.

26. The termination letter, is signed by the Human Resource Manager. At the place where the Claimant was to append her signature, she did not. The managing Director did not sign too.

27. She stated that after she received the termination letter, she did not seek audience from the Managing Director. The Managing Director would force her to go to work at midnight. According to her this was enough indication of what kind of a person he was. Under re-examination, the Claimant stated that at the time of termination, she was given the termination letter and a pay slip. She was told that the Managing Director had given instructions against her not to be allowed in the following day.

Claimant's Submissions.

28. Counsel for the Claimant submitted that it is settled law that before an employee's contract of service is terminated, she/he ought to be given reasons and an explanation for the termination. She should be accorded an opportunity to be heard too. The Claimant's employment was simply terminated, no reasons for the same were given to her. She was not given an opportunity to be heard. Counsel placed reliance on the case of **National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR** where the Court of Appeal held:

“With regard to issue number one [1], since it is not disputed that the employer/employee relationship subject to this appeal was subject to the prerequisites of the Act, the procedure the Bank ought to have followed when terminating the Respondent's employment is what is set out in section 41, 43, and 45 of the Act.

In Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, the Court summarized those procedures as follows: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.....

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that an employee understands the reason for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to the allegations levelled against him by the employer.”

We fully adopt the above position as the correct position in law that the bank ought to have invoked when contemplating termination of the Respondent's employment. None of the above procedures were outlined by DW1 as having been duly undertaken by the bank before terminating the Respondent's employment. We therefore find no basis for interfering with the judge's finding that the procedure employed by Bank to terminate the Respondent's employment was unprocedural.”

29. Counsel further submitted that the Respondent's witness testified that the Claimant was underperforming in her work. That despite several warnings she did not improve. He further submitted that however, in his evidence under cross examination, the witness admitted that there were no records placed before Court to confirm that there were performance appraisals on the Claimant regarding or in proof of her alleged poor performance.

30. Counsel relied on the case of **National Bank of Kenya vs Samuel Nguru Mutonya (supra)** where the Court quoted the case of **Jane Samba Mukala vs Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)** the Court observed that in the case of termination on grounds for poor performance, an employer must show that it has in place an employment policy or practice on how to measure good performance as against poor performance. In addition, an employer must prove what measures they have taken to address poor performance by an employee which includes seeking an explanation from the employee on the same. The Court concluded that in a case the employer decides to terminate an employee on grounds of poor performance, the employee must be informed of the contemplated termination of her/his employment on account of poor performance, and be given an opportunity to make a representation on the same and the ground of poor performance.

31. Counsel summed it up by saying, that the testimony by the Respondent's witness on poor performance of the Claimant was an afterthought meant to mislead the Court. The testimony ought to be rejected by the Court.

32. On the lack of a proper job description, counsel submitted that Section 10 of the Employment Act provides that a written contract of service should provide a job description for which an employee is being employed. None adherence to this provision goes to the root of the contract of employment and hence, a repudiation of the contract. An employee should be guided by a job description to enable him/her to perform to his/ her maximum and to avoid a situation where he/she is tossed from one area of work to the other at the whims of the employer. The Claimant's testimony that as a Buisness Development partner she was not given any job description was not successfully challenged. As regards the legal necessity of a job description, reliance was placed on the case of **Carolyn L. Musonye vs Panari Hotel Ltd (2017) eKLR**.

33. It was further submitted that an employment contract is an agreement of mind between an employer and an employee. Therefore, if an employer wants to amend the contract and make some changes to the existing terms, he owes an obligation to the employee to consult her on the same, explain to her/him in detail and with clarity the effect of those changes so that the employee makes an informed decision before she/he signs it or not. Counsel cited the case of **James Ang'awa Atanda & 10 Others vs Judicial Service Commission (2017) eKLR**, to buttress his submissions where Radido J held;

“A long chain of authorities on the common law suggest that for a variation of an employment to be lawful, there should be mutual agreement between the employer and the employee[or their representative where there is organized labour] the authorities further show that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract or repudiation [Rigby vs Ferodo ltd[1987]IRLR 516, Security and Facilities Division vs Hayes [2001]IRLR 81 and where the employee accepts the repudiation, that would amount to constructive dismissal.”

34. It was submitted that the Respondent's witness was unable to demonstrate that there were any consultations between the Respondent and the Claimant before the contract was varied. The changes that were effected were detrimental to the Claimant. Counsel buttresses this submission by the holding of this Court in **Meshack Mutilangi vs- East Africa Limited [2021] eKLR** thus;

“This Court concludes that the variation of the contract of employment was without consultation, unlawful and amounted to an unfair labour practice. It was a fundamental breach of the contract and repudiatory. The Claimant's case on constructive dismissal does not stand on loose ground. It is well anchored.”

The Respondent's Case.

35. In response to the claim, the Respondent filed a Memorandum of Reply dated 3rd August 2021 denying all the allegations brought forth by the Claimant.

36. The Respondent avers that the Claimant was employed as a Business Development Assistant and that her duties were properly stipulated in her job description. That the nature of its business is to provide support services to clients after purchase of goods and that it was the duty of the Claimant to offer these services, a fact the Claimant had knowledge of.

37. The Respondent further states that the allegations touching on the Managing Director are unfounded and malicious as the Claimant had a direct supervisor and did not engage with the Managing Director directly. It avers that the Claimant did not perform her duties well leading to clients complaining and loss of revenue by the Respondent and as such, she received several warnings on her conduct.

38. The Respondent states that the Claimant took all her leave days in 2014 and 2015.

39. It also adds that it did indeed follow the law and the terms of the contract of service in terminating the employment contract. It contends that it was willing to settle the matter amicably prior to the suit herein and is also willing and ready to issue a certificate of service to the Claimant.

40. The Respondent pleaded that the Claimant was a member of NSSF and therefore not entitled to service pay.

41. The Respondent presented one Francis Wambua, its General Manager to testify on its behalf in this matter. The witness urged the Court to adopt the contents of his statement dated 3rd August 2021, as part of his evidence in Chief, and the documents under the list of documents of even date as the Respondent's documentary evidence. There was no protest from the Claimant, the adoption was so done.

42. The witness stated that the Respondent is a company dealing in among other things supply of computer and other hardware and accessories and installation of various software within the country. That through a letter of appointment dated 24th March 2014 executed by the Respondent and her, the Claimant joined the Respondent's work force in the month of April 2014. Her gross salary being Kshs.30,000 per a month.

43. The witness stated that the contract was amended on the 4th of February 2015 with the Claimant's gross salary going upto Kshs. 35,000 per a month, in addition, the amendment brought on board some incentives upon her attaining some targets.

44. The witness reiterated the contents of the pleadings by stating that the Claimant's performance was below par.

45. On payment of the Claimant's final dues, the witness alleged that the Claimant's salary for March 2016 was paid in April 2016. That the document dated 24th April 2016, Bank Transfer SFI, tendered in evidence by the Respondent, attests to this. The Claimant's name was one of the names obtaining on the list that was attached thereto. Hence, she was among the staff members who were paid.

46. The witness stated that he does not recall the incident of issuing the termination letter. The letter ought to have been signed by the Managing Director and the Human Resource Manager. He positively identified the signature on the termination letter as that of the Human Resource Manager.

47. The witness stated that the Claimant was given a job description when she got into the employment of the Respondent. As regards the additional duties, he said, the Claimant was not supposed to sell software.

48. He further stated that the pay slip for March that had been exhibited by the Claimant was not their company's. They paid her salary for

April because the termination letter had not been signed by the Managing Director.

49. Cross examined by Counsel for the Claimant, he stated that by the month of April 2016, the Claimant was an employee of the Respondent, the reason why she was paid for the month. He stated that his testimony was on strength of the bank transfer document. However, pressed further, he admitted that the same is not been signed by a bank official and that it did not have the bank name.

50. He stated that the Claimant kept on absconding duty and whenever she so did, the Human resource Manager wrote her emails. The Respondent has not placed the emails before Court, he admitted.

51. The witness reiterated that the signature on the termination letter was the Human Resource Manager's. The rubber stamp thereon is the official rubber stamp for the company.

52. On the issue of leave, the witness stated that for the year 2014, the Claimant was only entitled to 8.2 days. She had picked 11 days out of her entitled leave days.

53. The witness alleged that the Claimant did benefit from the incentives that were as a result of the amended contract, however he had no document to prove this.

54. On the Claimant's performance the witness stated that appraisals were done on her and her performance proved to be below par.

55. He admitted that the letter dated 4th February 2015, amending the terms and conditions of the employment contract does not indicate that the Claimant was involved in the any consultations with the Respondent over the amendment. The document tendered by the Respondent as prove of the being, of the Claimant's job description, is not signed by anybody.

The Respondent's Submissions.

56. Against the directions of this Court, the Respondent didn't file any submissions in this matter. Consequently, this judgement is without the benefit of consideration of its submissions.

Determination.

57. From the evidence and the material placed before me by the parties I distil the following issues as the issues for determination in this matter.

- (a) What was the reason for the termination of the claimant's contract of employment?
- (b) Was the termination of the contract of employment procedurally fair?
- (c) Was the termination of the Claimant's contract of employment substantively fair?
- (d) What reliefs are available to the Claimant, if any?
- (e) Who should shoulder the costs of this suit?

What was the reason for the termination of the Claimant's contract of employment?

58. The Claimant herein asserted that her contract of employment was terminated on the 4th April 2016, through a letter of termination of even date. According to her, she was not given any reason prior to or in the letter that formed the basis for the termination. The Claimant stated in paragraph 8 of her statement of claim, the Claimant averred:

"The Claimant avers that on the 4th April 2016, her employment was summarily, unfairly and unlawfully terminated by the respondent immediately without any proper cause and she is challenging the termination as hereunder pleaded:

(a) No reason was given for the abrupt, unfair and wrongful termination.

(b) No prior notice was given to her before she was abruptly terminated.

(c) She was not given an opportunity to be heard.

(d) The Respondent neither followed the law nor acted with justice and equity before terminating her employment."

59. In answer to this averment, the Respondent in its memorandum of reply made a general denial of the same and stated that the Respondent followed the law and the contract of service in termination of the employment of contract thus:

"1. In response to paragraph 8 and 9 of the statement of claim, the Respondent followed the law and the contract of service in

termination of the employment contract.”

Here there is an admission that the Claimant’s contract was terminated and therefore, making whether or not there was a termination a non-issue. However, how, and why, remains an issue and I shall address this hereinafter shortly.

60. This Court has carefully considered the pleadings herein by the Respondent, the witness statement by the Respondent’s witness and his oral testimony in Court, I fear there is no material from therein from which one can pick the specific reason[s] why the contract of employment of the Claimant was terminated. The Respondent does not in any way expressly say that the termination was on this or that account.

61. I have considered that in the Respondent’s pleadings, the Respondent mentions that the Claimant’s performance was below par and that this stirred complaints from customers and occasioned loss to the it. Too, that its witness in his witness statement and oral testimony in Court mentioned this. However, I note that in the two, there is no specific and express link of the alleged poor performance and the reason for the termination. It is not expressly stated that termination was on account of poor performance.

62. It is from the termination letter that one is supposed to discern the reason of termination from. True as the Claimant stated there is no reason that was put forth on the termination letter for the dismissal. There is not an iota of content from which one can even infer the reason.

63. The Respondent’s witness attempted to assail the validity of the termination letter saying that the same was not signed by the Managing Director. However, in his oral testimony, he stated that the same was signed by the Human Resource Manager. He reiterated in his evidence under cross examination that on the letter there obtains the Human Resource Manager’s signature, adding that the rubber stamp thereon was the official one for the company. The Claimant candidly explained the circumstances of the termination letter, it was given to her when the Managing Director was out of the country. This version, was not controverted at all. If the termination letter was not authentic, nothing would have been easier than calling the Human Resource Manager to testify to disabuse the authenticity of the same. In the circumstances, I am prepared to agree and I do, agree with the Claimant that the letter was handed over to her in the circumstances and the manner she explained to Court.

64. By reason of the premise foregoing, it is difficult for one to conclusively determine what the reason for the termination was. Consequently, I agree with the Claimant’s case that the termination was upon a reason(s), that was not given to her prior to or in the termination letter.

Was the termination of the Claimant’s contract of employment procedurally fair?

65. Having found as I have hereinabove, that it is not in contest that the Claimant’s contract of employment was terminated, and that there is no specific reason that was given for the termination, I now turn to consider the procedural aspect of the termination.

66. Section 41 of the Employment Act provides for the procedure to be adopted by an employer contemplating dismissing an employee or terminating an employee’s contract of employment. The procedure is mandatory and any non-adherence thereto would lead to a legal conclusion that the termination was unfair. See, **National Bank of Kenya vs Samuel Ngaru Mutonya [2019] eKLR [Supra.]**

67. In the case of **Darius Kiseu Mwamburi vs Cooperative Bank of Kenya, [2021] eKLR**, this Court held that in considering the procedural fairness of a termination or summary dismissal of an employee the period under consideration has to be one from the time the employer conceives the intention to terminate or dismiss, to the preparation and issuance of the termination letter, or conveyance of the decision to terminate or dismiss.

68. Section 41 requires that once the employer forms the contemplation to terminate an employee’s contract of employment, he must bring this and the reasons stirring the same to the attention of the employee in a manner the employee can understand, in the presence of a colleague of the employee’s choice or shop floor representative of the union [if the employee is a member of a union]. Then in making a decision to terminate, consider the representation by the employee and his colleague or the representative as the case may be.

69. The Claimant contended that this procedure was not followed. The Respondent’s witness did not at all lead any evidence to demonstrate that this statutory procedure was followed. This coupled with the fact that the termination letter lacked the reason(s) for the termination leads me to an inescapable conclusion that the termination was not procedurally fair.

Whether the termination was substantively fair.

70. Section 43 of the Employment Act places an obligation Upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. In this case can one say that the Respondent has proved the reason for the termination of the Claimant’s employment contract? Certainly no, by reason of the premises hereinabove. The Respondent was not able to specifically link any reason to the termination or place any material before Court from which the reason(s) can be discerned. It cannot be said therefore that the Respondent discharged the burden of proof under this provision of the law. I consequently allow the default implication to set in, and conclude as I hereby do, that the termination was unfair in terms of section 45 of the Act.

71. Section 44 of the employment Act stipulates when summary dismissal can occur, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.”

Section 35 (1) (c) of the Act provides for a termination notice that I hold was relevant to the instant matter, thus:

“1. A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya be deemed to be

(a)

(b)

(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice.”

72. The letter of appointment dated 24th March, 2014 provided for termination of the employment as follows:

“On successful completion of probation, either party wishing to terminate the contract will give the other one-month notice, or one month’s pay in lieu of notice.”

73. It is clear therefore, that neither the statutory notice nor the contractual notice was given to the Claimant. What happened here was a summary dismissal, therefore.

74. Section 45 of the Employment Act prohibits an employer from terminating the employment of an employee unfairly. The provision goes further to give a clarification of what amounts to unfair termination in the following manner;

“2. A termination of employment by an employee 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;

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

c)

75. It goes without say therefore, that besides the burden of proof placed upon an employer under section 43 of the Act, there is a further burden bestowed on him under section 45 (2) to demonstrate that the reason proved under section 43 of the Act to be the reason for termination, was a fair reason relating to the employee’s conduct, capacity, compatibility, or operational requirements of the employer.

76. Having found hereinabove that the Claimant was summarily dismissed from her employment, the Respondent could only be said to have had a valid reason if it managed to demonstrate that the Claimant was guilty of a conduct in the nature of that contemplated in section 44 (3) of the Act.

The section provides:

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

77. The Respondent’s witness’s evidence was destitute of a citation and prove of any conduct on the part of the Claimant that was in character a fundamental breach of her obligation under the contract.

78. Section 44 (4) of the Act provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. I state this without losing sight of the fact that the list obtaining therein is not exhaustive.

79. In the case of **Darius Kiseu Mwamburi vs Cooperative Bank of Kenya Limited [2021] eKLR**, the Court said:

“99. It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44 of the Employment Act 2007, or its Human Resource policy. An employee’s misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee’s abandonment of the intention to remain in employment. In *Laws vs-London Chronicle Limited [1959] 2 ALL.R 285* the English Court of Appeal stated as follows in page -287;

“ Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”

80. In the upshot, the Court comes to a conclusion that the Respondent did not prove that the reason for dismissal, if they had any, was valid.

81. As I have said hereinabove the Respondent mentioned in its pleadings and by the evidence of its witness but without expressing it to be the reason for termination, that the performance of the Claimant was poor and that she perpetually missed to meet targets.

82. Assuming for a moment that the Respondent was asserting that the Claimant's employment was terminated on an account of poor performance, can one say that it was proved to be a valid and fair reason? Without hesitation I say no, for an employer to prove that it validly and fairly terminated an employee's contract, it does not take just an assertion that an employee was guilty of poor performance. It requires a detailed demonstration. The Respondent did not do this. In the case of **National Bank of Kenya vs Samuel Ngure Mutonya [2019] eKLR**, the Court of Appeal stated;

“The reason advanced by the Bank for terminating the respondent's employment was poor performance. In Jane Samba Mukula vs- Ol Tukai Lodge Limited Industrial Cause Number 863 of 2010;[2010]LLR 255[ICK][September,2013] the court observed as follows;

“a, where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act,2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show that measures were in place to enable them access the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established. Beyond having such evaluation measure, before termination on ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In an event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for the termination shared with the employee.”

83. By reason of the foregoing premises I hold that the termination of the Claimant's contract of employment was not substantively fair.

84. The Claimant's counsel made detailed and impressive submissions on numerous other issues, like lack of a job description of an employee, the conduct of the Managing Director of the Respondent, and its implication, and amendment of the contract of employment. They are issues that arose in the instant matter, but with due respect I consider them peripheral the main issues the Court has dealt with hereinabove. The Court shall therefore not delve into them.

Of the Reliefs

85. The Claimant sought for a compensatory relief pursuant to section 49 of the Employment Act. She urges this Court to award the maximum compensation contemplated thereunder, namely, 12 months' gross salary. To support this crave the counsel for the Claimant submits that the conduct of the Respondent taken into account will justify the award. He further submits that at the time of termination, the Claimant was earning a gross salary of Kshs. 48,820, placing reliance on the March 2016 pay slip. I do not agree that this is the gross salary that should be applied in the computation for the compensation. The March 2016 pay slip cannot be the right pay slip to use.

I have considered the pay slip, and what comes out clearly is that the same was a final pay slip prepared for the Claimant. It has included items like leave pay, notice pay and advance pay. The total figure that was payable under the pay slip was Kshs. 89,736.00 gross. The Kshs. 48,820 was arrived at after the statutory deductions. The Court cannot shy off from stating that the Claimant was deliberately attempting to mislead it. In computation I will settle for and apply the contractual salary, namely Kshs. 35,000.

86. Having found that the termination was procedurally and substantively unfair, and considering that; the termination cannot be said to be in accord with justice and equity giving the matter a contextual approach; the Claimant's contract was just terminated and the blatant breach of that which the Respondent is required of the law, I am of the view that the Claimant is entitled to a grant of compensation under section 49 (1) (c) of the Act, and an 8 months' salary will serve justice. Therefore Kshs. 280,000.

87. The Claimant was neither given the statutory notice, or contractual notice of pay in lieu thereof. In the circumstances of the termination, she was entitled to a one month's salary in lieu of notice. I hereby award the same, Kshs. 35,000.

88. The Claimant claimed for a refund of money that was deducted from her salary unjustifiably. It was submitted that the Respondent had not demonstrated any reasonable justification for the deduction. I agree with the Claimant on this and just like the Court stated in **Meshack Mutilangi vs East Africa Limited [2021] eKLR**, viz;

“I have agonized over what justification an employer would have through a term in a letter of employment to deduct an employee's salary, upon a reason that some targets were not met by the employee. I have not seen any. However, I am able to say with certainty, that the deducting of an employee's salary on a term like that, amounts to unjustified self-enrichment, deprivation of property, oppression, and unfair Labour Practice.”

89. I see not justification for the Respondent's action and it amounted to what the Court stated in the aforesaid matter.

90. The Claimant submitted for a figure of Kshs. 22,686.00. A claim for a refund is one that is in nature for a special damage. It must therefore be proved specifically. The Claimant in her evidence managed to demonstrate and prove a deducted amount of Kshs. 18,423. I can only order for a refund of this proved amount, and I so grant. The deductions as reflected in the March 2016 pay slip.

91. In a bid to challenge the Claimant's claim for unpaid leave days, the Respondent placed leave application forms before this Court as its documentary evidence. It did allege that the Claimant had no leave days outstanding. It is common cause that she was entitled to an annual leave of 21 days per a calendar year. The forms do not fully account for all the leave days for the years 2014, 2015 and 2016. For 2014, there is an indication that only 11 1/2 days were applied for and taken. For 2015, I note that on the 10th November 2015, the Claimant applied for leave for the period 1st December 2015 to 7th January 2016. The Respondent approved 24 days as opposed to the 25 days she had applied for. The Claimant did not in any manner challenge the authenticity of this application form and its contents. I am prepared to agree with the Respondent that there were no leave days outstanding for the Claimant for the year 2015. Having picked an extra 3 days in the year 2015, she can only get 2.5 days for the 3 months worked in 2016.

92. In the upshot she is entitled to 8.5 days for the year 2014 and 2.5 for year 2016. Therefore, a total of ten (10) days untaken leave. Consequently, for the claim under the head, unpaid leave, I award Kshs. 11,666.70.

93. There is absent any reason that can justify a failure to grant costs to the Claimant who has been successful in her litigation herein. Costs of this suit shall be in favour of the Claimant.

94. Consequently, Judgment is hereby entered in favour of the Claimant in the following terms:

- (a) A declaration that the termination of the Claimant's employment was procedurally and substantively unfair.
- (b) Compensation pursuant to section 49 (1) (c) – Kshs. 280,000.
- (c) One month's salary in lieu of notice – Kshs. 35,000.
- (d) Refund of unlawfully deducted salary – Kshs. 18,423.
- (e) Unpaid leave compensation – Kshs. 11,666.70
- (f) Interest on the above awarded sums at Court rates from date of filing this suit till full payment.
- (g) Costs of the suit.

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

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Wafula for the Claimant.

Mr. Makori holding brief for Ms Nyaga for the Respondent.