



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.316 OF 2016**

**ERNEST KIBET TORMOI..... CLAIMANT**

**VERSUS**

**KENYA FARMERS ASSOCIATION LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimant is an adult male and the respondent is a Co-operative Society registered under the So-operative Societies Act carrying out business throughout the Republic.
2. The claimant was employed by the respondent and his last station was at the head office in Nakuru. The claimant was employed in the year 1982 as Data Preparation Officer III and rose through the ranks to the position of Branch Manager.
3. The claimant worked diligently until the year 2004 when he started being issued with unexplained transfers. He was transferred to poorly performing branches or to far-flung areas always from his family and doctor. Such were with malice and meant to frustrate him into resignation or make him fail to attend duty and create justification for termination of employment and in the year 2006 the claimant contemplated resigning from his employment.
4. The claimant was also subjected to frustrations for a period of ten years with suspicious and unjustified internal audits despite previous audits having been favourable. The privileges accorded to other branch managers were denied of the claimant. Upon transfer from Moi's Bridge to Narok Branch the claimant was denied transport to relocate forcing him to resort to well-wishers for assistance.
5. On 30<sup>th</sup> September, 2013 the claimant was forced to apply for all his accumulated leave days despite having been denied taking of such leave days the previous years and in some cases had been asked to take fewer days. On 1<sup>st</sup> October, 2013 the claimant applied for 100 days of leave and handed over his duties. Upon taking leave, the due salaries and allowances were withheld leading to his being thrown out by the landlord and causing him great embarrassment.
6. On 1<sup>st</sup> January, 2014 after completing leave the claimant received letter dated 10<sup>th</sup> December, 2013 indicating that an audit had been done in October, 2013 and indicated that there were some irregularities attributed to him. such audit was done with malice noting the claimant had taken leave and nobody had interviewed him for any explanation.
7. The audit report was not shared with the claimant. He was not allowed a chance to reply to the report. The accounting officer at the branch who ought to have responded to the audit questions was not questioned and a perception was created that the claimant had embezzled funds.
8. On 5<sup>th</sup> March, 2014 the claimant resumed duty after his leave ended but found he had been replaced and a new branch manager appointed. Such was without notice. When he raised the matter with the managing director, the claimant was directed to stay at home and await further instructions.
9. The claimant waited for a year without pay and without communication from the respondent. he made demand from the respondent on 13<sup>th</sup> October, 2014 on the unfair treatment to which he was issued with a letter of transfer on 23<sup>rd</sup> October, 2014 from Narok to Marketing Department without a portfolio of duties and without a station.

10. On 13th January, 2015 the claimant was sent on an indefinite suspension on blanket allegations that such resulted following audit at Moi's Bridge branch for the years 2008 to 2012 and Narok Branch in the years 2012 to 2013. Such action was wrongful and unfair for the reasons that the reasons for suspension were not elaborated, it was for an indefinite period, the lawful dues were not paid during the period of suspension and such was meant to punish the claimant when he was made to report to the marketing manager twice a week during the period of suspension despite his salary being withheld and while he was facing serious financial difficulties.

11. In February, 2015 the claimant was invited by the respondent for a discussion with the disciplinary committee on 25th February, 2015. The meeting was adjourned despite allegations that Ksh.4, 728,092.00 had been lost. The claimant had responded to all questions addressed with him. the claimant then left Nakuru after the meeting adjourned only to be recalled back while on his way home and issued with letter dated 25th February, 2015 alleging Ksh.1,245,073.15 had been lost which allegation was with different amounts than before stated. That such amount got lost while the claimant was at Moi's bridge branch.

12. On 18th July, 2015 the claimant was invited for another meeting and discussion to be held on 23rd July, 2015. Such meeting was converted to a disciplinary hearing without giving the claimant prior notices so as to prepare. The claimant asked for adjournment to allow him prepare his defence but such request was dismissed. Such resulted in breach of rights in that the claimant had not been served with the charges he faced and was not allowed time to prepare.

13. The disciplinary committee took 6 months to notify the claimant of the outcome and then on 27th January, 2016 he was issued with letter terminating employment. Such was wrongful and resulted in unfair termination of employment as the claimant had not been given a fair hearing, he had no representation or representative at the hearing and had not been allowed to access the records and documents the respondent used in giving rise to the disciplinary hearing. He reasons given that the claimant had embezzled funds were not true, valid or without justification.

14. Following termination of employment, the claimant was exposed to untold suffering, his financial obligations and loan facilities were interfered with leading to massive losses due to default and his children who were in school were affected by non-payment of fees and the claimant who suffered from diabetes with constant need for medication was forced to miss the required medical attention and his health has deteriorated. The claimant has been exposed to ridicule and is unable to secure new employment anywhere. Aged 56 years at the time the claimant had hoped to work for the respondent until retirement and at such age he is not able to secure new employment.

15. The claimant is seeking for a declaration that his employment was unfairly terminated by the respondent who breached his rights and should pay the following dues;

- (a) the unpaid salaries amounting to ksh.1,284,608.00;
- (b) payment of unremitted statutory dues;
- (c) payment of damages for wrongful and unfair termination of employment ksh.592,896.00;
- (d) payment of anticipatory salary to the date of retirement Ksh.2,371,584.00;
- (e) two months' notice pay ksh.98,816.00;
- (f) reimbursement of travel expenses during the suspension period being Ksh.535,000.00;
- (g) unpaid leave allowances;
- (h) unpaid salary increments;
- (i) payment of retirement benefits;

- (j) damages for defamation of character;
- (k) issuance of a Certificate of Service;
- (l) interests on the paid dues; and
- (m) costs of the suit.

16. The claimant testified in support of the claims.

### **Defence and Counter-Claim**

17. In response the respondent's case is that the claimant was employed as Branch Manager at various branches and his last salary was Ksh.52, 480.00 inclusive of house allowance.

18. The claimant resigned from his employment and then reapplied back on 27th November, 2006. On 10th March, 2007 the claimant was offered a one year contract ending 10th April, 2004 as branch manager, Webuye.

19. In April, 2008 the claimant was transferred to Moi's bridge in the same capacity of branch manager with effect from 12th May, 2008.

20. On 14th April, 2010 the claimant was offered permanent employment earning Ksh.30, 405.00 per month and a house allowance of Ksh.5, 250.00 and on 1st February, 2012 the claimant was transferred to Narok branch. In October, 2013 an audit was conducted at the branch and upon submissions of the report to the managing director various irregularities were noted and raised with the claimant being;

- 1) petty cash shortage Ksh.171,923.00;
- 2) unsupported petty cash cheques Ksh.530,000.00;
- 3) irregular salary payment Ksh.143,029.00;
- 4) unsupported cheques encashed allegedly to purchase stocks Ksh.3, 882,513.00 total Ksh.4, 728,092.00.

21. some irregularities were also noted at the Moi's bridge branch in January, 2013 and reported by the Chief Accountant to the human resource manager by memo dated 15th January, 2013 to the effect that the salary paid effective July 2008 to February, 2012 the claimant had overdrawn a total Ksh.583, 674.25.

22. on 26th November, 2013 the internal auditor through a report of the hand over at Narok branch pointed out serious anomalies. The claimant was issued with a show cause notice dated 10th December, 2013 and responded vide letter dated 10th January, 2014 but the explanation was found wanting and the claimant was suspended on 13th January, 2014. By letter dated 11th February, 2014 the claimant was invited to attend disciplinary hearing on 25th February 2015 at which upon deliberations and proper conciliation of accounts the charges had been dropped from involving Ksh.4, 728,092.00 to Ksh.1, 158,775.15 and for the that reason the claimant asked for more time and the disciplinary committee agreed to adjourn the disciplinary hearing for the claimant to be able to prepare.

23. On 23th July, 2015 the claimant attended the disciplinary hearing where it was clarified that the previous hearing had been adjourned due to conflicting figures and the claimant had requested for time to look at the records. At the hearing the claimant requested for one more week to do verifications. On 16th December, 2015 the disciplinary committee met to deliberate on the matter and noted the claimant had not submitted any report and was uncooperative and a decision was taken to dismiss him from his employment. There was written communication on the reasons leading to termination of employment vide letter dated 27th January, 2016 and that the respondent would offset his indebtedness amounting to

Ksh.1, 287,995.15.

24. The defence is also that while the claimant was working at Embu branch, an annual stock taking review meeting found the branch to have exceeded the head office authority by borrowing from sales proceeds not being authorised by the chief accountant. By an audit report dated 19th September, 2006 it found a dented record and following which the claimant resigned. He had mismanaged the branch. The claimant reapplied for employment and was employed on condition he settled a debt of ksh.176, 110.00 he owed the respondent before he resigned.

25. The claimant was properly terminated in his employment, he was issued with notice and invited for hearing and he failed to discharge his mandate of giving a satisfactory defence. Irregularities noted at Moi's Bridge vide memo dated 15th January, 2013 established the claimant had overdrawn a salary up to ksh.583,674.25 from July, 2008 to February, 2012. Previously the claimant had been involved in a series of mismanagement of funds while at Embu branch and while at Narok he was aware he had failed to reconcile accounts despite being given more time to do so.

### **Counter-Claim**

26. In counter-claim, the respondent is seeking the payment of Ksh.1, 315,982.00 which the claimant failed to account for or return to the company at the time of exit. The claim is for;

- 1) stock shortage (Embu) Ksh.28,027.00;
- 2) overdrawn salary (Moi's Bridge) Ksh.578,482.15;
- 3) misapplied cash (Narok) Ksh.709,473.00 total Ksh.1, 315,982.00

27. and that the claimant should be dismissed and the counterclaim allowed with costs.

In evidence, the respondent called Joseph Kibet Towett the Internal Auditor and testified that the claimant was terminated in his employment following due process noting the disciplinary issues relating to non-accounting of funds while at Narok and Moi's bridge branches.

28. The witness conducted investigations through an internal audit and confirmed misappropriation of funds. The claimant was issued with a show cause notice to which he responded and was invited to the disciplinary hearing where he attended twice. During the first disciplinary hearing, the claimant was sent to the internal auditor for reconciliation and during the second disciplinary hearing he requested for more time to look at the records which was allowed. Following due process the disciplinary committee made a recommendation that the claimant should be terminated in his employment and be paid two (2) months' notice and due benefits which were used to offset the misappropriated funds and the claimant is still owing the respondent for amounts counter-claimed at Ksh.1,315,982.00.

29. The witness also testified that while he was undertaking audit investigations into the allegations made against the claimant, he was on leave or was on suspension and was not invited to verify the findings. Before taking leave the claimant was required to do a handover report and got a certificate. Such certificate allow for a cut off due to any issue which may arise over the period in service.

30. Mr Towett also testified that The audit and investigations reports filed do not show any cash losses as stated in the notice to show cause issued to the claimant amounting to Ksh.4, 478,092.00. Such shortage arose from irregular salary payment and cheques encashment but the source documents were not produced.

The emerging issues for determination in this case can be summarised as follows;

Whether employment terminated fairly or unfairly;

Whether the remedies sought by the claimant are justified; and

Whether the counter-claim is with merit.

31. The claimant was invited to a disciplinary hearing on 25th February, 2015 and the minutes therefrom noted as follows;

Case

a) *overdrawn salary while at Moi's bridge Ksh.536,225.00*

b) *cash shortage in petty cash account No.71 Ksh.171,923.00*

c) *unposted petty cash cheques Ksh.450,627 total Ksh.1, 158,775.15. the committee deferred the hearing of his case due to conflicting information/figures in the suspension letter dated 10<sup>th</sup> December 2013 of ksh.4, 728,092.00 as for the current charges of Ksh.1, 158,775.15. The internal auditor informed that the amount differential had been attributed to adjustment of the amount in the audit report of which Mr Turmoi had not been advised.*

*The committee asked the internal auditor in company of Mr Turmoi to verify all the documents related to the matter/adjustment made to the satisfaction of Mr Turmoi to facilitate further communication to him. ...*

32. On this basis the disciplinary hearing adjourned and met on again on 23rd July, 2015 where it was noted that the claimant asked for one week more to verify the documents with the auditor and at head office and it was agreed to give him up to 31st July, 2015. The committee met again on 16th December, 2015 and made a finding as follows;

*... as for now he [Ernest Tormoi] is being held responsible for kshs.1, 287,955.15 as follows;*

*Moi's Bridge overdrawn salary Ksh.587, 482.15*

*Narok cash loss and bank drawings Ksh.709, 473.00*

*Not accounted for total **Ksh.1, 287,955.15***

*...*

*The committee recommended that he be terminated and the amount of ksh.1, 287,955.15 be recovered from his dues.*

33. With regard to the matters set out above, the notice issued to the claimant and dated 11th February, 2015 directed him to attend for a *discussion with the disciplinary committee concerning your case on 25<sup>th</sup> February, 2015*. On the due date, 25th February, 2015 the claimant was issued with letter and in response to his response and which required him to;

*However your explanation on some of the under listed issues were unacceptable and therefor remains unresolved as follows;*

*(a) KFA MOI'S BRIDGE*

*(1) Overdrawn salary period between September,, 2008 to January 2012 – 536,225.15*

*(b) KFA NAROK*

*(2) Direct cash shortage petty cash fund – 171,923.00*

(3) Unposted petty cash cheques 450,000.00 [450,627.00]

(4) Cheque No.001497 used to update banking – 51,925.00

(5) Encashed cheque No.001521 of 18.9.2013 – 35,000.00 Total Kshs.1, 245,073.15

34. Again vide letter and notice dated 14th July, 2015 the claimant was invited to a discussion with the disciplinary committee concerning your case on 23<sup>rd</sup> July 2015.

35. Section 41 of the Employment Act, 2007 requires the employer who is considering terminating an employee over misconduct to explain to the employee the reason for which the employer is considering termination of employment as follows;

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the 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*

36. Such explanation is to give the employee a fair and reasonable chance to argue his defence. Until the employee has been taken through such a motion or procedures, employment should not be terminated unless the employer is satisfied that there exists a genuine reason to justify termination of employment. Such reason(s) must be valid, fair and arrived at in accordance with fair procedure.

37. Section 43(3) of the Act requires that;

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

38. The Court of Appeal in the case of **Cooperative Bank of Kenya Limited versus Banking Insurance & Finance Union (K) [2017] eKLR** held as follows;

*Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. See this Court's decision in **Samsung Electronics East Africa Ltd vs. K. M [2017] eKLR**. It is that right that is delineated under **Section 41 of the Employment Act** which stipulates: - ...*

39. In giving emphasis to the import of section 41, 43, 44 and 45 of the Employment Act, 2007 provisions the Court of Appeal in the case of **Amatsi Water Services Company Limited versus Francis Shire Chachi [2018] eKLR** held as follows;

*As a general guiding principle, we must recall that in matters employment, there has been a drastic change in policy and approach post the **Employment Act, 2007** and the **Constitution, 2010**. The latter decrees fair labour practices in **Article 41** while the former has elaborate provisions on fairness in termination of employment in **sections 41, 43, 44, and 45**. It is no longer fashionable, therefore, for employers to fire their employees willy nilly -- for any reason, no reason, or in any manner. The principle runs across all contracts of employment.*

40. The claimant was suspended and issued with a show cause notice dated 25th February, 2015 for the following allegations;

a) overdrawn salary while at Moi's bridge Ksh.536,225.00

b) cash shortage in petty cash account No.71 Ksh.171,923.00

c) *unposted petty cash cheques Ksh.450,627 total Ksh.1, 158,775.15.*

41. in the notice dated 16th December, 2015 the charges were;

*Moi's Bridge overdrawn salary Ksh.587, 482.15 Narok cash loss and bank drawings Ksh.709, 473.00 Not accounted for total **Ksh.1, 287,955.15***

42. Further, the counter-claim relates to;

1) stock shortage (Embu) Ksh.28,027.00;

2) *overdrawn salary (Moi's Bridge) Ksh.578,482.15;*

3) *misapplied cash (Narok) Ksh.709,473.00 total Ksh.1, 315,982.00*

43. following the disciplinary committee discussion held with the claimant on 25th February, 2015 the claimant requested for more time following the changed figures and allegations that ksh.4, 728,092.00 was unaccounted for and which had reduced to Ksh.1, 158,775.15. Being on the receiving end, on suspension and required to answer to these allegations, the respondent had the duty to set out the charges made against the claimant with clarity and particulars to enable him respond effectively in his defence. Upon the changes to the material particulars as the matter(s) moved along and following the disciplinary committee discussions on 25th February, 2015, the next hearing was on 23rd July, 2015. From the record the claimant requested for one week to go through the records. The next meeting was held by the disciplinary committee on 16th December, 2015.

44. It is not clear from such record(s) as to whether the claimant attended. It is also not clarified by the respondent as to whether, following the initial show cause notice of February, 2013 the claimant was issued with a new show cause notice with better particulars of the charges he ought to have responded to noting the conflicting figures tabled with the disciplinary committee for the discussions.

45. As set out above, the law vests the duty upon the employer to explain to the employee the grounds upon which termination of employment is being considered. Once the claimant was removed from the workplace and placed on suspension, the respondent had time to conduct investigations and audit the books to ascertain what misconduct and or loss had arisen in the claimant's duty.

46. It is not a sufficient defence that the claimant challenged the figures of ksh.4, 728,092.00 and that such reduced to Ksh.1, 158,775.15. upon the show cause notice and the finding that indeed the charge of the loss of ksh.4, 728,092.00 was not justified, the respondent as the employer had the duty to issue a new show cause notice setting out how the figures and loss of Ksh.1, 158,775.15 had arisen.

47. This is more so noting the conflicting figures as set out above.

48. The respondent as a financial institution or dealing with funds for different purposes has its audited accounts. save for the internal audit investigations, the audit reports relating to the claimant's various branches where he was manager should have been addressed with regard to the allegations made. Noting the conflicting figures and the purpose for the adjournment of the disciplinary committee discussion of 25th February, 2015, save for the claimant being required to *verify all the documents relating to the matter/adjustment* the respondent as the employer had the burden of proof that indeed the allegations made were genuine, valid and with foundation.

49. Following the adjournment of the disciplinary committee discussions with the claimant to allow him time to verify documents, which meant the disciplinary hearing, did not have a conclusion. It became imperative to return and follow the mandatory provisions of section 41 of the Employment Act, 2007.

50. Noting the discrepancies, the conflicting figures and changes to the allegations as the matters moved along since the year 2013 when the claimant was required to answer to audit question vide letter dated

10th December, 2013 eventually what led to termination of employment was that;

*.. Kshs.578,482.15 being overdrawn salary while in Moi's Bridge Branch and Kshs.709,47300 cash loss and bank drawings while in Narok Branch totalling to Kshs.1,287,955.15 which was ...*

51. To these allegations, the claimant had made his written responses to the effect that the alleged irregular salary payments arose not out of an irregularity but by staff salary advances as the respondent was not running a Sacco where they could borrow funds from. The advanced funds would be recovered through the salary deduction and the claimant took responsibility for the same.

52. On the alleged cash loss and bank drawings, the claimant's defence was that there was an officer in charge of petty cash at his branch, Mr J Rotich and there are supporting documents within the respondent to verify the details with regard to the allegations of shortages, unsupported cheques encashment and the un-posted petty cash cheques.

53. In each case of a transfer, the claimant did a handover and got a certificate. In each year there was an audit and internal auditor investigations. The claimant was not issued with any audit questions over matters in his branch until letter dated 10th December, 2013 to which the court finds he addressed adequately. The subsequent invitation to a discussion with the disciplinary committee confirms that indeed there was no proper charge(s) and which led to changes in the figures and amounts the claimant was required to address.

54. The respondent was at all material times with the backup records, the advantage of the internal auditor and annual audit reports. These put into good use, a proper investigation while the claimant was away on suspension should have resulted in a proper account of what charges should be levelled against the claimant if at all he was to blame. The purpose of the suspension was to remove the claimant from the workplace to enable proper investigations. By sending him on suspension, the respondent as the employer must have had good grounds to justify the same as otherwise he should have been left at work to help with any investigations. Requiring the claimant while on suspension to advise and verify the allegations made against him is tantamount to requiring him to advance allegations against him. Such is contrary to fair labour relations. It resulted in unfair termination of employment.

## **Remedies**

55. In submissions, the respondent has shed light on the dues owing to the claimant being;

- (a) 13 days accrued leave and travelling allowance Ksh.28,894.75;
- (b) Termination benefits for 6 years' service Ksh.228,036.00;
- (c) Unremitted provident fund before resignation Ksh.21,292.00;
- (d) Unremitted fund to the defunct Retirement Benefits Scheme Ksh.13,640.00;
- (e) Balance of salary between April, 2014 and October, 2014 Ksh.285, 923.00.

56. These computations are confirmed as due to the claimant.

57. On the claim for unpaid salaries, the claimant though suspended for long periods of time and the respondent having a policy that upon suspension he was to be paid 60% of his salary and after 90 days a nil salary remained in the employment of the respondent until letter and notice dated 27th January, 2016. The notice issued after the claimant made demand and followed up on his long suspension without pay and with a requirement for him to report twice a week to his supervisor. Such was putting a strain on his finances noting the payment of the due salary had stopped. The claimant had no control over his long suspension period. The respondent as the employer had taken charge of his affairs and insisted that he had to continue reporting twice a week as required.

58. Mr Towett testified for the respondent that while the claimant was on suspension, he was on 60% salary for 90 days. After such time, there was no salary paid. The witness could also not explain why the claimant was placed on suspension for such a long time. There was no basis. No rationale was established. It is apparent that such long period of suspension put a huge strain on the claimant who was required to report twice weekly to his supervisor. Such requirement was adhered to until the claimant applied to report to his nearest home branch at Eldoret noting he had no salary and was unable to pay rent and was being put to great expense to travel to the head office as directed. Such cannot be wished away like the defence has by stating that the claimant had the option to stay near his branch to avoid travel costs. The direction to report twice per week to the head office and then remove/withdraw the salary is tantamount to putting the claimant into inhumane expectation.

59. In **Victor Sammy Mutiso versus TSC [2016] eKLR** the court held that a reasonable time period for an interdiction should be within 3 months and if not possible, soon thereafter and a period of over a year is definitely long and not reasonable. In any event, an interdiction or a suspension like in this case should only be interim to allow for investigations and should not take long as held in **Peter Gaitho Ng'ang'a versus Board of Management Banita School and another [2015] eKLR**

*Interdiction is a preliminary step in the disciplinary process. The petitioner may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in the regulations.*

60. In **Samson Omwoyo versus Maasai Mara University & Another Cause No.2367 of 2016** the court held as follows;

*... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. ...*

61. The defence and submissions that the claimant should not be paid for work not done and reliance on the case of **Crospea Nafula versus Sukari Sacco Ltd, Cause No.1322 of 2012** is not relevant as the facts therein are different. The respondent chose to keep the claimant on suspension and without addressing his case conclusively. Ultimately, the salary claimed is due and owing to the last date of employment and awarded at Ksh.1,284,608.00 less Ksh.285,923.00 noted above as admitted and owing all being Ksh.998,685.00.

62. The claim for unremitted statutory dues for the period the claimant was under the employment of the respondent is a legal requirement to be fulfilled. Such dues were not deducted and remitted up and until the 27th January, 2016 should be paid in full without putting the claimant into any disadvantage. Such dues were not deducted from the claimant's salary should arise solely from the respondent's account.

63. On the claim for compensation and anticipatory salary, the two addressed together, the claimant testified that he was due to retire in 4 years at the time his employment was terminated by the respondent. Putting such matter into account and noting the hardship the claimant was placed for being unable to cater for his basic needs through the suspension period, going on for over a year without any salary and pleading to be allowed to report twice a week to his nearest branch to reduce on costs, going without a medical cover while the respondent was aware of his medical condition and needs only resulted in grave injustice which the court may not be able to redress in monetary terms but ameliorate the same through compensation herein found at 10 months gross wage as appropriate all at Ksh.494,080.00.

64. On the claim for two months' notice pay, the respondent in the letter of termination dated 27th January, 2016 note this amount as due to the claimant and hereby awarded at Ksh.98, 816.00.

65. On the claim for the reimbursement of travel costs during the suspension period and computation at Ksh.535,000.00 the evidence that the claimant had 60% salary for 90 days above addressed with the payment of the due full salary, the requirement to be on the job is addressed. With the requisite compensation for the unfairness, the hardship factored is for the period the claimant was not under a

salary and was required to report to the head office until there was a change to Eldoret. Such covered April and May 2015. A reasonable computation of the due travel costs and upkeep for such period is hereby assessed at two months' salary all at ksh.98, 816.00.

66. The claim for leave allowance such is addressed above and confirmed.

67. On the claim for unpaid salary increments, there is no provision under the terms and conditions of employment and there was no evidence as to how such benefit arose. Such is declined.

68. The claimant is entitled to retirement benefits in accordance with his employment terms and conditions. The contributory scheme being managed outside of the respondent, the respondent shall issue the necessary letters and authority for the access to the retirement benefits due to the claimant. Such should be processed within a reasonable period taking the time of service, the contribution by both parties and the age of the claimant and noting the provision above under the Retirement Benefits Scheme and the on-going provident fund.

69. The court finds no sufficient material and evidence with regard to the claim for damages for defamation of character. Such is declined.

70. A Certificate of Service should unconditionally issue under the provisions of section 51 of the Employment Act, 2007.

### **Counter-claim**

71. The counter-claim for stock shortage while the claimant was in Embu branch for Ksh.28,027.00 the submissions by the respondent are correct to the extent that such matter arose in the year 2006 when the claimant resigned from his employment with the respondent and was reengaged under different terms on 10th March, 2007. Where any claim(s) was due from the claimant to the respondent such matter ought to have been addressed then within the allowable time period. Where such monies are still due and owing, they are lost in time by virtue of section 90 of the Employment Act, 2007.

72. On the claim for overdrawn salary while the claimant was at Moi's Bridge at Ksh.587, 482.15 the claimant admitted that as employees they would get salary advances as there was no Sacco from which to borrow from. He was not clear as to how his advances were paid for in full. this amount is reasonably due from the claimant to the respondent. this was a figure the respondent consistently used in all the notices issued to the claimant.

73. As noted above the claim for misapplied cash while the claimant was at Narok for ksh.709, 473.00 is without basis and a good defence was given in this regard. Such claim is dismissed.

**Accordingly, judgement is hereby entered for the claimant with a finding that employment terminated unfairly and is entitled to the following dues;**

**(a) 13 days accrued leave and travelling allowance Ksh.28,894.75;**

**(b) Termination benefits for 6 years' service Ksh.228,036.00;**

**(c) Unremitted provident fund before resignation Ksh.21,292.00;**

**(d) Unremitted fund to the defunct Retirement Benefits Scheme Ksh.13,640.00;**

**(e) Balance of salary between April, 2014 and October, 2014 Ksh.285, 923.00;**

**(f) Salary due up and until 27<sup>th</sup> January, 2016 Ksh.998, 685.00;**

**(g) Compensation Kshs. 494,080.00;**

**(h) Notice pay 98,816.00;**

**(i) Traveling costs Ksh.98,816.00;**

**(j) The claimant shall be issued with necessary letter for access to the provident fund;**

**(k) Certificate of service shall be issued in accordance with section 51 of the Employment Act, 2007; and**

**(l) Costs of the suit.**

**The counter-claim is hereby confirmed in the following terms;**

**1) overdrawn salary (Moi's Bridge) Ksh.578,482.15;**

**2) Interests due on (1) above from the time due until paid in full. court rates shall apply.**

**Delivered at Nakuru this 7th day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....

.....