



**Chara v Hantex Garments (EPZ) Limited (Cause 773 of 2016)
[2024] KEELRC 1778 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 773 OF 2016**

**AK NZEI, J
JULY 4, 2024**

BETWEEN

AMINA NYANDZUA CHARA CLAIMANT

AND

HANTEX GARMENTS [EPZ] LIMITED RESPONDENT

(consolidated with Cause Nos. 774 -798 of 2016)

JUDGMENT

1. The Claimant herein (in Cause No. 773 of 2016), Amina Nyandzua Chara, sued the Respondent vide a memorandum of claim dated 5/10/2016 and filed in this Court on 7/10/2016. I will not venture into asking why the suit has been pending unheard for this long, neither will I attempt to look for an answer. Be that as it may.
2. The Claimant pleaded:-
 - a. that at all material times, she was an employee of the Respondent, having been employed on 11/3/2007 as a Production Controller, with a starting salary of kshs. 5,400.
 - b. that the Claimant remained in employment for nine years, with her salary being reviewed to kshs. 5,828, which amount was below the statutory minimum wage.
 - c. that on 9/1/2016, the Claimant's employment was terminated without any warning, and was never issued with a termination letter.
 - d. that the Respondent has refused and/or failed to pay the Claimant's terminal dues which included notice pay, unpaid leave and salary arrears arising from salary underpayment.



- e. that termination of the Claimant's employment was unfair, contravened the Employment Act, the Labour Institutions Act, Article 41(1) of the Constitution of Kenya and the rules of natural justice.
 - f. that the Claimant's dismissal was devoid of any lawful justification, and did not accord with justice and equity as the Claimant was not given any valid reason for her termination, was not given any and/or any fair hearing prior to termination, was not given termination notice and was not paid her terminal dues upon termination.
3. The Claimant sought the following reliefs:-
- a. A declaration that termination of the Claimant's employment was unfair and unlawful.
 - b. A declaration that the Claimant was paid below the statutory minimum wage.
 - c. One month salary in lieu of notice.....kshs. 10,954.70
 - d. Unpaid annual leave for 9 years (189 days)kshs. 68,985.
 - e. The equivalent of 12 months' salary for unlawful termination of employment (kshs. 10,954.70x12)...kshs. 131,456.4
 - f. Salary arrears resulting from unlawful underpayments that were below the minimum statutory wage.....kshs. 358,131.1
 - g. Unpaid salary upto the time when a termination letter will be issued.
 - h. Costs of the suit.
4. It is worthy noting here that the Claimant set out a schedule detailing the pleaded salary underpayments from the year 2007 upto 2016 at paragraph 10 of her memorandum of claim, which I will not replicate in this judgment. The Claimant did not, however, plead and/or specify any particular Minimum Wage Orders on which her allegations of underpayment were based.
5. Documents filed by the Claimant alongside the memorandum of claim included her written witness statement and a list of documents dated 5/10/2016 listing 5 documents. The listed documents included copies of Claimant's contract of employment, identity card, payslips, and NHIF statements. What I have seen on record, however, are copies of the Claimant's identity card, the Claimant's employment/job card, payslip for January 2016, NSSF membership card and a demand letter dated 30/6/2016.
6. The Respondent entered appearance on 7/11/2016 and subsequently filed Response to the Claimant's claim on 1/12/2016, denying the same. The Respondent further pleaded:-
- a. that the Claimant was employed by the Respondent as a Helper on 3/1/2012 and not on 26/2/2008 as alleged.
 - b. that the Respondent always complied with employment laws and regulations, and that the Claimant's salary was within the relevant statutory wage regulations.
 - c. that the Claimant was lawfully terminated from employment on account of gross misconduct by habitual absenteeism without authority to engage in unprotected strike between the dates of 5/1/2016, 6/1/2016 and 9/1/2016.



- d. that prior to her termination, the Claimant was duly warned that participating in the unprotected strike amounted to gross misconduct, and would result to termination of her employment.
 - e. that termination of the Claimant's employment was proper and accorded with provisions of the *Employment Act* 2007.
 - f. that the Claimant was paid all her accrued terminal dues and had no further claims against the Respondent.
7. Documents filed alongside the Respondent's Response to the claim were a written witness statement of Christopher Kinyanjui dated 12/1/2017 and a list of documents dated 22/11/2016, listing 11 documents. The listed documents included a copy of the Claimant's employment letter dated 15/3/2012, a copy of a Court order dated 18/12/2015, a (notice dated 9/1/2016) on closure of the Respondent company on 11/1/2016, a general notice of disciplinary hearing/show cause letter (dated 15/1/2016) and a (general) notice on disciplinary hearings starting from 16/1/2016, among other documents.
8. The Court's record shows that on 12/3/2019, Counsel for both parties herein informed the Court that they had agreed that:-
- “The 24 cases be dispensed with as follows:
- a. Cause.No. 773, 775, 776, 777, 778, 779, 780, 781, 784, 786, 792, 793,794 and 795 of 2016 be heard together, with Cause No. 773 of 2016 as the lead file.
 - b. Cause No. 782, 790 and 796 of 2016 be heard together with Cause 873 of 2016 being the lead file.
 - c. Cause No. 774,797 and 798 of 2016 be heard together with Cause No. 798 being the lead file.
 - d. Cause No. 783, 787 and 788 with cause No. 787 being the lead file.
9. The Court made the following order:-
- “matters to proceed on 27th November 2019 as per agreed schedule.”
10. When the matters came up for hearing on 27/11/2019, however, Counsel for both parties told the Court that they wished to have all the matters (Cause Nos. 773 -798 of 2016) consolidated as the Claimants were terminated on the same day. The Court allowed the consolidation.
11. Trial opened (before Ndolo, J) on the aforesaid date (27/11/2019). The Claimants called two witnesses, Kahena Kenga Masha (CW-1) and John Abode Ochoo (CW-2). CW-1 adopted his witness statement and testified that he was employed by the Respondent on 13/1/2014 as a Machine Operator earning kshs. 5,218, which was later increased to kshs. 8,365 per month, and that the Respondent had more than 1000 employees. That employees were given employment contracts.
12. CW-1 further testified that in 2015, they worked until 23/12/2015 when they went on Christmas holidays; that they resumed on 2/1/2016 and worked upto 8/1/2016 and that they had no notice of any issues. That on 9/1/2016, they found a notice at the gate which was locked, and also found that police were also at the gate.. That they were chased away by the police and told to return their gate



passes on 11/1/2016. That they were paid salary for one week in January 2016 as they handed in the gate passes, (on 11/1/2016) and were given payslips.

13. It was CW-1's evidence that the Claimants had no notice of any wrong, were not called for disciplinary hearing and were not given any notice. That the Claimants' Union was in the process of recruiting, but the Claimants had not yet joined. That the Claimants did not fail to go to work on 5/1/2016. That after handing in their gate passes, the Claimants could not access the work premises, and that they did not receive any communication from the Respondent. That the Claimants worked continuously and never took leave. That the Claimants' employment was terminated on the same day. The witness produced in evidence the documents filed.
14. Cross-examined, CW-1 testified that the Claimants used to swipe at the gate using the gate passes, and that they were told to return their gate passes and to collect their pay, and that the Respondent's taking of their gate passes amounted to termination. That the Claimants did not receive notice of disciplinary hearing, and were not given notice. That on returning his gate pass, CW-1 was told that work (employment) had ended.
15. The Claimants' second witness (CW-2) testified that he was employed by the Respondent as a welder on 8/5/2012 with an initial salary of kshs. 15,000, and that he was earning ksh. 21,000 at the time of termination. That in 2015, the Claimants worked upto 23/12/2015, and resumed on 2/1/2016 and worked upto 8/1/2016. That on 9/1/2016, they found the Respondent's gate closed and a notice thereon to the effect that the company had been closed until further notice. That this was at 7.30 a.m. That there was police at the gate and that the Claimants, and indeed other employees totaling to about 1000, were not allowed to access the Respondent company's premises as the police and the Respondent's security prevented them. That on 11/1/2016, the Claimants were paid at the gate for the days worked. That he, CW-2, did not return his gate pass as he had paid for it and wanted to keep it as evidence that he had worked for the Respondent. That the Claimants were not called back to work, and were not allowed to access the Respondent's premises.
16. It was CW-2's further evidence that the Claimants had no prior notice of their termination, and that they had no notice of any wrong that they had done, and were not given any reason for their termination; or told of any date on which they had failed to go to work. That they worked on 5th and 6th January 2016, and that on 9/1/2016, they found the gate closed. That they were paid for the days worked (in January 2016), and would not have been paid if they had not worked. That the Claimants did not receive any notices for disciplinary hearing; and were never contacted to resume work.
17. It was CW-2's further evidence that he Respondent's 1,700 employees wanted to join a trade Union. That they had signed to join but had not yet joined as the Union recruitment process had not been completed. That there was no strike. That the Claimants were not paid in lieu of notice, were not notified of any charges against them, and that termination of their employment was unlawful and unfair.
18. Cross-examined, CW-2 denied having seen a Court order on 18/12/2015. He testified that he did not know why there was police on 9/1/2016, and that all the other Claimants returned their gate passes on 11/1/2016 and that they, including CW-2, had been called to return them and were paid. That he (CW-2) had a contract and payslips.
19. The defence case was taken before me on 15/11/2022. The Respondent called one witness, Christopher Kinyanjui (RW-1), who adopted his witness statement dated 12/1/2017 as his testimony. He also produced in evidence the Respondent's documents listed on the list of documents dated 22/11/2016. He further testified that the Claimant (in cause No. 773 of 2016) was employed on



3/1/2012 according to her employment letter produced in Court by the Respondent, and was being paid in accordance with the law and wage guidelines.

20. RW-1 further testified that around September 2015, there was an illegal strike, and that the Claimants were involved in the activity, that about 1,500 employees participated. That the Respondent sought intervention of the Labour Office and a return to work formula was worked out and the employees went back to work. That the Respondent filed a case against the Officials of the Claimants' Union, and that the Court gave orders restraining them. That the Court gave the Respondent a go ahead to discipline any employee engaging in misconduct. That on 5th, 6th and 9th January 2016, the employees refused to go to work and were chaotic, throwing stones and harassing anyone going to work. That the Respondent decided to take precautions by shutting the gates and posting a notice on the company gates; and proceeded to initiate disciplinary action against the employees. That a notice was posted on the company's gates advising employees to collect their individual invitations to the disciplinary process (hearing). That the Claimant did not go to collect her letter. That dues paid to the Claimants included the number of days worked and any balance of leave days for 2015, less statutory deductions.
21. Cross examined, RW-1 testified:-
- a. that there was nothing on record to show that the Claimants' dues were paid.
 - b. that on 5th, 6th and 9th January 2016, all the Respondent's 1500 employees did not report on duty. That the Respondent had attendance registers but had not produced them in Court.
 - c. that the notice to attend disciplinary hearing was a general notice not addressed to any one, and was issued on 14/1/2016. That the disciplinary hearings were supposed to commence on 16/1/2016.
 - d. that the ground for the disciplinary hearing was absenteeism on 5th, 6th and 9th January 2016. That an employee collecting an individual invitation would be given a hearing date.
 - e. that no individual notice was issued to any employee who did not turn up to collect. That the Claimants did not turn up.
 - f. that the Respondent had not produced in Court any minutes of disciplinary proceedings.
 - g. that the Respondent issued a general notice to show cause dated 14/1/2016, and that there was no acknowledgement of receipt of the notice. That the Respondent did not post the notice or any letter to the employees.
 - h. that there having been 1,500 employees, it was difficult to tell who had participated in the trike and who did not.
 - i. that all the Claimants were the Respondent's employees.
22. Having considered the pleadings filed and evidence presented by both parties, issues that present for determination, in my view, are:-
- a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimants are entitled to the reliefs sought.
23. On the first issue, it is to be noted that the fact of the Claimants having been the Respondent's employees is not in dispute. Indeed, the Respondent (RW-1) testified that the Respondent had employed all the Claimants, and that it had terminated their employment lawfully/fairly. So, was the termination fair." I do not think so. The allegation against the Claimants by the Respondent was



that they had absented themselves from work/duty on 5th, 6th and 9th January 2016. The Respondent (RW-1) admitted that no individual show cause letters were issued to the Claimants and that the Respondent did not send/post any individual letters to the Claimants. That even the general notice that the Respondent alleged to have posted on the company's gate asking employees to collect their individual invitations to attend disciplinary hearing was not send to individual Claimants.

24. It is also to be noted that the Respondent never rebutted and/or denied the Claimants' testimony that their individual gate passes, without which they could not access the Respondent company's premises, had been handed back to the Respondent on 11/1/2016 as the Claimants collected their pay for days worked in January 2016. RW-1 testified that the general notice asking employees to collect their individual invitations to attend disciplinary proceedings were dated 14/1/2016 and that disciplinary hearings were to start on 16/1/2016. Further, no minutes of any disciplinary proceedings regarding any of the Claimants herein were exhibited by the Respondent in Court.
25. The summary of all the foregoing is that the Respondent did not comply with the mandatory provisions of Section 41 of the *Employment Act* regarding any of the Claimants despite the fact that the Respondent alluded to them having absented themselves from work, which is a gross misconduct under Section 44(4) of the *Employment Act*.
26. Sections 43(1) and 45(2) (a) of the *Employment Act* were also not complied with as the Respondent did not demonstrate, by evidence, that the claimants absented themselves from duty on the dates in issue. No attendance registers or clocking in records were produced in Court by the Respondent.
27. It was held as follows in the case of WALTER OGAL ANURO -VS- TEACHERS SERVICE COMMISSION [2013' eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

28. The Court of Appeal stated as follows in the case of NAIMA KHAMIS -VS- OXFORD UNIVERSITY PRESS [E.A] LIMITED, CIVIL APPEAL NO. 15 OF 2014 [2017] eKLR:-

“...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 to 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 an employee an opportunity to be heard as by law required.”

29. I find and hold that termination of the claimants' employment by the Respondent was procedurally and substantively unfair, and I so declare.
30. On the second issue, and having made a finding that termination of claimants' employment was unfair, I award each of the claimants the equivalent of seven months' salary being compensation for unfair



termination of employment. I have considered the manner and circumstances in which the Claimants' employment was terminated.

31. The claim for one month salary in lieu of notice is allowed pursuant to Section 35 (1) (c) of the Employment Act. It was testified by/on behalf of the claimants that the Respondent only paid the Claimants for days worked in January 2016. The Respondent did not avail any evidence demonstrating payment of notice pay.
32. The claim for unpaid annual leave is allowed. The Claimants pleaded and testified that they did not take leave during their respective periods of employment. On its part, the Respondent did not avail any evidence, pursuant to Section 74(g) of the Employment Act, demonstrating that the claimants had either taken leave or had been paid in lieu thereof.
33. It is to be noted that unpaid leave dues, which remain unpaid from one leave earning year to another during the period of employment, are in the nature of a continuing injury as envisaged in Section 90 of the Employment Act. The suit herein is shown to have been filed within twelve months from the date of cessation of the continuing injury, this being the date of termination of employment.
34. The claims for salary arrears arising from alleged salary underpayments are declined. I also decline to declare that the claimants or any one of them had been underpaid during the period of employment in issue. The claimants did not refer the court to any particular years' Minimum Wage Orders in support of the alleged underpayments, and did not plead any such particular Minimum Wage Orders/Wage Guidelines. Cases belong to parties, and it behoves them to plead their respective cases with precision, and to adduce appropriate evidence in prove of the pleaded facts. Making of general allegations in pleadings is totally unacceptable.
35. Consequently, and having considered written submissions filed by Counsel for both parties herein, judgment is hereby entered for the claimants against the Respondents as follows:-
 - i. Amina Nyandzua Chara (cause No. 773 of 2016)
 - a. One month salary in lieu of notice.....kshs. 5,828
 - b. Unpaid annual leave for 4 years (2012-2015).kshs. 16,296
 - c. Compensation for unfair termination of employmentkshs. 40,796Total kshs. 62,920
 - ii. Fatuma Kamole Mwanyiro (Cause No. 774 of 2016)
 - a. One month salary in lieu of noticekshs. 5,845
 - b. Unpaid annual leave for 5 years.....kshs. 20,475
 - c. Compensation for unfair termination of employmentkshs. 40,915Total kshs. 67,235
 - iii. Mwanaidi Nyandua Magande (cause No. 775 of 2016)
 - a. One month salary in lieu of notice.....kshs. 5800
 - b. Unpaid annual leave for four years....kshs. 16,212



- c. Compensation for unfair termination
of employmentkshs. 40,600
Total Kshs. 62,612
- iv. Rehema Kanga Masha (Cause No. 776 of 2016)
 - a. One month salary in lieu of notice.....kshs. 9,365
 - b. Unpaid annual leave for two yearskshs. 13,110
 - c. Compensation for unfair termination
of employmentkshs. 65,555
Total ksh. 88,030
- v. James Muthini Muteti (Cause No. 777 of 2016)
 - a. One month salary in lieu of notice.....kshs. 5,800
 - b. Unpaid leave for one yearkshs. 4060
 - c. Compensation for unfair termination
of employmentkshs. 40,600
Total kshs. 50,460
- vi. Asha Athman Ganjirani (Cause No. 778 of 2016)
 - a. One month salary in lieu of notice.....kshs. 6,200
 - b. Unpaid annual leave for four years.....kshs. 17,360
 - c. Compensation for unfair termination
of employmentkshs. 43,400
Total kshs. 66,960
- vii. Eunice Zawadi Kacheche (cause No. 779 of 2016)
 - a. One month salary in lieu of notice.....kshs. 5,818
 - b. Unpaid annual leave for four years kshs. 16,290
 - c. Compensation for unfair
termination of employment.....kshs. 40,726
Total kshs. 62,834
- viii. Salim Goto Gosi (Cause No. 780 of 2016)
 - a. One month salary in lieu of notice.....kshs. 5,845
 - b. Unpaid annual leave for two yearskshs. 8,183
 - c. Compensation for unfair termination
of employmentkshs. 40,915



- Total kshs. 54,943
- ix. Lilian Lumbwa (Cause No. 781 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,828
 - b. Unpaid annual leave for one yearkshs. 4,080
 - c. Compensation for unfair termination of employmentkshs. 40,796
- Total kshs. 50,704
- x. Selestine Kwekwe Mwandege (cause 782 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,200
 - b. Unpaid annual leave for four years.....kshs. 14,366
 - c. Compensation for unfair termination of employment.....kshs. 36,400
- Total ksh. 63,126
- xi. Jane Aberi Mariita (Cause No. 783 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,845
 - b. Unpaid annual leave for four yearskshs. 16,366
 - c. Compensation for unfair termination of employmentkshs. 40,915
- Total Ksh. 63,126
- xii. Christine Atieno Otieno (Cause No. 784 of 2016)
- a. One month salary in lieu of notice.....kshs. 9,365
 - b. Unpaid annual leave for one yearkshs. 65,555
 - c. Compensation for unfair termination of employment.....kshs. 54,555
- Total Ksh. 81,475
- xiii. Mohammed Tsui Chimera (Cause No. 785/2016)
- a. One month salary in lieu of notice.....kshs. 8,000
 - b. Unpaid annual leave for four years.....kshs. 22,400
 - c. Compensation for unfair termination of employment.....kshs. 56,000
- Total kshs. 86,400
- xiv. Saul Muse Munyasi (cause No. 786 of 2016)



- a. One month salary in lieu of noticekshs. 5,845
 - b. Unpaid annual leave for four yearskshs. 16,366
 - c. Compensation for unfair termination
of employmentkshs. 40,915
- Total kshs. 63,126
- xv. Marium Kwekwe Maphengo (Cause No. 787 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,880
 - b. Unpaid annual leave for three yearskshs. 12,348
 - c. Compensation for unfair termination
of employmentkshs. 41,160
- Total kshs. 59,388
- xvi. Cynthia Kwamboka Obwiri (Cause No. 788 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,845
 - b. Unpaid annual leave for three yearskshs. 12,274
 - c. Compensation for unfair termination
of employmentkshs. 40,915
- Total kshs. 59,034
- xvii. Jennifer Mshai Mwemba (Cause No. 789 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,800
 - b. Unpaid annual leave for four yearskshs. 16,240
 - c. Compensation for unfair
termination of employment.....kshs. 40,600
- Total kshs. 62,640
- xviii. John Abede Ochoo (Cause No. 790 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,845
 - b. Unpaid annual leave for three years.....kshs. 12,274
 - c. Compensation for unfair termination
of employmentkshs. 40,915
- Total kshs. 59,034
- xix. Veronica Wanjiru Njeri (cause No. 791 of 2016)
- a. One month salary in lieu of notice.....kshs. 5,845
 - b. Unpaid annual leave for one yearkshs. 4,091
 - c. Compensation for unfair
termination of employment.....kshs. 40,915



Total kshs. 50,851

xx. Miriam Heba Mwabila (Cause No. 792 of 2016)

a. One month salary in lieu of notice.....kshs. 5,800

b. Unpaid annual leave for one year.....kshs. 4,060

c. Compensation for unfair termination of employment.....kshs. 40,600

Total kshs. 50,460

xxi. Kadzo Safari Mangi (Cause No. 793 of 2016)

a. One month salary in lieu of notice.....kshs. 9,365

b. Compensation for unfair termination of employment.....kshs. 65,555

Total kshs. 74,920

xxii. Daniel Ekada Ewagat (Cause No. 794 of 2016)

a. One month salary in lieu of notice.....kshs. 5,845

b. Unpaid annual leave for two years.....kshs. 8,218

c. Compensation for unfair termination of employment.....kshs. 40,915

Total kshs. 54,978

xxiii. Godfrey Ambango Lumumba (Cause No. 795 of 2016)

a. One month salary in lieu of notice.....kshs. 6,400

b. Unpaid annual leave for three yearskshs. 13,440

c. Compensation for unfair termination of employment.....kshs. 44,800

Total kshs. 64,640

xxiv. Charity Atse karuku (Cause No. 796 of 2016)

a. One month salary in lieu of notice.....kshs. 9,365

b. Unpaid annual leave for three yearskshs. 19,666

c. Compensation for unfair termination of employment.....kshs. 65,555

Total kshs. 94,586

xxv. Chizi Bule Kibogo (Cause No. 797 of 2016)

a. One month salary in lieu of notice.....kshs. 5,845

b. Unpaid annual leave for four yearskshs. 16,366

c. Compensation for unfair



termination of employment.....kshs. 40,915

Total kshs. 63,126

xxvi. Christine Mali Kahindi (cause No. 798 of 2016)

a. One month salary in lieu of noticekshs. 5,800

b. Unpaid annual leave for three years ...kshs. 12,180

c. Compensation for unfair

termination of employment.....kshs. 40,600

Total kshs. 58,580

36. The awarded sums shall be subject to statutory deductions pursuant to Sections 49(2) of the [Employment Act](#).

37. The claimants are awarded costs of the consolidated suit and interest on total awarded sum. Interest shall be calculated at court rates from the date of this judgment.

Dated, Signed And Delivered At Mombasa This 4th July 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.Claimants

Respondent

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Cause 773/2016

