

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI**

ELRC NO. E080 OF 2024

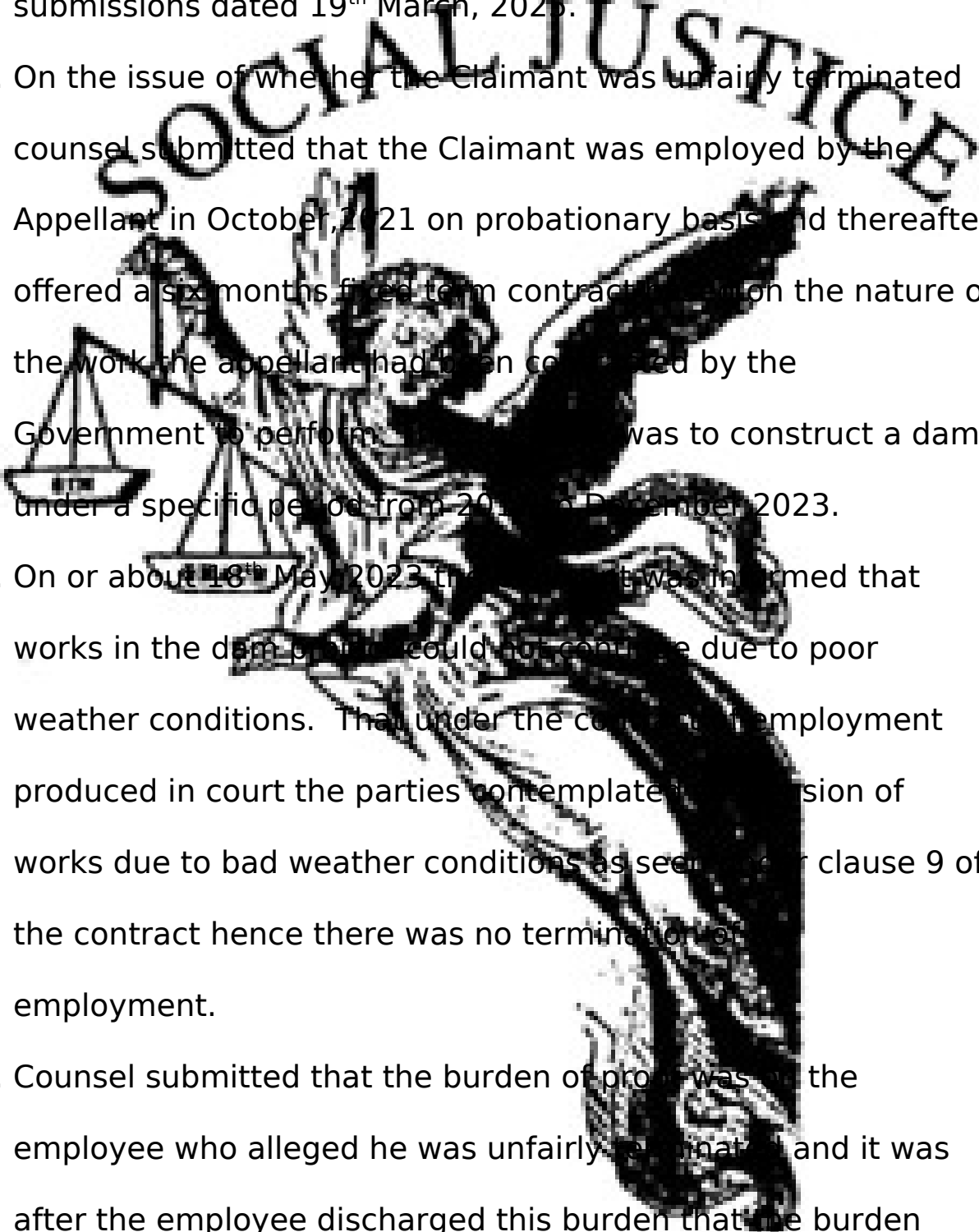
**(CONSOLIDATED WITH APPEALS NOS: E078, E079, E080,
E081, E082, E083, E084, E085, E086, E087, E088, E089,
E090, E091, E092, E093, E094, E095, E096 AND E097 OF**

**AVIC INTERNATIONAL HOLDING
CORPORATION... APPELLANT
VERSUS
FESTUS KIETI MULWA & PARTNERS.....
RESPONDENTS**

(Being an appeal from the Judgment delivered by Hon. Noelle Kyanya(DR) in Ruiru Senior Principal Magistrate's Court MCELRC/035 /2023, Festus Kieti Mulwa vs Avic International Holding Corporation on 4th October, 2024)

JUDGMENT

1. Through the Memorandum of Appeal dated 15th March, 2024, the Appellant appeals against the whole of the Judgment of Honourable Noelle Kyanya (DR).
2. The Appeal was based on the grounds that:

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5. The Appellant's Advocates MNM Advocates LLP filed written submissions dated 19th March, 2023.
6. On the issue of whether the Claimant was unfairly terminated counsel submitted that the Claimant was employed by the Appellant in October, 2021 on probationary basis and thereafter offered a six months fixed term contract. On the nature of the work the appellant had to be completed by the Government to perform the work was to construct a dam under a specific period from 20th to December 2023.
7. On or about 18th May 2023 the appellant was informed that works in the dam project could not continue due to poor weather conditions. That under the contract of employment produced in court the parties contemplated suspension of works due to bad weather conditions as seen in clause 9 of the contract hence there was no termination of employment.
8. Counsel submitted that the burden of proof was on the employee who alleged he was unfairly terminated and it was after the employee discharged this burden that the burden shifted to the employer to justify the termination. Counsel

relied on the case of **Josephine M. Ndungu & Others v Plan International Inc (2019) eKLR**. In this case the Claimant did not discharge its burden of proof to cause a shift of the burden to the Appellant to prove that any such alleged termination was unfair.

9. Counsel submitted that it was common ground in the testimony of the Claimant and that of the Appellant that work was suspended due to poor weather conditions. That the Claimant conveniently took this to mean that employees were terminated and moved to court to seek redress on the same. That works were suspended on 24th May, 2023 and barely two weeks later on 5th June, 2023 the Claimant had already written a demand letter to the Appellant demanding admission of unfair termination. That the Claimant treated suspension of works as constructive dismissal on his part when the Appellant did not put an end to the employment.

10. Counsel submitted that there was no case for unfair termination and relied on the case of **Kiprotich Njiru v Vishak Builders Limited (2020) eKLR** where the court found no proof of unfair termination when none was communicated. That

the Claimant did not lead evidence to prove that he was told to never report back to work and that his services were no longer needed by the Appellant.

11. On the issue of whether there was conversion of employment upon expiry of the fixed term contract in July 2022 counsel submitted that the Claimant worked intermittently and not continuously. That the same could be proved from the job card. That the invitation of the Appellant for the trial court to find that there was conversion of his engagement under section 37 was misplaced. That the same was brought in the submissions and not in the claim. Counsel relied on the case of **Angeline Musali Mutua v Vegpro 9 (2020) eKLR** on the issue that parties are bound by their pleadings and submissions could not take the place of pleadings.

12. Counsel further relied on the case of **Sahmy George Ngari & 2 Others vs J.M Muritu Construction (2019) eKLR** where a similar case was dismissed for construction works lasting so long as construction was in progress. In this case, the court while dismissing the claim, relied on Labour Institutions (Building and Construction Industry) (Wage) Order which

governed daily payment of wages for general tradesman which include carpenters, joiners, masons, stone dressers, bricklayers etc. Counsel therefore submitted that there can be no conversion of such employment as provided under section 37(1) of the Act.

13. Counsel further submitted that the Claimant's assertion that there were alterations to the employment contract should be not be entertained since the Claimant was free to finalize employment contract and the Claimant was not forced or coerced to sign the fixed term contract. The parties willingly entered into a contract and the courts can only give effect to the contract. That the Claimant had no reasonable reason to claim compensation for unfair termination and that in the interest of justice the claim ought to have failed.

14. On the issue of whether there was underlying contract counsel submitted that it was not disputed that the Claimant was engaged in the building of a dam project which is under building and construction to which the relevant Wage Order was the Labour Institutions (Buildings and Construction Industry) (Wages) Order 2012. The respondent in his testimony

stated that he was paid Kshs 530/= per day while the referenced order provides for Kshs 492/= per day for persons working in other towns and municipalities which is the case here where the Claimant was working in Ruiru.

15. Counsel submitted that the Claimant's suggestion that Labour Institutions Order 2022 were by law subservient to the Regulations on Wages (General) Order 2018 by virtue of the doctrine of implied repeal was not correct for two reasons; first the respondent was calling on the court to declare the Legal Notice No.2 of 2018 and Legal Notice No.2 of 2022 to be deemed repealed without arguing the same in its pleadings. The doctrine of implied repeal was totally inapplicable in this instance as there was no conflicting statutes or laws to trigger in aid the doctrine. Counsel relied on the case of **James Gacheru Kariuki & 19 Others v County Government of Mombasa & 56 Others (2019) eKLR** on conditions necessary for doctrine of implied repeal to apply.

16. Counsel further submitted that under the payroll before the court it showed that the respondent was never paid below the minimum wage of Kshs 492 a day as provided by the Wages

Order of 2012. Hence the Claimant never adduced evidence to prove the issue of underpayment and it ought to have been dismissed.

17. On the issue of whether the respondent was entitled to reliefs sought counsel submitted that while most of the respondents were employed in 2021, when the project had started in 2017, the same had run for around four years. That as at the date of the testimony the project had been finished and handed back to the Government of Kenya for commissioning which testimony was not controverted by the Claimant who claimed to not know the project ended.

18. Counsel submitted that by the nature of employment in the building and construction Industry the engagement of an employee was only as long as there was active construction of the project. That the completion of the project usually signifies the end of the relationship and in such a situation the employee could not claim to have been unfairly terminated. The issuance of termination notice was never contemplated in such time specific projects simply because parties to such

contracts have mutual understanding that an employee could only be engaged when there is work to be done.

19. Counsel relied on among others the case of **Ronald Kai Tsuma & 4 Others v China Jiangxi Kenya Limited (2019) eKLR** where court found that employment end with completion of the project of building and construction. Termination notice would not issue in such a case as the Claimant was not entitled to prayers so long as it is established that the project came to an end.

20. On the issue of reliefs available, counsel submitted that the Claimant did not discharge the burden of proof that there was unfair termination and the claim for compensation for unfair termination of 12 months' salary ought to be wholly dismissed. In this regard, counsel relied on the case of **OI Pejeta Ranching Limited v David Wanja M. Mbororo(2017) eKLR.**

21. On the claim for notice pay counsel submitted that the Appellant did not terminate the services of the respondents and in any event the project was at its tail end and no such notice would be required to be issued to the Claimant.

22. On the claim of underpayments counsel relied on its earlier submissions on the same while submitting the same should be dismissed. In conclusion counsel submitted that the respondents failed in their evidential burden under section 407 of the Evidence Act to lead evidence that he was entitled to his claims.

RESPONDENTS' SUBMISSIONS

23. The Respondents' Advocate, Advocate Ochieng & Company Advocates filed written submissions dated 26th February, 2025.

24. On the issue of unfair termination of the Respondent counsel relied on section 45(2) of the Act on unfair termination where employer fails to prove the reasons for termination and on a fair procedure. Counsel relied on section 45(2) of the Act on proof of reasons for termination. That the burden fell on the Appellant to prove why the Respondents' contract of employment had to be terminated.

25. Counsel submitted that the Respondent in the test suit one Festus Kieti Mulwa testified that the Appellant on 18th May, 2024 through his supervisor told him not to report to work due to bad weather. That the Respondent was engaged on time

specific project. That in cross-examination the Appellant's witness conceded that there was no mention of time specific project in the fixed term contract issued to the Respondents at the beginning of their employment. That the contract had a redundancy clause which envisaged for an employer - employee relationship.

26. Counsel further submitted that the procedure had to be adhered to as provided under section 35(1) of the Act for the termination to be fair. The nature of the contract of service that existed between the Claimant and Respondent required a termination notice under section 35(1) of the Act. That the Respondents having continued in the Respondent's employment beyond expiry of the fixed term contract their employment was protected under the provision of section 37(1) of the Act.

27. Counsel further relied on the case of **Timothy Mwaale Kotol & 2 Others v Mogotio Constituency Development Fund Committee & Another (2020) eKLR** on protection of such employees under section 37(1). Counsel also relied on the case of **Stella Mukwana Siboko & Another v style Industries Limited (2022) eKLR** on when an employee

continues working after the lapse of fixed term contract to be protected by section 35(1)(c) of the Act as they are presumed to work on month to month contract terminable under section 35(1)(c).

28. Counsel submitted that the Respondents after expiry of their fixed term contracts continued working for the Appellant without being issued with another contract hence the relationship which was then month to month employment contract terminable as stipulated under section 35(1) (c) of the Employment Act. The trial court did not err in holding that the termination of the Respondent' employment had been unlawful and unfair.

29. On the compensation awarded counsel submitted that damages for unfair termination of 12 months was provided for under section 49 of the Act. That the court had discretion to award the same while relying on the case of **Men Right (EA) Limited v Nguti (Petition 37 of 2018) 2019 KESC 79(KLR)**. That the trial court exercised its discretion judiciously and it was upon the Appellant to illustrate that the

discretion was not exercised judiciously and the award should not be disturbed.

30. On the claim for underpayments counsel submitted that section 26 of the Act and section 48 of the Labour Institutions Act 2007 provided that the statutory terms and conditions of employment are prescribed in every employment contract. That the wage order applicable in determining the salary the Respondent's were entitled to as a mason in Ruiru was Legal Notice No. 2 of 2018 and Legal Notice No. 125 of 2022 in the manner shown in the claim.

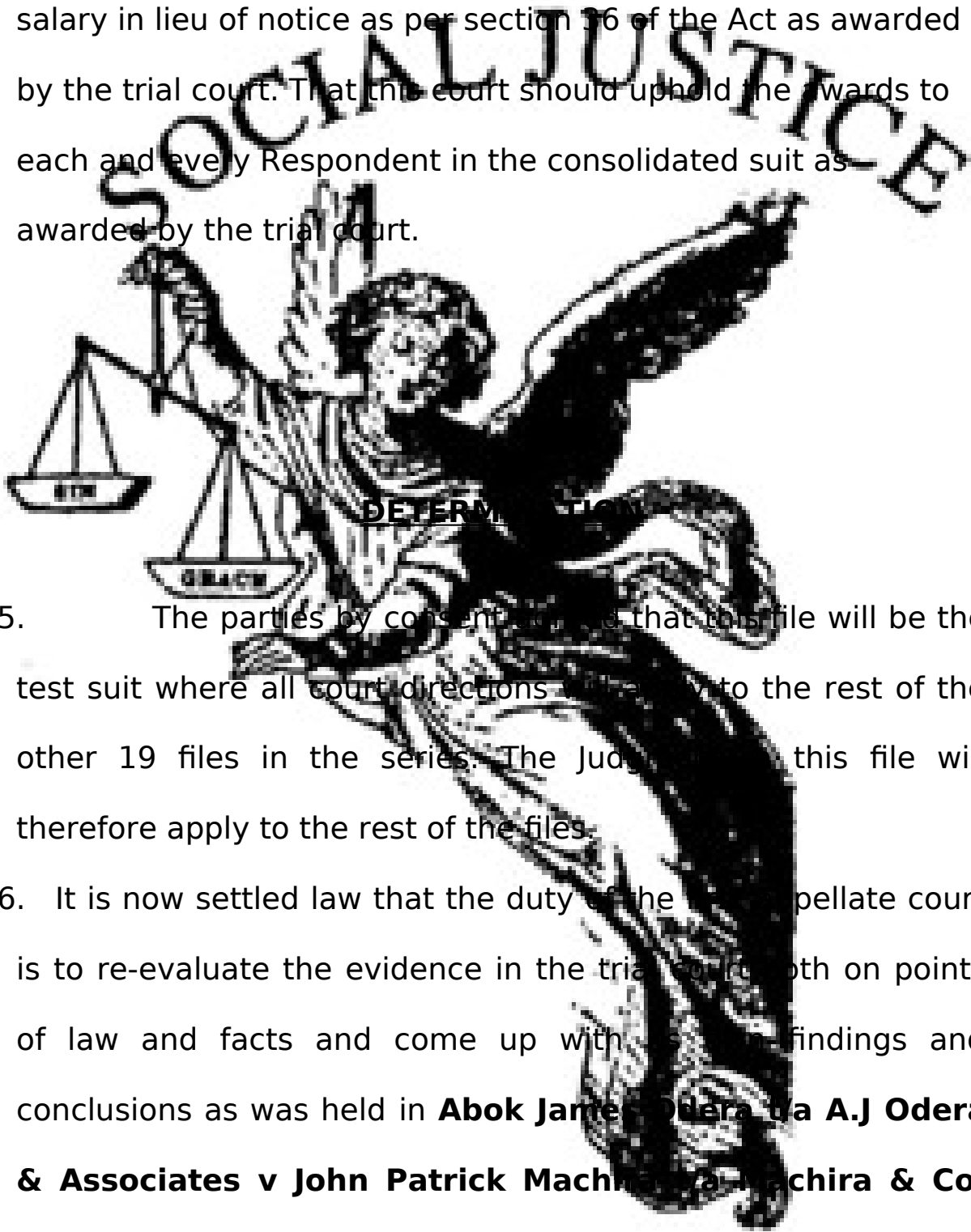
31. Counsel submitted that a mason without formal training was classified as an ungraded artisan in the legal notices. That the trial magistrate rejected the Appellant's contention of the applicable Order of Labour Institutions (Building and construction) (Wages) Order 2012. That the trial magistrate reasoned that the national minimum wage is revised periodically to coincide with the changing economic times, there was no justification for a mason in the Building and Construction Industry to be paid less than a mason in any other industry considering that they do the same type of work. That

doing so would discriminate the respondents hence unconstitutional.

32. Counsel further submitted that it would not make factual sense to rely on 2012 enactment when there is a 2023 enactment on the same issue. That the order relied upon by the Appellant gives way to Legal Notice No. 125 of 2018 and Legal Notice No. 125 of 2022 on the basis of the doctrine of implied repeal and relied on among other recent Court of Appeal decision in the case of **Stephen Mutitu Otinga v The Cabinet Secretary, Ministry of Education, Youth & Sports, Nairobi Civil Appeal No. 15 of 2023 (UP)**

33. Counsel submitted that the Respondent was to be paid a monthly salary of Kshs 13,780.00. That under Legal Notice No. 2 of 2018 the Respondent was supposed to be paid Kshs 16,907.90 between October 2021 and April 2022 whereas under Legal Notice No. 125 of 2022 the Respondent was supposed to be paid Kshs 18,936.85/= per month hence the Respondent was always underpaid. That the award by the trial court on underpayments should not be disturbed.

34. Counsel submitted that the Respondent was entitled to salary in lieu of notice as per section 56 of the Act as awarded by the trial court. That this court should uphold the awards to each and every Respondent in the consolidated suit as awarded by the trial court.



35. The parties by consent agreed that this file will be the test suit where all court directions will apply to the rest of the other 19 files in the series. The Judge in this file will therefore apply to the rest of the files.

36. It is now settled law that the duty of the appellate court is to re-evaluate the evidence in the trial court both on points of law and facts and come up with its own findings and conclusions as was held in **Abok James Odera vs A.J Odera & Associates v John Patrick Macharia vs Machira & Co. Advocates [2013] eKLR** where it was states thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

37. The Court has reviewed and considered the grounds of appeal, the record, the judgment of the trial court and submissions by counsel and will condense the grounds of Appeal into two issues for determination as follows: -

- a) **Whether the trial magistrate erred in finding that the Respondents were unfairly and unlawfully terminated.**
- b) **Whether the trial court erred in awarding the Respondents the reliefs sought.**

Whether the trial magistrate erred in finding that the Respondents were unfairly and unlawfully terminated.

38. It is not in dispute that the Respondent among the other Respondents was engaged by the Respondent on October, 2021 on probationary terms where he was issued with a six months fixed term contract from January 2022 to June 2022. The Respondent was engaged as a mason in the dam construction project. The Respondent continued working past the June 2022 expiry date up to May, 2023 when he was told that there was no work as there was suspension of work due to bad weather.

39. This therefore meant that his contract was constructively renewed since after expiry of the fixed term contract and the parties continued working applying the existing terms without giving the Respondent any new contract or relieving him of his duties. The Appellant alleged that the Respondent's contract had since lapsed and he was engaged on casual basis. The Appellant also alleged that the Respondent was engaged on time specific project which had since been completed and at the time of termination it was at its tail end hence there was no requirement to be given any notice of termination.

40. This court takes the view that the Respondent whose fixed term contract ended in June 2022 and he continued working past the expiry of the contract without any communication from the Appellant that his contract was not renewed he had legitimate expectation for renewal of his contract. Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed term contract was created, the sentiments of Rika J.

in **Teresa Carlo Omondi v Transparency International-**

Kenya [2017] eKLR guides this court as follows-

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

41. In the case of **Otiende v Ligawa & another (Petition E052 of 2022) [2023] KEELRC 3363 (KLR) (13 December 2023) (Judgment)** the court observed as follows: -

In the Court’s view, the conduct of the Respondents not only created a legitimate expectation on the Petitioner but also led to an inference that he was still an employee until released formally in terms of clause 1(iv) of the contract.

42. The conduct of the Appellant in this case where it continued paying the Respondent his salary, never notified its intention of not renewing the contract before it expired and never objected to the Respondent’s continuation of work

amounted to the Respondent's legitimate expectation. The parties were presumed to be bound by the terms of the existing contract.

43. The Appellant's assertions that the Respondent did not work continuously can not hold water since the Act foresees a scenario of the aggregate period worked of three months. The same is also not supported by evidence since the Respondent was paid month to month.

44. This court and other courts either of concurrent jurisdiction or above, have held severally that where an employer and employee continue the employment relationship after expiry of fixed term contract such an employee who is paid month to month converts to an employee to be only released with notice as per section 35(1) (c) of the Employment Act. This position was emphasized by this court in **Stella Mukwana Siboko & another v Style Industries Limited [2022] KEELRC 769 (KLR)** where the court held that: _

In the upshot, the court does not agree with the Respondent that at the time of termination of the Claimant's employment, the latter had been working under respective fixed term contracts, which lapsed at their appointed dates, hence the termination. However, I am prepared to agree with the Claimants that after their initial fixed term contracts herein before mentioned that lapsed after expiry of their lifespans,

they were not placed under any other fixed term contracts, but they continued to work for the Respondent.

As a consequence, I hold that the employee-employer relationship that was between the Respondent and the Claimants was a month to month employment contract terminable as stipulated under section 35 (1)(c) of the Employment Act.

45. This means therefore the Respondent could only be released upon notice as required by the law. The contract entered into by the parties provided for notice whenever employees were to be suspended due to issues like bad weather as the reason given by the Appellant. The trial court rightly found that the Respondent was never issued with any notice as required by the law or the existing contract.

46. Whereas the Appellant alleged that the Respondent was engaged for time specific project nothing like that was indicated in the contract or any letter issued to the Respondent notifying him that the said project was coming to an end. The only reason given was suspension due to bad weather and not completion of the project. In any case the Appellant testified that the project was for a period between 2017-December 2023 while the Respondents were terminated in May 2023 when the project had not been completed. In fact, the issue of

completion of the project came up during hearing when the Respondents had since been terminated.

47. The assertions of there being no notice of termination for time specific roles would only apply if the project had come to an end but in this case the project was not yet completed but the Respondents suspended specifically due to bad weather without the required notice under the existing contract and the law.

48. This court agrees with the trial court that the Respondent discharged his legal burden of proof that termination was unfair and the evidentiary burden of proof then shifted to the Appellant to justify the termination under section 47(5) of the Employment Act. The Appellant cannot claim that it never terminated the Respondent when it sent him on suspension without notice and the suspension had no specific duration.

49. This court also agrees with the trial court that the termination fell short of substantive and procedural fairness envisaged under section 43 and 41 respectively hence unfair under section 45 of the Employment Act.

50. This court therefore upholds the trial court decision that the termination of the Respondent was unfair and unlawful.

Whether the trial court erred in awarding the Respondents the reliefs sought.

51. The trial court having found that the Respondents were unfairly terminated was justified in awarding the compensation for unfair termination as it did. The trial court observed the considerations under section 49(4) and in this case awarded the Respondent 4 months' salary and the rest were awarded between three- and four-months' salary which is justified. This court will only interfere with the discretion of the trial court in awarding damages if a number of factors are proved as was held in the case of **Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018)** KLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case

as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

52. The awards of compensation made to the Respondents were not even maximum compensation and were reasonable and justified and this court will not disturb the same. The court will also not disturb the award of notice pay since the Respondents were terminated without notice.

53. On the claim for underpayments each party took a strict stand and the trial court agreed with the Respondents that the right wages were those of the Legal Notice No. 2 of 2018 and Legal Notice No. 125 of 2022. The Appellant insisted on application of the Labour Institutions (Building and Construction) (Wages) 2012 which provided lower rates than those in the current notices. This court agrees with the trial court since it would be impracticable to apply rates of 2012 to an employee who left work over ten years later when times have changed and the law has always been revised on the wages for all employees as times change. The doctrine of implied repeal which the parties submitted on applied in this case where the current legal notices of 2018 and 2022 repealed the Labour institutions (Wages) order 2012 since the

same employees were doing the same work as those governed by the Labour Institutions order. It would be discriminatory to the Respondents to apply rates which applied a decade ago.

54. **In the upshot the Appeal is found unmerited and is hereby is dismissed with costs to the Respondents.**

55. **It is so ordered.**

Dated at Nairobi this 9th day of October 2025

Delivered virtually this 9th day of October 2025

Abuodha Nelson Jorum

President Judge-Appeals Division