

**REPUBLIC OF KENYA**

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

**CAUSE NUMBER 1460 OF 2017**

DOMINIC KITALI NZALA.....	1ST CLAIMANT
REGINA MUSENYA NDURURU.....	2ND CLAIMANT
HENRY OMONDI OCHIENG.....	3RD CLAIMANT
NELSON MULINDI.....	4TH CLAIMANT
JUMA JOASH CHANGULU.....	5TH CLAIMANT
FRANCIS MAINA IRUNGU.....	6TH CLAIMANT
GODFREY ODHIAMBO OTIENO.....	7TH CLAIMANT
ANTHONY KALWE.....	8TH CLAIMANT
BENSON IGUNZA.....	9TH CLAIMANT
FREDRICK NZWII.....	10TH CLAIMANT
CATHERINE WANYAGA.....	11TH CLAIMANT
HARON MWANDAWA.....	12TH CLAIMANT
AFENIKE OMENY.....	13TH CLAIMANT
STEPHEN MBUKU.....	14TH CLAIMANT

CHRISPHINE OCHIENG OWINO.....15TH CLAIMANT

PETER KAZANGA.....16TH CLAIMANT

JACKTONE ADOL.....17TH CLAIMANT

-VERSUS

CHI-MOTORS LIMITED.....  
.....RESPONDENT

**CORAM**

**Before Lady Justice J.W. Keli**

**C/A Otieno**

**JUDGMENT**

1. Vide a memorandum of claim dated the 11<sup>th</sup> July, 2017, the claimants sued the respondent and sought the following Orders:-
  - a) **That the termination of employment contract of the appellants on account of redundancy was unfair, unlawful and illegal NULL and VOID;**
  - b) **That the Respondent fails to issue to the appellants in time as in the labour laws- Employment Act 2007 Section 40(1) (f) and (g) Laws of Kenya;**
  - c) **That the Respondent pays the appellants terminal dues as tabulated in the Memorandum of Claim;**
  - d) **That the Respondent pays interest on the total amount at court rates;**
  - e) **That the cost of this cause be provided by the Respondent; and**

f) **That any other relief deemed fit to grant be granted.**

2. The claimant in support of the claim filed his verifying affidavit sworn on 11<sup>th</sup> July, 2017 with a bundle of documents attached; list of witnesses of even date; Claimants' witness statements; and list of documents all of even date.
3. The Respondent entered appearance through their advocates Mungai Kalande & Co. Advocates and filed its Defence to the Memorandum of Claim dated 18<sup>th</sup> September, 2017. In support of its Defence, it filed its List of witnesses, a Witness statement of one Stephen Mburu Paul and its Respondent's list and bundle of documents all of even date.

**Hearing and evidence**

4. The 1st, 2nd, and 17th Claimants were represented by the law firm of Omongo Gatune & Co Advocates. Unfortunately, the 2<sup>nd</sup> claimant passed away while the case was pending and was not substituted. The 2<sup>nd</sup> claimant's case was dropped. The cases of the 1st and 17th claimants were heard before me on January 22, 2025, when the 1st claimant adopted his witness statements dated July 11, 2017, and a supplementary statement dated September 30, 2022, as the evidence in chief for the 1st and 17th claimants. He had the authority to sue and plead, dated March 23, 2023. He was cross-examined by counsel for the respondent, Mr. Mungai, on March 18, 2025, and re-examined.
5. The 3<sup>rd</sup> to 16<sup>th</sup> Claimants' case was heard before Justice Ocharo Kebira on the 24th May 2023 and was represented by the law firm of Nyaswenta and Associates advocates. CW1 was the 4<sup>th</sup> claimant, Nelson Mulindi who stated he had authority dated 18<sup>th</sup> April 20223 to testify on

behalf of the other claimants. He was cross-examined by counsel for the respondent, Mr. Mungai, and re-examined.

6. The respondent's case was heard before me on the 18<sup>th</sup> March 2025, when Stephen Mburu Paul testified as RW1. He adopted as his evidence in chief his witness statement dated 18th September 2017 and produced documents of the same date as R-exhibits 1-5. He was cross-examined by counsel for the 1st and 17th claimants, Omongo and Nyaswenta, for the 3rd to 16th claimants. He was re-examined by counsel for the respondent and the case closed.

### **The Claimant's case in summary**

7. The Claimants' case is that on various dates, the Respondent engaged the services of the 17 Claimants in different job roles and at varying salaries. It is claimed that the Respondent issued a redundancy notice letter to the Principal Labour Officer at the Industrial Area, Nairobi, on January 25, 2017. The Claimants further state that the Respondent unfairly terminated their employment on January 1, 2017, without notice. The Claimant reports that after the redundancy notice was issued, the Labour Officer has been calling the Respondent to resolve the matter, but to no avail, leading to the filing of this case. The Claimant asserts that the Respondent is obligated to pay the Claimants notice pay, salary, severance, public holidays, leave, and compensation for damages and losses resulting from the termination, as detailed in the memorandum of claim for each Claimant.

### **Respondent's case in brief**

8. Conversely, the Respondent admits that the Claimants were its employee on short term contract basis which contracts were prepared to be terminated concurrently with the marketing licence Agreement made between the Respondent and Engen Kenya Limited. The Respondent avers

that the Claimants were not rendered redundant, but their contracts expired on 31st December, 2016, upon termination of the License Agreement between Engen Kenya Ltd and the Respondent. The Respondent avers that it could not renew the Claimants' contracts because it lost its service station dealership with Engen Kenya Ltd on 1<sup>st</sup> January, 2017 and was not in a position to offer the Claimants fresh contracts. However, upon expiry of the Claimants' contracts, it paid all their dues, which were inclusive of leave days and one(1) month's salary, due to the prevailing circumstances under which the contracts ended, which were beyond the Respondent's control. The Respondent avers that it has sued Engen Kenya Limited in Milimani HCCC No. 526 of 2016 for damages for breach of contract for unlawfully and illegally terminating the service station dealership.

## **DETERMINATION**

### **Issues for determination**

9. The claimants outlined the following issues for determination in the dispute-
  - a. Whether the 1st and 17th Claimants were employed under short term contracts?
  - b. Whether due procedure was followed in declaring the 1st and 17th Claimants redundant?
  - c. In the affirmative, whether they are entitled to the reliefs sought.
  
10. Conversely, the respondent outlined the following issues for determination in the dispute-
  - i. Whether the Claimants were employed under contracts of service?
  - ii. Whether termination of the Claimants employment was justifiable and lawful?
  - iii. Whether the Claimants are entitled to the reliefs sought?

11. The issue of redundancy was disputed, hence the court finds that since there was a termination of employment of the claimants, the issues for determination in the dispute are as follows-
  - a. The nature of employment of the claimants
  - b. Whether the termination of the Claimant's employment was justifiable and lawful?
  - c. Whether the Claimants are entitled to the reliefs sought?

### **The nature of employment of the claimants**

#### **Claimant's submissions**

12. The 1st Claimant testified before this Court that in January 2016, he was issued with a contract of service for a period of five months, covering January to June 2016. However, upon its expiry, no further contract was issued to him, despite him continuing to work for the Respondent. He further testified that prior to 2016, he had never been issued a contract. That the Respondent is well aware of this fact, as evidenced by the testimony of its director, one Stephen Mburu, who admitted during trial that:-
  - i. He was unaware of when the Claimants were employed, as he was not the manager, and was therefore unable to provide an answer.
  - ii. This was the only contract issued to the Claimant in his entire period of service.
  - iii. The contract ran from January 2016 to June 2016.
  - iv. No other contract was issued to the Claimant after the expiry of the said contract.
  - v. The Claimant continued to work for the company.
  - vi. The Claimant was not informed that the contract was coming to an end. The Respondent maintained that he did not know the Claimants as they were engaged as casual workers earning a commission. On being asked to provide any Commission Agreement between the Respondent and the 1st and 17th Claimants, he was unable to do so. Legal Provision on Contract of Service Section 9(a) of the Employment Act, 2017 provides that a contract of service applies to a period or a number of working days amounting, in aggregate, to the equivalent of three months

or more. Additionally, Section 37 of the Employment Act mandates the conversion of casual employment into a term contract if an employee works continuously for at least one month or performs work that extends beyond three months. In the instant case, the 1st Claimant worked for the Respondent for close to six(6) years, while the 17th Claimant worked for eleven (11) months uninterrupted until their termination on account of redundancy. This duration qualifies their employment as a term contract under Section 37. In light of the foregoing, the Claimants were not engaged on short-term contracts but were, in fact, employees of the Respondent, having worked beyond the statutory threshold for casual employment.

### **Respondent's submissions**

13. Section 9(2) of the Employment Act provides as follows; (1) A contract of service- (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing. (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3). (3) For the purpose of signifying his consent to a written contract of service an employee may- (a) sign his name thereof; or (b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer. That all the Claimants herein including the 1st and the 17th Claimants were employed by the Respondent under contracts of service that were to last for six (6) months at a time from 1st January 2016 and 1st July 2016 respectively. The contracts were subject to renewal based on each employee's performance and on the petroleum dealership

contract between the Respondent and Engen Kenya Limited. The Contract with Engen Kenya Limited was to last for one (1) year and was to expire on 1st September 2017. However, there are terms in the contracts stating that they would be renewable upon expiry for one more year. This conditions are clearly highlighted under paragraphs 1 and 5 of the said contracts which were consented to and signed by the Claimants in compliance with the section 9 of the Employment Act stated above. The Respondent further submits that upon the expiry of the Claimants contracts of employment on 31st December 2016, the Respondent was hopeful that it's contract with Engen Kenya Limited would continue and enable the Respondent to renew its contracts with the Claimants. Unfortunately, on the midnight of 1st January 2017 Engen Kenya Limited forcefully took over the petrol station, evicted the Respondent and terminated the contract between itself and the Respondent. Although the Respondent was able to file a suit against Engen Kenya Limited for breach of contract at Milimani in HCCC No. 526 of 2016, the Respondent was left with no choice but to dismiss the Claimants since it was not in a position to continue operating without the petroleum dealership contract with Engen Kenya Limited. The Respondent also submits that upon expiry of the Claimants contract of employment, the Respondent ensured that it paid all dues owed to the Claimants including leave days and days worked for on public holidays. The Claimants were also paid one month's salary on compassionate grounds due to the circumstances under which the contracts had been terminated. In light of the above, the Respondent submits that the Claimants' contracts were not terminated on redundancy but on the expiry of their contracts of employment and on the fact that the petroleum dealership contract between the Respondent and Engen Kenya Limited had also been terminate.

### **Issue 1- Decision**

14. All the claimants and RW1 confirmed to the court that the only contract of service held by the claimants was that of 1st January 2016 for a period of 6 months and was not renewed, but the claimants continued working up to 1st January 2017 when they were all sent away following the termination of a petrol station dealership the Respondent held with Engen Kenya Ltd. RW1 testified that the contract expired in December 2017 and was not renewed and Engen Kenya Ltd forcibly took over the property. The Respondent raised a defense of expiry of the contract of employment, but RW1 told the court the only contract of service before the court was dated 1st January 2016 (R-exhibit 2). The court examined the contract issued on 1st January 2016 and found it was for 6 months. RW1 confirmed that no other contract was issued, but the claimants continued to work up to 1st January 2017. The court finds that on expiry of the contract of service, the continued employment of the claimants means the contract was open and the issue of expiry did not arise. RW1 confirmed the dealership contract was for 1 year, and they had been negotiating for renewal since 2012. The witness during cross-examination could not confirm when he first engaged the 1<sup>st</sup> claimant, who told the court he was employed in 2011. The court examined the contract of service issued on 1<sup>st</sup> January 2016 and found it was for 6 months. RW1 confirmed that no other contract was issued, but the claimants continued to work up to 1<sup>st</sup> January 2017. The court finds that on expiry contract, the continued employment meant the contract was open and issue of expiry did not arise. The employment of the claimants from 1<sup>st</sup> July 2016 was deemed permanent. Indeed, though some of the claims, like the 1st claimant, had worked since 2011 with the respondent, only one contract of service was issued, which expired, and the employees continued to work without a contract, converting their employment to open ended contractual employment.

**Issue 2- Was the termination of the Claimant's employment justifiable and lawful?**

### **Claimant's submission**

15. The Claimant told this Court that their services were abruptly dispensed with. They were at work on 1st January 2017 when they were thrown out of employment and informed that the company was closing down due to redundancy. L. He further told the Court that at no point were they informed of any impending redundancy. M. No meetings or consultations were held with the Claimants before their termination to discuss the reasons for, or the extent of, the intended redundancy, as required by law. N. That the Labour Officer convened several meetings and invited the Respondent to attend in an effort to amicably resolve the matter, but the Respondent failed to engage. O. In fact, the redundancy notice was only forwarded to the Labour Office twenty-five days after the Claimants had already been sent home and lodged a complaint with the Labour Office. Section 40 of the Employment Act, 2007 provides for redundancy; 40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy; (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer; (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union; (e) the employer has where leave is due to an

employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service. While the Employment Act does not expressly mandate consultations between an employer and employees targeted for redundancy, such consultations are considered an crucial step in the termination process. This requirement is reinforced by Kenya's international obligations under the International Labour Organization (ILO) Convention No. 158 - Termination of Employment Convention, 1982. Specifically, Article 13 of Recommendation No. 166 under the Convention requires consultations with affected employees or their representatives before effecting redundancy terminations. This ensures transparency, fairness, and compliance with international labor standards to which Kenya is a party. Q. To buttress this, we wish to rely the case of Mberia vs. Majlis Lamu Ltd (Cause E205 of 2022) [2024] KEELRC 1662 (KLR), where Lady Justice Stella Rutto rendered herself thus: 61“Fundamentally, consultations should not be cosmetic but rather meaningful and should be geared towards mitigating the adverse effects of the redundancy.” 62“As I have found that there was no evidence of consultations between the parties in the instant case, I return that the Respondent is at fault to that extent.” R. In the present case, the mandatory redundancy procedure was fundamentally breached. Although a notice was served upon the Labour Officer, this was done way later after the facton 25th January 2017. We were also not told the criteria used in sending these employees away. This position is supported by the holding in Kenya Union of Domestic Hotels, Educational Institutions, Hospital and Allied Workers (Kudheiha) vs. Nairobi Hospital (2022) eKLR; "The Respondent failed in all fronts to comply with the requirements of rendering redundancy as stipulated in Section 40 of the Employment Act by;- a. Failing to give notice to the Claimant. b.

Failing to hold meaningful consultancy with the Claimant. c. Failing to demonstrate how its selection criteria of affected employees was based on an objective or open criteria." S. Similarly, in the instant case, the Respondent did not adhere to these statutory and procedural requirements, rendering the redundancy unlawful.

### **Respondent's submissions**

16. Sections 43 and 45(2) of the Employment Act provide that;- Section 43 (1) In any claim arising out of termination of a contract, the employer shall be required 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. (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. Section 45 (1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason- (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure. The Court in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR also stated that "for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness. "Moreover, section 47(5) of the Employment Act 2007 stipulates that "for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the

employer." We submit that termination of the Claimants employment was justifiable and based on genuine reasons as the Claimants employment came to an end upon expiry of their contracts and on termination of the petroleum dealership contract between the Respondent and Engen Kenya Limited which was beyond the control of the Respondent. The Respondent could not renew the Claimants contracts as its operation depended on the terminated contract by Engen Kenya Limited. Further, the claim that the Claimants were declared redundant has no legal basis as there was no intention by the Respondent that there would be an automatic renewal of the contracts upon expiry. Paragraphs 1 and 5 of the contracts clearly stated that renewal of the Claimants contracts was based on the performance of each employee and that the contracts would be terminated with immediate effect if a new dealer was appointed to operate the site. In any case automatic renewal of the contracts would undermine the very essence of the term of the contracts and revert the same to indeterminate contracts of employment. This was held in *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR where the Court stated as follows:- "Was renewal automatic? The Court agrees with the submissions of the Respondent that it was not the intention of the Parties that there would be an automatic renewal. Such an intention would not make sense, and would negate the Respondent's policy shift in 2008, from permanent and pensionable terms to fixed-term contracts, with regard to certain positions. The Respondent would just have re-designated the position held by the Claimant prior to 2008, and asked her to go on serving on permanent and pensionable terms. Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment. ... The general principle is that fixed-term contracts carry no expectation of renewal." The Respondent herein also submits there was no actual procedure of dismissing the employees on 1st January 2017 since the Respondent was abruptly evicted from the petrol station and its contracts terminated. However,

on that morning of 1st January 2017 the Respondent orally notified the Claimants who had reported for work of expiry of their contracts and the reasons as to why their contracts could not be renewed. The Labour Officer was also notified via a letter dated 1st January 2017. Later on, the Respondent paid all dues owed to the Claimants including leave days, days worked for on public holidays and one month's salary as notice on compassionate ground due to the circumstances under which the contracts were terminated. Evidence of the said payments is provided for on the list of pay slips annexed to the Respondent's witness statement. The Respondent therefore submits that termination of the Claimants employment was substantively fair and procedural.

### **Decision**

17. The claimants took the position that this was a case of redundancy while the respondent said it was a case of non-renewal of fixed contract between the respondent with a third party (Engen Kenya Ltd). The court held that after 1<sup>st</sup> July 2016 the contract of service having not been terminated and for failure to issue another contract the employment of the claimants converted to non-defined contractual engagement or what is called permanent employment. The reason for the termination was for lack of renewal of the petrol dealership contract. The respondent filed a court case whose outcome is unknown and had insignificant relevance to this case. The claimants were aware of the eviction as it was done while they were working. The court finds that the reason was valid as per section 43 of the Employment Act to wit- '43. *Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required 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. (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.’*’ The termination was based on the closure of the business, and the claimants were not at fault. The court agreed with the claimants that this was a case of redundancy, which is defined under the Employment Act as – *“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;* “The Respondent issued a redundancy notice to the Labour Officer at Industrial Area Nairobi dated 1<sup>st</sup> January 2017 and received by the County Labour Office on the 25<sup>th</sup> January 2017(Claimants’ list of documents dated 11<sup>th</sup> June 2017 exhibit 4). The reason for the redundancy was sudden termination of the dealership between Engen ( K)Ltd and the respondent. The respondent told the labour officer it would comply with the conditions of redundancy under the Employment Act. The claimants told the court there was no compliance.

18. RW1 confirmed to the court they did not pay the claimants after 1<sup>st</sup> January 2017, the date of termination of employment. The claimants produced letters by the County Labor Officer dated 20<sup>th</sup> March 2017 and 28<sup>th</sup> March 2017 calling for conciliation as the respondent had not settled the redundancy dues(Claimant’s list of documents dated 11<sup>th</sup> June 2017 exhibit 4). The respondent did not cooperate leading to this suit. The court then finds that the reasons for termination was valid but the respondent failed to comply with redundancy procedure hence a case is proved of unfair termination.

## **Whether the claimants were entitled to relief sought**

### **Claimant's submissions**

19. The Claimants were neither informed nor notified of their impending termination. No valid reasons were provided for their dismissal, nor was the manner of termination justified. In fact, contrary to the redundancy claim, the petrol station was never closed-a material fact that the Respondent's Director acknowledged during trial. As demonstrated above, the circumstances surrounding the Claimants' termination were both substantively and procedurally flawed. Accordingly, the Claimants seek the following reliefs:

- a. One-month salaries in lieu of notice The 1st and 17th Claimants were never notified of the impending termination of 1st January 2017 in violation of Section 35(1)(c) of the Employment Act, 2007 which provides for notice. These claims are due. The 1st Claimant earned Kshs. 21,850/= adding 15% of house allowance of Kshs. 3,277/= makes the claim Kshs. 25,127/=. The 17th Claimant earned Kshs. 13,700/= adding 15% of house allowance of Kshs. 2,055/= makes the claim Kshs. 15,755/=. The Claimants were neither provided housing nor were their salaries consolidated to include a housing allowance, making these claims justifiable under the law.
- b. One month Redundancy notice

20. The Claimants seeks redundancy notice as provided for under section 40 of the Employment Act, 2007. Section 40 has two notices; a) Notice to the union or labour office at least one month before the process commences. b) Notice to the affected employee or payment in lieu of notice. In the instant case, the Claimants seek compensation in lieu of the redundancy notice.

- a. Severance Pay - The Respondent argued that it lost its service station dealership with Engen Kenya Ltd, a circumstance it claimed was beyond its control. This is a clear case of redundancy

however the laid down procedures were not adhered to. One of the reliefs payable to an employee under redundancy is severance pay. Section 40 (1) (g) of the Employment Act, 2007 "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service." This claim is due. 1st Claimant  $[15/26 \times 25,127 \times 5 \text{ years}] = \text{Kshs. } 72,482/=$  and the 17th claimant  $15/26 \times 13,700 \times 1 \text{ year} = 7,903.85$

- b. Unpaid Leave -The Claimant stated that for the duration they worked for the Respondent, they were not allowed to proceed for their annual leave. The 17th Claimant was equally not paid his prorate leave days for the 1 year worked. They were also not paid in lieu of leave days at the time of termination. The Respondent apart from denying the Claimants' claim, did not avail any payment vouchers or evidence to show that the Claimants applied for and was granted leave for the duration they were employed.
- c. Unpaid Public Holidays -The Claimant informed the Court that they used to report to work during public holidays because the petrol station operated on daily basis. The director confirmed this fact that the service station operated during public holidays and apart from off days no other pay or off was granted with respect to these days. Despite working during these public holidays, the 1st Claimant stated that they were not paid any additional compensation for this extra work.
- d. 12 months' compensation for irregular loss of employment We respectfully urge the Honourable Court to award twelve (12) months' compensations. The Claimants lost their source of livelihood without notice and for no justifiable reasons as at no single day that the petrol station was ever closed. We were not told why the Respondent opted not to follow the redundancy procedures to wit having consultative meetings with the affected employees and

issuing such proper redundancy notice as required by law. An employer cannot arbitrarily terminate employees without adhering to due process. Awarding compensation under this head will serve as a clear statement from the Court that such disregard for legal protections and fair labor practices is unacceptable.

- e. Costs of the suit. - Your Honour, we shall pray that the costs of this suit be borne by the Respondent. Its conduct prior to filing this claim was improper. An employer cannot lawfully lay off employees without prior notice. Despite multiple invitations from the labour office to resolve the matter amicably, the Respondent remained uncooperative. Instead, it insisted that the Claimants pursue legal action. A demand letter was issued, yet the Respondent has treated this matter with undue casualness.

#### **Respondent's submissions**

21. Contrary to the Claimants allegations, the Respondent herein submits that he notified the Claimants of the reasons of termination of their employment and that the same was reasonable. The Respondent further submits that the Claimants are not entitled to any of the reliefs sought including one month's salary in lieu of notice, one month redundancy notice and the severance pay reason being that the Claimants contracts were not terminated on redundancy but on expiry of their contracts and on termination of the Respondent's contract with Engen Kenya Limited which was conditional on the operational requirements of the Respondent. In regard to costs of the suit, the Respondent submits that costs are awarded at the discretion of the court as provided under section 27 of the Civil Procedure Act which states that: "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what

property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order." In conclusion we submit that the Claimants are not entitled to any of the reliefs sought and the suit herein should be dismissed with costs to the Respondent.

### **Issue 3 -decision**

22. The court found the reason for the redundancy was valid. The termination was deemed unfair for lack of compliance with redundancy procedure under section 40 of the employment at to wit- *'40. Termination on account of redundancy (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions— (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy; (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer; (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union; (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's*

*notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.’’*

23. On the prayers sought as per paragraph 11 of the claim and section 40 of the Employment Act namely-
24. **Notice pay in lieu-** the same is awarded for all the claimants for 1 month salary as pleaded and under section 40 of the Employment Act
25. **On claim for unpaid salary-** the respondent told the court the same was paid for December 2016. It is stated that in the witness statements the claimants only sought notice pay. The court confirmed this was the position as per the witness statement of Dominic Kitali Nzala dated 30th September 2022, on behalf of the 1st and 17<sup>th</sup> claimants. Nzala adopted the statement as his evidence in chief. The respondent produced in court payslips for December 2016 signed by the claimants. On a balance of probabilities, the court finds the claimants were paid their salary for December 2016. Their employment was terminated on 1<sup>st</sup> January 2017 when the respondent was evicted by Engen Kenya Ltd. The claim for unpaid salary is disallowed.
26. **On Claim for severance pay-** This was due under section 40 of the Employment Act, being a case of redundancy, and was not paid. The severance is payable at rate of 15 days for every complete year worked. The respondent did not produce separate record of employment to rebut the pleaded years worked being the custodian of employments records under section 10 and 74

of the Employment Act. The court noted errors in the tabulation by the claimants and will re-tabulate the payable amounts.

27. **On claim for Leave days.** The claimants were entitled to the minimum 21 statutory leave days. They sought leave for all days worked. They did not produce any application for leave which was denied by the respondent. Without such justification as to why they did not apply for leave they can only be entitled to maximum 18 days, carried forward, as per section 28(4) of the Employment Act to wit – ‘(4) *The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.*’ The Court will re-tabulate payable leave as per the period worked for each of the claimants.
28. **The claim for public holidays** ought to be proved strictly. The claimants made a blanket claim for payment of public holidays without specificity. They did not dispute that there was a rota. There are several public holidays in a year. He who alleges must prove as per section 107 of the Evidence Act, to wit-“107. Burden of proof. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”. The claimants sought for payment of public holidays which was beyond the normal working days. It was their burden to prove the specific public holidays worked to invite the respondent to admit or deny. The claim fails.

29. Compensation for Unfair Termination - The reason for the termination was held as valid. The claimants are awarded the equivalent of one month's salary as compensation for non-compliance with the redundancy process under section 40 of the Employment Act.

## **CONCLUSION**

30. Judgment is entered for the claimants against the respondent as follows-
31. The reasons for termination is held as valid and is held to have been based on redundancy. The termination is held unfair for lack of procedural fairness in redundancy.
32. **1<sup>st</sup> Claimant – Nzala**  
Notice pay (Under section 40 of the Employment Act – Kshs 21859  
Severance pay (5 years) – Kshs.54647.5  
Pending leave (18 months) - Kshs. 32,788.5  
Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 21859
33. **3<sup>rd</sup> Claimant – Ochieng**  
Notice pay (Under section 40 of the Employment Act – Kshs 14553/-  
Severance pay (3years) – Kshs. 21829.5  
Pending leave (18 months) - Kshs. 21829.5  
Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs Kshs 14553/-.
34. **4<sup>th</sup> Claimant – Mulindi**

Notice pay (Under section 40 of the Employment Act – Kshs 14553/-

Severance pay (5years )– Kshs. 36382.5

Pending leave (18 months )\_- Kshs. 21829.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553/-

35. **5<sup>th</sup> Claimant – Chunguli**

Notice pay (Under section 40 of the Employment Act – Kshs. 13,317

Severance pay (1years )– Kshs. 6,660

Pending leave (13 months )\_- Kshs. 13760.9

Compensation for lack of procedural fairness, salary equivalent of 1 month – Kshs. 13,317

36. **6<sup>th</sup> Claimant – Irungu**

Notice pay(Under section 40 of the Employment Act – Kshs 15569

Severance pay (3years )– Kshs. 23353.5

Pending leave (18 months )\_- Kshs. 23443.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 15569

37. **7<sup>th</sup> Claimant – Otieno**

Notice pay(Under section 40 of the Employment Act – Kshs 14553

Severance pay (0 years )– nil

Pending leave (6 months )\_- Kshs. 7276.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553.

38. **8<sup>th</sup> Claimant - Kalwe**

Notice pay(Under section 40 of the Employment Act – Kshs 12083

Severance pay (0years )- nil

Pending leave (6 months )\_- Ksh 6041.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 12083.

39. **9<sup>th</sup> Claimant - Igunza**

Notice pay(Under section 40 of the Employment Act – Kshs 14553

Severance pay (3years )– Kshs. 21829.5

Pending leave (18 months )\_- Ksh 21829.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553 .

40. **10<sup>th</sup> Claimant - Nzwii**

Notice pay(Under section 40 of the Employment Act – Kshs 17000

Severance pay (4 years )– Kshs. 34000

Pending leave (18 months )\_- Ksh25,500

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 17000

41. **11<sup>th</sup> Claimant - Wanyaga**

Notice pay(Under section 40 of the Employment Act – Kshs 21850

Severance pay (2years )– Kshs.21850

Pending leave (18 months )\_- Ksh32775

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 21850.

42. **12<sup>th</sup> Claimant - Mwandawa**

Notice pay (Under section 40 of the Employment Act – Kshs 15055

Severance pay (1years )– Kshs. 7527.5

Pending leave (6 months )\_- Ksh.7527.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 15055.

43. **13<sup>th</sup> Claimant - Omeny**

Notice pay(Under section 40 of the Employment Act – Kshs 14553

Severance pay (1 complete years )– Kshs 7276.5

Pending leave (18 months )\_- Ksh21829.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553

44. **14<sup>th</sup> Claimant – Mbuku**

Notice pay(Under section 40 of the Employment Act – Kshs 14553

Severance pay (nil complete years )– nil

Pending leave (6 months )\_- Ksh 7276.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553

45. **15<sup>th</sup> Claimant – Owino**

Notice pay (Under section 40 of the Employment Act – Kshs 12000

Severance pay (1 complete years )– Kshs 6000

Pending leave (6)months )\_- Ksh. 6000

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 12000

46. **16<sup>th</sup> Claimant – Kazanga**

Notice pay(Under section 40 of the Employment Act – Kshs 14553

Severance pay (nil complete years )– nil

Pending leave (6 months )\_- Ksh 7276.5

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 14553

47. **17<sup>th</sup> Claimant – Radol**

Notice pay(Under section 40 of the Employment Act – Kshs 13700

Severance pay (nil complete years )– nil

Pending leave (8 months )\_- Kshs. 9133.3

Compensation for lack of procedural fairness, salary equivalent of 1 month - Kshs 13700

48. The award to attract interest at court rates from the date of filing the suit.

49. Cost of the suit to the claimants.

50. Stay of 30 days.

51. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

For 1<sup>st</sup> and 17<sup>th</sup> claimant – Onenga

3-16<sup>th</sup> Claimants – absent

Respondent- Masinde h/b Mugai

ORIGINAL