

REPUBLIC OF KENYA

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

ELRC APPEAL NO. E007 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

MT ELGON ORCHARDS LIMITED.....

.....APPELLANT

VERSUS

ROBERT WANJALA SHIKUKU.....

RESPONDENT

*(Being an appeal from the Judgment and orders of Honourable
Symphie Makila (Principal Magistrate) delivered on 14th August
2024, in Kitale CMELRC No. 19 of 2023, Robert Wanjala Shikuku
v Mt. Elgon Orchards Limited)*

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent herein was the Claimant in Kitale CMELRC No. 19 of 2023 where the Respondent sued the Appellant vide a Memorandum of Claim dated 15th September 2023 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 14th August 2024 in favour of the Respondent awarding

him Kshs. 331,000 as compensation for unfair termination of his employment, one month's salary in lieu of notice, leave pay and salary arrears. The Respondent was also awarded costs of the suit and interest from date of filing suit.

3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 9th September 2024 on the following grounds of appeal:

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- a) THAT the Learned Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent compensation for unfair termination of Kshs. 180,000
- b) That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent One month's salary in lieu of Notice of Kshs. 15,000
- c) That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding Claimant/Respondent Leave pay of Kshs. 121,154/=.

- d) That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Salary arrears of Kshs.15,000/=.
- e) THAT the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent a Certificate of service.
- f) That the Learned Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent costs of the suit
- g) That the Learned Magistrate totally misdirected herself in delivering the Judgement in favour of the Respondent, failing to consider and appreciate the evidence on record, thus reaching a wrong and unfair conclusion in awarding the Claimant/Respondent compensation and payment for annual leave, salary arrears, notice pay and. a certificate of service.
- h) That the trial magistrate erred in law and fact by rendering a decision that went against the weight of

the evidence tendered, contrary to rule 21 of the Employment and Labor Relations Court rules (2016), now rule 59 of the Employment and Labor Relations Court rules (2024).

- i) That the Learned Magistrate erred in law and fact in disregarding the evidence adduced by the Appellant, the Claimant/Respondent's conduct and testimony in admission of misconduct, at trial, in the award of 12 months compensation to the Claimant/Respondent.
- j) That the Learned Magistrate erred in law and fact in disregarding the Claimant's admission at trial that he was afforded notice and a fair disciplinary hearing.
- k) That the Learned Magistrate erred in law and fact in disregarding the evidence adduced by the Appellant in the award to the Claimant/Respondent resulting in unjust enrichment of the Respondent to the unfair detriment of the Appellant.

4. The Appellant prays for the following orders:

- a) The Appeal be allowed.
- b) The Judgment of Honourable in KITALE CMEELRC SUIT NO. 19 of 2023 ROBERT WANJALA SHIKUKU V MT ELGON

ORCHARDS LIMITED delivered on 14th August 2024, be set aside in entirety and be substituted by appropriate orders of this Honourable Court

c) THAT this Honorable court do dismiss the Respondent's case in CMELRC SUIT NO.19 of 2023 ROBERT WANJALA SHIKUKU V MT ELGON ORCHARDS LIMITED, with costs to the Appellant.

d) The Appellant be awarded the costs of this Appeal.

5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 19th September 2025 while the Respondent's submissions are dated 16th September 2025.

Analysis

6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.

7. Vide his Memorandum of Claim dated 15th September 2023, the Claimant (now the Respondent) averred that he was an employee of the Appellant for a period of 10 years and that his services were unexpectedly, wrongfully and unfairly terminated by the Respondent without justifiable cause on 13th March 2023.
8. The Claimant avers that as at the time he was unfairly terminated from employment, he was earning a salary of Kshs. 15,000 per month.
9. He contended that he was terminated from employment in March 2023 without being paid his salary of Kshs. 15,000/= for the month of February 2023.
10. The Claimant averred that his employment was unprocedurally, unfairly and/or illegally terminated by the Respondent with no reason or warning given, hence the same was unreasonable and without any justifiable cause and in violation of the provisions of Section 41(1), 44(4), 43, 20 and 45(2) of the Employment Act 2007.

11. The Claimant maintained that the termination was unfair because the Respondent did not act in accordance with justice/equity thus violated section 45(2) of Employment Act.
12. The Claimant contended that owing to the unfair termination of his employment, he was entitled to terminal benefits and prayed for the following reliefs:-
 - a. A Declaration that the Claimant's employment was unlawfully, unprocedural and unfairly terminated and in the circumstances the Claimant is entitled to compensation
 - b. A declaration that the Respondent had engaged in unfair labour practices
 - c. Salary arrears in terms of paragraph 5 of Kshs. 15,000
 - d. Accumulated savings of Kshs. 18,000
 - e. Costs of this suit and interests at court rates from the time of filing this suit until payment in full
 - f. Certificate of service as per section 51 of the Employment Act
 - g. Any other relief that the court may deem fit and just and grant

13. The Appellant (Respondent in the trial court) filed a Statement of Response dated 26th October 2023 and averred that the Respondent was summarily dismissed for gross misconduct on account of theft and absenteeism.
14. The Appellant maintained that due procedure was followed in the dismissal of the Respondent.
15. The Appellant prayed that the suit be dismissed with costs.

Evidence

16. The suit was heard on 17th April 2024 and on 5th June 2024. The Respondent testified on his own behalf while the Appellant called Judy Cherotich Sambay who testified as RW1.
17. The Respondent adopted his witness statement and testified that he was an employee of the Appellant for over 9 years. He averred that he was terminated from employment by the Appellant without being heard. He also averred that he was not paid his terminal dues.
18. In cross-examination, the Respondent stated that he took leave during his employment. He admitted that he had guaranteed loans for other people amounting to Kshs. 12,492. He denied writing an appeal letter. He testified that

although he attended the disciplinary hearing, he was not given an opportunity to present his case, and that he was never issued with a Certificate of Service

19. On re-examination, the Respondent stated that the leave forms filed by the Appellant did not cover the 9 years he had worked and did not indicate any unpaid leave days. He testified that his last salary was Kshs. 16,089, but he was not paid for February 2023. He further stated that he was served with notice to show cause dated 10th March 2023, which required him to respond on the same day and the disciplinary hearing took place on 11th March 2023. According to the Respondent, he was not given sufficient time to respond or prepare his defence.
20. RW1, Judy Cherotich Sambay introduced herself as the Respondent's Human Resource and Administration Manager. She adopted her witness statement dated 26th October 2023 as her evidence in chief. It was her testimony that the Claimant absconded duty from 23rd February 2023 until 1st March 2023. The Appellant's witness stated that the Respondent was not owed any money by the Appellant and

that after computation, he had a negative balance of Kshs. 2,334.46.

21. On cross-examination, RW1 stated that the Claimant was arrested on 25th February 2023 and was in custody until 2nd March 2023, that the supervisor was not informed about his arrest and incarceration. She stated he was summarily dismissed and was not entitled to notice. She stated that the time given to the Respondent to show cause was sufficient since he had pleaded guilty and the court matter had been concluded.
22. RW1 stated the disciplinary hearing occurred on 11th March 2023 and dismissal was on 13th March 2023. She also stated that the Respondent had been previously issued with warnings for absenteeism. RW1 maintained that the Respondent was not paid his final dues as his account had a negative balance due to deductions. She stated he was a member of MEO Sacco through the employer, with membership ceasing upon dismissal.
23. On re-examination, RW1 maintained that the Claimant was accorded a fair hearing.

24. After the close of the Respondent's case, the trial court delivered its judgment on 14th August 2024 in favour of the Claimant, which judgment is now the subject of this appeal.

The Appellant's submissions

25. In its submissions, the Appellant asserted that the learned trial magistrate erred in disregarding its documents on the ground that they were not formally produced thereby substituting technical rules for the substantive determination of rights, contrary to the dictates of the law. This, according to the Appellant, was despite the fact that the documents were on record, had been relied upon during testimony and subjected to cross-examination. The Appellant submitted that the decision to exclude them, therefore, constituted a misdirection that undermined substantive justice.

26. The Appellant contended that section 1A and 1B of the Civil Procedure Act obligate courts to facilitate the just, expeditious, and proportionate resolution of disputes, while Article 159(2)(d) of the Constitution requires courts to administer justice without undue regard to procedural technicalities.

27. It is the Appellant's submission that the Respondent, having cross-examined RW1 extensively on the Appellant's documents without raising any objection at the hearing, waived any right to later challenge their admissibility. On this basis, the Appellant submitted that it is trite law that a party cannot approbate and reprobate as the Respondent even relied on portions of the same documents in submissions thereby confirming their evidential role.
28. The Appellant asserted that RW1 expressly referred to the Appellant's documents during her examination-in-chief, adopted them as part of her testimony, and was subjected to intensive cross-examination on their contents by the Respondent's counsel. It is submitted that the objectives of production were therefore fully achieved and the trial court's insistence on a formal marking ceremony ignored the substance of the proceedings.
29. The Appellant further maintained that even if the documents were not formally produced, such lapse was purely technical and caused no prejudice to the Respondent as the documents had been filed well in advance on 27th October 2023, were available on the court record, and were known to all parties.

30. The Appellant further asserted that the threshold for admissibility and reliance on evidence is deliberately lower in employment and labour relations proceedings. In support of this position, the Appellant cited the case of ***Alividza Akatsa Georgina & 3 others v IEBC [2016] KEELRC***.
31. It is therefore submitted that the learned magistrate erred both in law and in fact by disregarding the Appellant's documents, thereby departing from both the letter and spirit of the ELRC Rules and occasioning a miscarriage of justice.
32. Regarding the trial court's finding that the Respondent was unfairly terminated from employment, the Appellant submitted that the learned trial magistrate based her finding solely on the oral evidence that the disciplinary procedure was concluded in a short span of time, while completely disregarding the Appellant's documentation on the events leading to the Respondent's dismissal.
33. The Appellant asserted that the oral evidence established that the Respondent underwent a disciplinary procedure as envisaged in Section 41 of the Employment Act.
34. The Appellant further submitted that the Respondent confirmed in his oral testimony that he received a show cause

letter, responded to it, attended the disciplinary hearing, had the opportunity to bring a witness but chose not to, and was afforded the opportunity to appeal against the dismissal.

35. While submitting on the timelines within which the disciplinary process was undertaken by the Appellant, it is the Appellant's contention that nothing precludes a disciplinary process from being concluded promptly, so long as the employee is granted a fair and reasonable opportunity to be heard. To buttress this point, the Appellant relied on the case of ***Omboga v Mpesa Foundation Academy [2024] KEELRC 685*** and ***Nyariro v Kenya Power & Lighting Co. Ltd [2022] KEELRC 1475***.
36. It is therefore the Appellant's submission that the trial magistrate erred in finding the dismissal unfair solely due to the short timeline, as the Respondent did not object to the timelines or request to be given more time to prepare.
37. In this regard, the Appellant submitted that the award of 12 months compensation for unfair termination solely premised on the disciplinary timeline was grossly erroneous citing the case of Peter ***Wangai v Egerton University [2019] KEELRC 1906***, ***Geoffrey Wambua King'oo v Dinesh***

Construction Limited [2019] KEELRC 545, and Rahab Wothaya Esiromo & 7 others v Blueshield Insurance Company Limited [2015] KEELRC 1646.

38. The Appellant therefore maintained that the finding of unfair termination was unfounded and the award of remedies was excessive and unjustified.
39. The Appellant urged the Court to set aside the trial court's judgment in its entirety and allow the appeal with costs.

The Respondent's submissions

40. In his submissions, the Respondent argued that in the 11 grounds of appeal set out in the Memorandum of Appeal, the Appellant faults the trial court for disregarding its list of documents. According to the Respondent, courts have consistently held that the mere marking of a document for identification does not dispense with the requirement for formal proof, and such documents do not automatically form part of the record.
41. In this regard, the Respondent submitted that the Appellant's documents were neither marked for identification nor formally produced, and therefore cannot be treated as exhibits and

have no evidential value. In support of this position, reliance was placed on the Court of Appeal decision in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR.***

42. The Respondent further submitted that, in his testimony before the trial court, he demonstrated that he was issued with a show cause letter dated 10th March 2023, which required him to respond the same day. The Respondent contended that he was not afforded ample time to prepare his response which position he alleges was affirmed by RW1 during cross-examination when she testified that the Respondent was issued the show cause letter on 10th March 2023 and was required to respond by close of business the same day. The Respondent submitted that RW1 further testified that the disciplinary hearing for the Respondent was conducted on 11th March 2023 and his services were terminated on 13th March 2023.

43. It is the Respondent's submission that the rushed disciplinary process and subsequent termination was sufficient evidence that the dismissal was premeditated, unfair, and procedurally flawed. In support, the Respondent cited ***Omenda v Gurudumu Sacco Society Limited [2023] eKLR,***

emphasizing that a one-day notice cannot be deemed adequate by any reasonable standard.

44. The Respondent therefore submitted that the Appellant failed to discharge the burden of proving the reasons for the summary dismissal as required under Section 45 of the Employment Act, as it did not effectively controvert the Respondent's evidence.
45. In the end, the Respondent urged the court to uphold the reliefs granted by the learned magistrate and dismiss the appeal herein with costs to the Respondent.

Determination

46. I have considered the Appellant's Record of Appeal and the submissions by both parties. The grounds of appeal may be summarized into the following issues for determination:
 - i. Whether the trial court erred in disregarding the Appellant's documents for want of formal production.
 - ii. Whether the trial court erred in finding that the Respondent's termination was unfair and unprocedural.
 - iii. Whether the remedies awarded by the trial court were justified.

- iv. Whether the award of costs to the Respondent was proper.

Whether the trial court erred in disregarding the Appellant's documents for want of formal production.

47. The Appellant faulted the trial court for declining to rely on its filed documents on the basis that they had not been formally produced. The Appellant argued that the documents were referred to by RW1 in examination-in-chief, and extensively used during cross-examination, hence the objectives of production were met. The Appellant therefore contended that failure to mark them as exhibits was a mere technicality.
48. The Respondent, on the other hand, submitted that documents that are not formally produced do not form part of the evidentiary record.
49. The law indeed draws a distinction between documents filed and documents produced as exhibits. While I agree with the Respondent's submission that merely filing documents does not make them evidence, employment and labour proceedings are not bound by strict rules of evidence. Rule 59 of the Employment and Labour Relations Court (Procedure)

Rules 2024 allows the court to determine a matter on the basis of pleadings, witness statements, documents filed and submissions, provided substantive justice is achieved.

50. In this case, RW1 expressly adopted the Respondent's documents in her testimony as her evidence in chief and referred to them during examination-in-chief. The Respondent's Counsel cross-examined her on the same documents. At no point was an objection raised. The documents were therefore sufficiently identified, explained, and tested in cross-examination.
51. The purpose of production of documents which is to authenticate, associate the document with a witness, and allow cross-examination, was achieved. The trial court's rejection of the documents solely for want of a formal marking elevated form over substance and contravened the principles of substantive justice under Article 159(2)(d) of the Constitution.
52. Further, rule 35(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides that a party shall notify the Court when submitting a statement of claim or a response to a statement of claim of any witnesses it proposes

to call in support of its submissions, file witness statements, file list and copies of documents to be relied upon, and shall, at the same time, notify the other party. Rule 65(2), (3) and (4) further provide:

(2) Evidence before the Court may be given orally or if the Court so orders, by affidavit or a written statement.

(3) The Court may, at any stage of the hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.

(4) The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities.

53. Rule 40(f) provides for the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or parts of documents, will serve as evidence of what they purport to be.

54. Rule 33 further provides that: A party may, by notice, object to a pleading and in that notice, state the grounds of

objection except that no objection may be raised to any pleading on the ground of any want of form.

55. There is no provision in the Employment and Labour Relations Court (Procedure) Rules (2024) for production of documents. The practice is for witnesses to adopt their witness statements together with the documents filed in court. Production is only necessary where the court specifically orders for the same either upon application of a party or on its own motion.

56. The court therefore finds that the trial magistrate erred in disregarding the Appellant's documents which are on record and which were adopted by the Appellant's witness during the hearing, as the documents ought to have been considered alongside the oral evidence.

Whether the trial court erred in finding that the Respondent's termination was unfair and unprocedural.

57. Before an employer can be required to prove that fair process in section 41 of the Employment Act was complied with, the court must make a finding whether there was valid reason for termination.

58. In the present case the reason given for the termination of the Respondent from employment is absenteeism.
59. In determining whether absenteeism constituted a valid reason for termination, the court is guided by Sections 43 and 45 of the Employment Act. Section 43 requires the employer to prove the reason for termination, while Section 45 demands that such reason be valid and fair, meaning that the reason must relate to the employee's conduct, capacity or compatibility, or the employer's operational requirements.
60. The Appellant's case was that the Respondent was absent without permission and had a history of failing to report to duty. RW1 testified that the Respondent was absent from work from 27th February 2023 to 6th March 2023 necessitating the decision to initiate disciplinary proceedings against him.
61. In his defence, the Respondent averred that he was arrested during the period he was absent from work. The Appellant produced police statements indicating that the Respondent had written statements with regard to theft of jericans.
62. Under Section 44(4)(a) of the Employment Act, absence from work without leave or lawful cause constitutes misconduct and is a valid ground for termination. Arrest by police where

an employee has committed a criminal offence and pleads guilty is not a valid ground for absenteeism. However, section 44(4)(f) provides that an employee is liable to summary dismissal if: *in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment **and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty.***

63. In the instant case both parties are agreed that the Respondent was arrested and incarcerated from 27th February 2023 to 6th March 2023. He was therefore in police custody for less than 14 days. This did not constitute valid reason for termination of his employment.
64. In the circumstances, I find that from the evidence adduced before the trial court, the Appellant did not prove that there was a valid reason for termination of the Respondent's employment.
65. The next issue for determination is whether the Appellant complied with the requirements of fair procedure under Section 41 of the Employment Act.

66. The Respondent faulted the disciplinary process, contending that he was issued with a show cause letter on 10th March 2023 requiring a response by close of business on the same day, and that the disciplinary hearing was convened the following day, 11th March 2023, with his dismissal being effected on 13th March 2023. He maintained that these timelines did not afford him adequate opportunity to prepare his defence.
67. Section 41 of the Employment Act requires that an employee be given adequate time to respond to the allegations levelled against them, in addition to being informed of the right to be accompanied by a fellow employee or shop floor representative during the disciplinary hearing.
68. In the court's view, requiring the Respondent to reply on the same day the notice was issued, followed by a hearing the next day did not afford him a reasonable opportunity to prepare.
69. The court in the case of case cited by the Respondent ***Omenda v Gurudumu Sacco Society Limited [2023] eKLR***, affirmed that disciplinary processes conducted in an

unreasonably compressed timeframe deny the employee adequate time to respond breach procedural fairness.

70. Flowing from the foregoing, I find that although the Respondent was taken through a disciplinary hearing, the subsequent termination was procedurally unfair as the Respondent was not given adequate time to respond to the allegations against him as envisaged under section 41 of the Employment Act, and therefore was in breach of the procedural protections guaranteed under Section 41 of the Employment Act, 2007.

71. From the foregoing, the termination of the Respondent's employment was without valid reason and without fair procedure. The same was therefore both substantively and procedurally unfair.

Whether the remedies awarded by the trial court were justified

72. On the remedies, the trial court made a declaration that the dismissal of the Respondent was unlawful, unprocedural and unfair and proceeded to award him:

a) Compensation for unfair termination Kshs. 180,000

b) One-month salary in lieu of notice	Kshs. 15,000
c) Leave pay	Kshs. 121,154
d) Salary arrears	Kshs 15,000
Total	Ksh. 331,000

73. The Respondent was also awarded costs and interests and the Appellant was directed to issue him with a Certificate of Service.

74. I will address the reliefs awarded in separate heads as hereunder; -

i. A declaration that the dismissal was unlawful, unprocedural and unfair

In view of the finding above that the termination of the Appellant's employment was affected without compliance with the procedural requirements of Section 40 of the Employment Act, a declaration is hereby made that the dismissal was unfair, unprocedural and therefore unlawful.

ii. 12 months Compensation for unfair termination

The trial court awarded the Respondent the maximum compensation of twelve (12) months' salary. While Section 49(1)(c) of the Employment Act permits such an

award, it must be justified by the circumstances of the case. The pay slip at page 60 of the Record of Appeal confirms that the Respondent earned a gross monthly salary of Kshs 16,089. Having found that the termination of the Respondent's employment was unfair both procedurally and substantively, he is entitled to compensation. Taking into account his long service of over nine years, the procedural infractions by the Appellant, the relevant factors under section 49(4) of the Employment Act and all circumstances of the case, it is my view that 10 months' salary is reasonable compensation. I accordingly award him the same at Kshs. 160,890 as compensation.

iii. One-month salary in lieu of notice

Having found that the Respondent did not follow due process in terminating the Appellant's employment, the Appellant is entitled to one month's pay in lieu of notice amounting to Kshs 16,089.

iv. Leave pay

The trial court awarded leave pay to the Respondent. The Appellant filed leave forms at pages 61-64 and a

leave summary at page 65 of the Record of Appeal, which accurately reflect the Respondent's leave records. These documents show that the Respondent took leave during his employment. Consequently, the trial court's award of leave pay was unjustified and is hereby set aside.

v. *Salary arrears*

The trial court awarded the Respondent salary arrears of Kshs 15,000 based on his claim that he had accumulated unpaid salary for the month of February 2023. However, a perusal of the pay slip filed by the Appellant at page 60 of the Record of Appeal shows that the Respondent was paid his salary for February 2023 in full. The award of salary arrears by the trial court was unwarranted and is hereby set aside.

vi. *Certificate of service*

The Appellant contends that it has already issued the Respondent with a certificate of service. The Respondent, however, denies having received it. In the interest of clarity and compliance with Section 51 of the

Employment Act, the Appellant is directed to re-issue the Certificate of Service to the Respondent.

Conclusion

75. In light of the foregoing, the appeal succeeds. The judgment of Hon. S. Makila (PM) delivered on 14th August 2024 in Kitale CMELRC Cause No. 19 of 2023 is hereby set aside and substituted with the following orders:

i. A declaration that the Respondent’s termination from employment was unfair and therefore unlawful.

ii. The Respondent is awarded: -

a. One month’s pay in lieu of notice..... Kshs. 16,089

b. 10 months’ salary as compensation for

unfair termination Kshs.
160,890

**Total Kshs.
176,979**

76. The Appellant shall issue the Respondent with a Certificate of Service.

77. Each party shall bear its costs of the Appeal.

78. The Appellant shall bear the Respondent's costs in the trial court.
79. Interest shall accrue on the decretal sum from date of judgment in the trial court.
80. Orders accordingly.

**DATED, DELIVERED AND SIGNED
THIS 20TH DAY OF NOVEMBER, 2025.**

**M. ONYANGO
JUDGE**