News Café-Kenya t/a Vibe Nairobi Limited v Hassan (Appeal E224 of 2023)
[2025] KEELRC 3420 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3420 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E224 OF 2023

JW KELI, J

NOVEMBER 27, 2025

BETWEEN

NEWS CAFÉ-KENYA T/A VIBE NAIROBI LIMITED ..... APPELLANT

AND

ABDARANAM UKIRU HASSAN ..... RESPONDENT

(Being an Appeal from the consolidated Judgment and Decree of the Hon. W.K. Micheni (CM) delivered on 5{{^th}} October 2023 in Nairobi MCLRC Nos. E475 OF 2021; E476 OF 2021; AND E477 OF 2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the consolidated Judgment and Decree of the Hon. W.K. Micheni (CM) delivered on 5th October 2023 in Nairobi MCLRC Nos. E475 OF 2021; E476 OF 2021; AND E477 OF 2021 filed a Memorandum of Appeal dated the 5th of November 2023 seeking the following orders: -

    a. The appeal be allowed and the judgment of the trial magistrate be set aside and the same be substituted with an order dismissing the suit.

    b. The court do issue such orders at the Honourable Court will be pleased to make to meet the ends of justice.

    c. The costs of this appeal and in the subordinate court be awarded to the Appellant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in fact and law in failing to find from evidence on record that the Claimants were on a fixed term yearly contract and misconstrued the terms and conditions of service between the Appellant and the Respondent.

3. The Honourable Magistrate erred in fact and law by totally ignoring the effect of the fixed term contract of service as documented to give effect the terms and conditions of the service in regard to service and benefits.

4. The Honourable Magistrate erred in law by failing to appreciate the mitigating factors in respect to the circumstances under Covid- 19, which necessitated the cessation of the service contract.

5. The Honourable Magistrate misdirected herself in making a finding to award compensation and other benefits, which are in the circumstances too high and excessive.

6. The Honourable Magistrate erred in fact and law by failing to appreciate the evidence tendered by both the Appellant and the Respondent, analyze, and apply the correct law.

Background To The Appeal

7. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 22nd March 2021 seeking the following orders: -

    a. A declaration that the Respondent's decision to place the Claimant on indefinite unpaid leave amounts to unlawful and unfair termination.

    b. Compensations for unfair termination Kshs.720,000

    c. Notice pay (1 Month's salary) Kshs. 60,000

    d. Unpaid salary for the months of Feb and March 2020 Kshs.120,000

    e. Service charge for the months of Feb 2017 to March 2020 Kshs.285,000

    f. Overtime for 80 days worked between May 2015 to March 2020 Kshs.276,919.80

    g. Overtime for 45 public holidays worked between May 2015 to March 2020 Kshs. 207,689.85

    h. Service pay for the year 2019 and 6 months in the years 2018 and2020 Kshs.51,923.03

    i. Severance pay for being held redundant @ 15 days for each full year worked Kshs.138,461.40

    j. Cost of the suit

    k. Interest at court rates on b), c), d), e), f), h, and i) above from the date of the Claimant's termination (23rd March 2020) till payment in full

    l. Certificate of service

    m. Any other relief that this Honourable Court may deem fit and just to grant (pages 5-10 of Appellant's ROA dated 16th April 2025).

8. The Respondent filed his witness statement dated 22nd March 2021; list of witnesses of even date, and list of documents also of even date (pages 12-49 of ROA). The Respondents in in Nairobi MCLRC Nos. E476 OF 2021 and E477 OF 2021 also filed their Memoranda of Claims dated 22nd March 2021, respective witness statements dated 22nd March 2021; list of witnesses of even date, and list of documents also of even date 9pages 50 -118 of ROA).

9 The three claims were opposed by the Appellant who entered appearance and filed defences dated 7th April 2021 and witness statements of Josh Okombo Ochieng dated 11th November 2022 (pages 119-130 of ROA).

10. The Respondents' cases were heard on the 9th of May 2023 with the Respondents testifying in the case. They relied on their filed witness statements as their evidence in chief and produced the documents attached to their list of documents. They were cross-examined by counsels for the Appellant, Mr. Ongicho and Mr. Asuga (pages 166-168 of ROA).

11. The Appellant's case was heard on the same day with the Appellant calling one witness: Joash Okoyo Ochieng as RW1 who testified in all the three cases. He relied on his filed witness statements as his evidence in chief. He was cross-examined by counsel for the Respondent Ms. Osiemo (pages 168-169 of ROA).

12. The parties took directions on filing of written submissions after the hearing. The Claimant complied.

13. The Trial Magistrate Court delivered its judgment on the 5th of October 2023 partially allowing the Claimants/Respondents' claims to the tune of Kshs. 1,183,840.37 for the Respondent in MCELRC E475/2021; Kshs. 856,957.03 for the Respondent in MCELRC E476/2021; and 579,813.75 in MCELRC E477/2021, comprising of 4 and 12 months' salary as compensation for unfair termination, one month's salary in lieu of notice, unpaid salaries for February and March 2020, service charge for February 2017 to March 2020, overtime, service pay, and unpaid annual leave (judgment at pages 171-190 of ROA).

Determination

14. The appeal was canvassed by way of written submissions. Both parties complied

Issues for determination

15. In their submissions dated 4th September 2025, the Appellant submitted generally on the grounds of appeal.

16. The Respondents identified the following issues for determination in their submissions dated 22nd September 2025:

    i. Whether the Respondents were on fixed term yearly contracts.

    ii. Whether the trial court erred in law by failing to appreciate the mitigating factors in respect to the circumstances under Covid 19 which necessitated the cessation of the service contract.

    iii. Whether the trial court erred in awarding compensation and other benefits which are too high and excessive.

    iv. Whether the trial court failed to consider evidence tendered by both the Appellant and the Respondent and apply the correct law.

17. The court on perusal of the grounds of appeal found the issues placed before the court for determination in the appeal were-

    i. Whether the Respondents were on fixed term yearly contracts.

    ii. Whether the trial court erred in law by failing to appreciate the mitigating factors in respect to the circumstances under Covid 19 which necessitated the cessation of the service contract.

    iii. Whether respondents were entitled to relief granted.

Whether the Respondents were on fixed term yearly contracts.

The Appellant's submissions

18. The court did not find a direct submission by the appellant on this issue. The grounds of appeal were -

    a. The Honourable Magistrate erred in fact and law in failing to find from evidence on record that the Claimants were on a fixed term yearly contract and misconstrued the terms and conditions of service between the Appellant and the Respondent.

    b. The Honourable Magistrate erred in fact and law by totally ignoring the effect of the fixed term contract of service as documented to give effect the terms and conditions of the service in regard to service and benefits.

The Respondent's submissions

19. This being a first appeal, the Honourable Court has jurisdiction to re-evaluate the evidence on record and come to its own conclusion. The Appellant alleges that the trial court erred in law and fact by failing to find that the Respondents were on a fixed term yearly contract. This allegation is false and the Appellant is trying to hoodwink the Court that the Respondents were on a yearly contracts. None of the Respondents was on a yearly employment contract and none of the Contracts filed by the Respondents can be construed to be fixed term contracts. Further, the Appellant, which is a custodian of employees records, never filed any documents/records in this case. There was no evidence to indicate that the Respondents were on a fixed term contract. The Appellant solely relied on the testimony of its witness Joash Okombo Ochieng who never produced any document to controvert the Respondent's evidence before the Court. 8. Fixed term contracts have been defined by the Court of Appeal in Transparency International Kenya v Teresa Carlo Omondi [2023] KECA 174 (KLR) at para. 27 as follows, "...The Respondent was under a fixed term contract with a definite commencement date and termination date." Similarly, fixed term as contracts have been defined to mean, " ...a contract typically entered into for a specific duration (defined by time) or purpose (for a particular project) and ordinarily expire either with effusion of the agreed period or fulfillment of the purpose of what they entered" (Refer to page 69 of G. Ogembo, Employment Law Guide for Employers, 2nd Edition, [2022]).

20. According to the evidence which was furnished in the trial court, none of the contracts on the record can be insinuated to be fixed term contracts. The Respondent- Abdaraman Ukiru Hassan (who was the Claimant in MC.ELRC E 475 of 2021)was issued with employment contracts of 1st May 2015 when he was employed as a F & B Supervisor. Subsequently, on 1st February 2017 he was promoted as a Manager (page 24 & 25 of record of appeal). None of the terms of the contracts suggests that they were fixed term contracts. We note with concern that the Appellant has omitted page 2 of Abdaraman Ukiru Hassan's contracts for 2015 and 2017. The said page 2 of each of the contracts contains the clauses on hours of work, overtime, entitlement, termination of contract, leave, other employment and confidential matters and it is similar to page 2 of Loise Wangari Njoki's contract at page 112 of the record of appeal. We have since filed a supplementary Record of Appeal containing the said contracts and we will be seeking leave of court to have the record admitted. With respect to Loise Wangari Njoki who was a Claimant in MC.ELRC E 477 of 2021, she furnished the Court with her employment contract dated 1st November 2015 (pages 111 to 115). None of the Clauses ever insinuated that she was on a fixed term yearly contract. The Appellant never submitted any records or evidence to controvert the Claimants' position that they were permanent employees as indicated at paragraphs 4 of their witness statement. It is trite law that the employer is a custodian of employee records and

when sued they ought to produce records. The Court of Appeal, in Jackson Muiruri Wathigo T/A Morton Supermarket v Lilian Mutune [2021] e KLR at paragraph at paragraphs 24 and 27 re-affirmed the legal position that employers are custodians of employment records and where none are produced, the court will accept the employee's version. The Court stated: "Similarly by dint of section 10 (7) of the *Employment Act* the burden to proof lay on the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming ...In light of the fact that the appellant failed to produce evidence on terms of the respondent's engagement as envisioned under section 10 (7) of the *Employment Act*, we, like the ELRC, are inclined to accept the respondent's version." The assertions that the Respondents were on fixed term contracts are not substantiated by the evidence on record. We pray that the Honourable Court finds that grounds 1 and 2 of the memorandum of appeal have not substantiated and the same be dismissed.

Decision

21. The impugned decision by Hon Wendy Micheni (as she was then) dated 5th October 2023 was with respect to 3 suits at the trial namely -MC ELRC 475/2021, MC ELRC 476/2021, and MC ELRC 477/2021. Before the trial court were 3 contracts of employment for Hassan in MCELRC NO, 475 of 2021. On perusal of the contracts the court found that the same had no defined period of service. The first contract was dated 1st may 2015 as F& B Supervisor at salary of Kshs. 25000. The subsequent contract appeared to the court to have been a promotion by increment of salary, and the last one, dated 1st February 2017, was a promotion to the position of a manager. The grounds of appeal applied to all the employees, and thus the contracts issued to Hassan by the appellant apply as proof of the nature of employment of the three employees. The court holds that the contracts were open-ended and not fixed.

Whether the trial court erred in law by failing to appreciate the mitigating factors in respect to the circumstances under Covid 19 which necessitated the cessation of the service contract.

Appellant's submissions

22. It was the 1st Respondent's evidence of being aware of the Government restrictions and lockdown due to Covid-19 and Appellant's closure of 3 other outlets of the Appellant, is well documented in his Witness Statement as his evidence and that he was terminated on 23rd March 2020, refer to paragraphs 10,14,15,16,17,18,23 and 27 pages 14 and 15 of the Record. The 1st Respondent stated both in his evidence in chief and in cross examination that due to the lockdown and prolonged period of Covid-19 that he was terminated (constructive dismissal). It was not redundancy but Government policy directive to close down business operations akin to force Majeure. The Appellant's Witness confirmed that the salary for Februar,2020 and March, 2020 had not been paid was subject to statutory deductions. The Claimant stated that he was yet to be notified of his employment status and hence the claim. The Appellant's action of closing 3 outlets namely Hardy, Adlife at Yaya and Gigiri- Roselyn was due to the Government's directive to combat Covid-19 pandemic and as a result of prolonged closure/ Lockdown restrictions and reduced business rendered the cost of running the business unsustainable. We wish to submit that the termination of the Respondents was lawful and Appellant's decision not to recall the Respondents was justified due to economic reasons and closures of work places by the Government. The Law affords protection the an Employer under Section 43 (2) of The *Employment Act*, 2007, S 43 (1)..... (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 Respondent's evidence on record, paragraphs 4,5 and 6 of the witness statement that;- (see pages 121-122 of the Record)The Covid-19 Pandemic impacted the hotel business severely and the government on 23rd March 2020 ordered closure of all hotels. The lockdown affectively killed the business. The Respondent had four

outlets namely at, Hardy, Yaya, Sarit and Gigiri areas. During the lockdown and subsequent slow lifting of the lockdown, the respondent closed 3 outlets at; Hardy, Adlife at Yaya and Gigiri-Roselyn. The lockdown result to mass layoffs as the business was not able to sustain the overhead costs. The layoff cannot be attributed to a voluntary action by the Respondent. The Respondent had not paid the Claimant salary for February and March, 2020 and is willing to pay one month ex-gratia to cover notice due to the abrupt closure by the government 19. In the case of Matsesho –vs Newton (Cause of 2019 [2022] KEELRC 1554 (KLR) (29 July, 2022) (Judgment)/[2022] KEELRC 1554 (KLR) (see paragraphs 24-26); On the other hand section 43 of the Act obligates the employer to prove the grounds for terminating an employee. Where the employer fails to do so the law raises a presumption in favour of the unlawfulness of the termination. Of course the law expects an employee to provide prima facie evidence in terms of section 47 of the *Employment Act* to prove unfair termination before the presumption aforesaid comes into play. It should be noted that in proving the reasons for termination under section 43 of the *Employment Act*, the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating the employee. In other words, situations may arise where the employer genuinely believes that a ground for terminating an employee has arisen when in actual fact it has not. For example, the employer may have strong preliminary evidence pointing to the employee having committed an offense against the property of the employer only for subsequent investigations to clear the employee. If the employer shows that he acted on such evidence out of a genuine belief that the employee had committed the act, the termination would be on valid grounds. The test is whether the action of the employer falls in the band of actions that would be considered reasonable in the circumstances. Put differently, the question would be whether another reasonable employer acting on the same set of facts would have reached a similar decision (see Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR).It is submitted that the Respondents acknowledges the circumstances prevailing during the lockdown and subsequent closure of the Appellant's 3 outlets in paragraphs 14-18 of the Respondents' witness statements. The acknowledgement of circumstances satisfied the condition of Section 47 (5) of The *Employment Act*, 2007. Thus the Respondent has proved or justified the reason for termination.21. In the case of Galgale Jasso v Agricultural Finance Corporation [2021] eKLR (Cause 13 OF 2019). The Court expounded Section 43(2) and 47(5) of The *Employment Act* and held that, (at paragraphs 34 -36); Indeed the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between sections 43 and 47(5) of the *Employment Act*, the Court of Appeal in Muthaiga Country Club v Kudheiha Workers [2017] eKLR said the following: ''The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment." I will come back to this question regarding the burden of proof later on in this judgment. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the

termination. Commenting on this question, the Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR said as follows: - ''The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test.'' The court, relying on an extract from Halsbury's Laws of England went further to comment as follows: - "...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine 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. http://www.kenyalaw.org - Page 4/7 Muthaiga Country Club v Kudheiha Workers [2017] eKLR ..... 47. Complaint of summary dismissal and unfair termination (5) 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 the employment or wrongful dismissal shall rest on the employer." As noted above, the fact that the grievants' employment was terminated through summary dismissal was not denied. The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment. Under Section 43(2) of the Act, "43(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 Respondents have alluded to Section 40(1) of The *Employment Act*, 2007 in their Submissions. The Appellant did not voluntarily plan to terminate the Respondents. It was the Government's policy directive, lockdown and movement restrictions which rendered hotel business impossible to carry on and all the Respondents have acknowledged that in fact 3 outlets were permanently closed due to rent and other overhead costs. It was therefore prudent to terminate the Respondents under the prevailing financial circumstances which the Appellant believed to have existed. Therefore, it was not redundancy but force Majaure. Redundancy is defined under Section 2 of the *Employment Act*, 2007. Redundancy "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 initiative of the Government to declare lockdown and restricted movement impacted negatively the operation of the Respondent resulting to closure of 3 outlets. This closure resulted to loss of employment. It was not at the initiation of the Appellant but a Government directive due to Covid-19 pandemic and its effects. The Respondents during re-examination expounded that the Appellant had financial challenges resulting from low business from the starting of the year 2020. It is not lost that Covid-19 ravaged Asian Countries from November 2019 and the Appellant's clientele majorly was composed of foreign nationals and with the effect of Covid-19 the clientele reduced. The Respondent's loss of employment was in actual sense, constructive termination triggered by Covid-19 pandemic. The Respondent should not be blamed for acts which were beyond its control. The Employment contract was frustrated with no fault to either party. The

Appellant raised the defence of force Majeure and only conceded to unpaid salary for February,2020 and March, 2020; leave days if any and one month salary in lieu of notice all subject to tax and or as provided for under Section 49(2) of The *Employment Act*, 2007. In the case of Firimbi t/a Sinai Hotel v Imungu (Appeal E131 of 2024) KEELRC 1283 (KLR) (6 May 2025) (Judgment) Neutral citation: [2025] KEELRC 1283 (KLR) the Court observed; Firstly, given that this is the initial appeal, this Court must reconsider and re-evaluate the evidence and materials presented before the Trial Court, arriving at its own independent findings and conclusions. This position is articulated in detail in the case of Selle vs Associated Motor Boat Co.[1968]EA 123; see also Abdul Hameed Saif vs Ali Mohamed Sholan [1955]22 E.A.C.A.270 where the Court held that: "An Appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955),22 E.A.C.A.270)". The Court in the Firimbi t/a Sinai Hotel v Imungu (Appeal E131 of 2024) (supra) The Court in this case while setting the judgment observed that the Learned Trial Magistrate didn't consider the pivotal evidence - the minutes. Had she, she would have appreciated that the Claimant deliberately and willingly walked out of her employment relationship. The second Respondent's Claim number E476 of 2021 Francis Madahama Zakayo v News Café Kenya t/a Vibe Nairobi Limited, (pages 50-84 of the Record) shares similar evidence with the 1st Respondent. It was the 2nd Respondent's evidence of being aware of the Government restrictions and lockdown due to Covid-19 and Appellant's closure of 3 other outlets of the Appellant, in his Witness Statement as his evidence in chief that he was terminated on 23rd March 2020, refer to paragraphs 10,11,12,14,15,16,17,18,19 24,27and 28 (pages 57 to 59 of the Record). 32. The Appellant had denied all aspects of the 2nd Respondent's Claim and stated that the 2nd Respondent absconded duty and further denied claim double rate for 41 public holiday days. The 2nd Respondent was paid full salary for that month when the holiday fell due- meaning one half of the double rate was paid during that end month, thus the remaining one half. Therefore, only 41 days rate was payable. The rest of the claim was disputed. The Appellant stated in its evidence in-chief that the 2nd Respondent was employed on yearly contract and rose to management position of Supervisor, he absconded duty and therefore constructively terminated the contract. The 3rd Respondent's Claim MCELRC/ E 477 of 2021 Loise Wangari Njoki –vs News Café T/A Vibe Nairobi Limited. The 3rd Respondent's Claim and Witness Statement both dated 22nd March, 2021 were adopted during the hearing as evidence in chief. While the Respondent's Defence dated 7th April, 2021 and Witness Statement dated 11th November, 2022 were adopted during the hearing as evidence in chief. The Appellant disputed the whole claim except the one annual leave days, salary for February,2020 and March, 2020. The rate of overtime and public holidays one segment were paid during the respective monthly salary when they fell due except one half thereof; therefore, the computation follows the same trajectory of the previous cases. The 3rd Respondent was not declared redundant as the termination was effective from the date of Government declared lockdown on 23rd March, 2023. 37. The closure by government and restrictions on movement rendered the opening and running the business impossible. All the Respondents admit that they were terminated and not separation through redundancy and have all attached the notification by the employer. This was constructive termination or force majeure.

23. In Tamarindi Management Limited v Gatheru (Employment and Labour Relations Appeal E021 of 2023) [2025] KEELRC 2110 (KLR) (18 July 2025) (Judgment) Neutral citation: [2025] KEELRC 2110 (KLR) The main issue in this appeal is whether the respondent's employment contract was

terminated on account of frustration. The appellant employed the respondent for 20 years until 4th June 2020 when it terminated the contract with a notice of one month citing frustration occasioned by the Covid-19 Pandemic. The respondent led suit alleging unlawful termination on account of redundancy. The Court concluded that the Management had the prerogative to continue with the operations or otherwise thus it was redundancy. The Supreme Court of Kenya has delved to define Frustration of contract and Termination of contract by Force Majeure; in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology (Petition E001 of 2024) [2024] KESC 74 (KLR) (6 December 2024) (Judgment) Neutral citation: [2024] KESC 74 (KLR) The respondent issued a notice to terminate its lease with the petitioner citing financial constraints from Government policy changes and the covid-19 pandemic. Aggrieved, the landlord claimed rent for the unexpired term. The court noted that the respondent had pleaded frustration, not force majeure, and that absence of a force majeure clause barred its application. The court highlighted the nature and distinction between an act of God, force majeure and the doctrine of frustration in contracts. The court further found that financial hardship alone, even stemming from the covid-19 pandemic, did not automatically discharge a tenant's rental obligations. Land Law – leases – termination of leases – doctrine of frustration - whether the covid-19 pandemic constituted a frustrating event, that would discharge a tenant's rental obligation - whether a landlord could claim rent for the unexpired term of a lease where a tenant vacated the premises without mutual agreement - *Land Act* (cap 280), section 57(1) (a) and (b). Contract Law – termination of contracts – grounds of termination of contracts - act of God, force majeure and frustration - distinction between an act of God, force majeure and frustration - principles under the doctrine of frustration - whether self-induced frustration could be relied upon to terminate a contract under the doctrine of frustration - whether it was mandatory to include a force majeure clause in a contract for it to apply. Words and Phrases - act of God – definition of act of God – an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight - Black's Law Dictionary, 11 th Edition, page 43. Words and Phrases - force majeure – definition of force majeure – an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (for example floods and hurricanes) and acts of people (for example riots, strikes and wars) force majeure clause – a contractual provision allocating the risks of loss if performance becomes impossible or impracticable especially as a result of an event or effect that the parties could not have anticipated or controlled - Black's Law Dictionary, 11 th Edition, page 788. Words and Phrases – frustration – definition of frustration – the prevention or hindering of the attainment of a goal, such as contractual performance - commercial frustration; an excuse for a party's non- performance because of some unforeseeable and uncontrollable circumstance, also termed economic frustration – self-induced frustration; a breach of contract cause by one party's action that prevents the performance, the phrase is something of a misnomer since self-induced frustration is not really a type of frustration at all but is instead a breach of contract - temporary frustration; an occurrence that prevents performance and legally suspends the duty to perform for the duration of the event. If the burden or circumstances is substantially different after the event, then the duty may be discharged – contracts; the doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated, also termed frustration of purpose - Black's Law Dictionary, 11th Edition, page 812.

24. The Claimant have sought relief under Section 40 of The *Employment Act*, 2007. The Respondent contends that there was termination of employment due to Covid19 pandemic and particularly the Government directive on lockdown and restricted movement. It is submitted that the Respondent has demonstrated that from the onset of Covid19, the Hotels, eating places business which is the role business of the Respondent received the blunt of the pandemic and the declaration of the lockdown

killed the business where three (3) outlets were completely closed and staff sent away on unpaid leave. All the Claimants have acknowledged the notice of 23rd March, 2020 by the Respondent's Managing Director. It is therefore safe to conclude that there existed circumstances which made the management to offload the staff. The Respondent genuinely believed the financial position was not going to ease or to recover and advised the Claimants to resign. This is a case of constructive termination triggered by the Government lockdown and restrictions under Covid19 Management rules and therefore no blame should be placed upon the Respondent. Under Section 43(2) of The *Employment Act*, 2007 "43(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" As held in the case of Court of Appeal No. 184 of 2015 Muthaiga County Club v Kudheiha Workers....., the Court held that S.47(5) of The *Employment Act*, 2007 is satisfied when the employer justifies the grounds of termination. In the case of Meshack Auta Ongeri v Nyamache Tea Factory Limited [2019] eKLR (ELRC Cause No. 68 of 2018- Kericho); The Court was not shy to dismiss the claim. The Respondents had submitted on redundancy, yet the claims were based on constructive Termination or force majeure. The Court is urged to exercise its discretion and allow only the claims/items admitted by the Appellant. In Kenya Revenue Authority v Reuwel Withaka Gitahi & 2 others [2019] eKLR, Civil Appeal No. 664 of 2017; The Court of Appeal held that, "the standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that its 'genuinely believed to exist 'causing it to terminate the employees 'service.

The Respondent's submissions

25. In the case of Meshack Auta Ongeri v Nyamache Tea Factory Limited [2019] eKLR (ELRC Cause No. 68 of 2018- Kericho); The Court was not shy to dismiss the claim. The Respondents had submitted on redundancy, yet the claims were based on constructive Termination or force majeure. The Court is urged to exercise its discretion and allow only the claims/items admitted by the Appellant. In Kenya Revenue Authority v Reuwel Withaka Gitahi & 2 others [2019] eKLR, Civil Appeal No. 664 of 2017; The Court of Appeal held that , "the standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that its 'genuinely believed to exist 'causing it to terminate the employees 'service.at paragraphs 6 and 7 at pages 129 and 132 of the record of appeal, "The staff were issued with a notice of closure due to lockdown and the slow resumption of opening up eating places and hotels, the costs were unsustainable and hence released the staff. The Government lockdown order was effected from 23rd March 2020. The Covid-19 pandemic had its effects way back to December 2019 and business went down and resulting to salary arrears from February and March, 2020." From the foregoing, there's no iota of evidence has been tendered to show that the Appellant pleaded force majeure. The trial court considered all the Respondent's arguments and stated as follows at paragraphs 30 and 32 at pages 185 and 186 of the record of appeal, "The Respondent urged the court to find that the Respondent genuinely believed to exist an adverse economical/financial condition leading to the lay off...In the instant case, the Respondent has not submitted evidence like financial statements showing that they were undergoing financial constraints due to covid 19. In absence of these documents, it is impossible to justify that indeed they shut down their business due to financial challenges arising from covid 19. We humbly submit that if the Appellant was experienced frustration of the contract, it was at liberty to cite provisions of the contracts or provisions of the *employment Act* such as, section 43 and 45 in its notices to the Respondents which it did not do rendering the Respondents termination unfair. It cannot be allowed to rely on frustration of the contract or force majeure. The Court of Appeal decision in Five Forty Aviation Limited v Erwan Lanoe [2019] KECA 763 (KLR) is instructive in this respect. The Court of Appeal declined the appellant's claim of frustration of contract and stated as follows at page 5, "In

light of the above, it is our finding that the appellant's failure to either invoke the binding clause 9 procedures in the contract itself or alternatively to invoke the sections 41, 43 and 45 procedures in the *Employment Act* 2007 rendered the termination of the respondent's contract with them not only unfair but also unlawful cannot be faulted. It is affirmed." The position in Five Forty Aviation v Erwan Lanoe has been upheld by the Supreme Court in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR) at paragraph 96 where the supreme court faulted the party alleging frustration of the contract for failing to cite the clause of the contract in the notice and provisions of law thus making the termination unlawful. With regard to the appellant's argument that the court should have considered force majeure, we respectfully submit that the same was neither pleaded nor was it provided for as a clause in the Appellant's employment contracts issued to the Respondents. Therefore, a party cannot rely on force majeure clause which is not supported by the contract. The Supreme Court in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR) noted that there is a distinction between frustration and force majeure and both instances they ought to be pleaded in trial court's pleadings. For force majeure to be considered there must be such a clause within the contract. The Supreme Court observed as follows at para. 62, "Force Majeure applies to contracts excuse further performance due to natural disasters and human caused events such as wars or strikes that prevent a contract from being fulfilled. It must be written into the contract, specifying what kind of events would apply." None of the Appellant's contracts with the Respondent ever provided for a clause of force majeure and as such, the same cannot apply. No evidence was advanced to the contrary. Further, the Appellant's notices to the Respondents did not invoke the termination clause or sections 43 and 45 of the *Employment Act* to discharge the appellant. We humbly submit that the Appellant has not demonstrated how the trial court erred in law in this respect. We, pray that ground 3 of the Memorandum of Appeal be dismissed and the trial court's decision be upheld.

Decision

26. The ground of appeal was as follows-

    a. The Honourable Magistrate erred in law by failing to appreciate the mitigating factors in respect to the circumstances under Covid- 19, which necessitated the cessation of the service contract.

27. The claimant in MCELRC E475/2021 pleaded that the appellant terminated their employment unfairly under the guise of COVID-19. The claimant had been sent home on 23rd March 2020 under COVID restrictions. The restrictions were lifted on 27th April 2020 by the government and limited operation from 5am to 4pm. The branch where he was stationed at Sarit Center had been operational, but he was not recalled, and he continued to be under unpaid leave. In defense, the appellant pleaded Force Marjorie COVID-19 pandemic. It said that COVID-19 led to massive layoffs and closure of 3 of the appellant's branches as they could not sustain the business. The appellant contended that it paid salary for February and March 2020 and were willing to pay ex gratia to cover notice due to the abrupt closure by the government. The trial court held as follows- 'The Respondent urged this court to find that the Respondent generally believed to exist an adverse economic/financial condition leading to the layoff.

    31. To this, the Claimants rightfully cited the case of Ben Murage Njogu v Ramani Warehouse Limited [2021] e KLR where the Employment & Labour Relation Court observed as follows at paragraphs 22 to 23:"There would have to be some other reasons therefore, to justify sending the Claimant on unpaid leave. Covid-19 does not sell. It has not been shown to have affected the Claimant adversely. There is evidence showing that the Respondent has continued to

employ, and import human resources from India. While it is appreciated that Covid-19 has impacted negatively on the global economy, not every business has been so affected. Some businesses have thrived in adversity. The Respondent has not shown that it is one of the businesses that have been adversely affected by Covid- 19. It has not exhibited its financial statements, showing how its performance has been affected by Covid-It is not enough to make bare statements about business loss attributed to Covid-19. There is definitely no factual basis to link the decision of the Respondent, sending the Claimant on indefinite and unpaid leave, to Covid-19. It not explained why the Claimant was singled out."

32. In the instant case, Respondent has not submitted evidence like financial statements showing that they were undergoing financial constraints due to Covid-19. In absence of these documents, it is impossible to justify their assertions that indeed they shut down their business due to financial challenges arising from Covid 19.

33. To this extent, I find the termination to be irregular and unlawful.'

28. The court agreed with the Trial Court that this was not a case of constructive dismissal as the employees were waiting to return to work. The defence was that work was not available and that amounted to redundancy. The court upheld the decision of the trial court in finding this was a case of redundancy. The trial court, for lack of proof, held that the reason for financial constraints based on COVID-19 pandemic was not proved for lack of documents, thus no valid reason for the redundancy. In the Ben Murage Njogu case relied on by the Trial Court, the court found that the defence of business financial constraints based on COVID-19 pandemic could not apply as there was evidence before the trial court that the business continued to employ and import human resources from India. The court finds that in that decision the lack of documents on financial constraints was not the only basis of rejecting the defence of force majeure COVID-19 pandemic. In the instant case, the defence witness led evidence that it closed three of its branches. This was not contested by the respondents. Closure of business branches on its own, is prima facie evidence of business scaling down and of business financial constraints. During cross-examination, Hassan(PW1) confirmed that the ADLIFE branch closed in 2020 due to rent arrears. He confirmed his branch was closed. Zakayo (PW2) said he was not paid and that was what he was claiming. Njoki (PW3) said her services were terminated on 22nd March 2020. RW1 on cross-examination said the business closed due to COVID-19 pandemic but they did not issue notice to labour office. The court finds that the reason based on business financial constraints caused by COVID-19 pandemic (a force majeure) was proved on a balance of probabilities before the trial court. The only issue was the failure by the appellant to comply with redundancy procedure under section 40 of the *Employment Act*- '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." There was no compliance with the foregoing section 40, the procedure for termination was flawed, and thus the termination is upheld as unfair on account of lack of procedural fairness.

Whether the respondents were entitled to the relief sought.

Appellant's submissions

29. Except claims acknowledged by the Appellant; all the 3 Respondents have not proved their case to justify the prayers sought; namely,

(i) Service Charge for the months of February 2017 to March 2020 @7,500per month x 38 months Kes.285,000.00. Not provided for in the contract of service and no defined criteria, it is speculative to say the least and time barred.

(ii) Overtime for days worked between May 2015 to March2020 for all the 3 Respondents. The 1st and 2nd Respondents were managers.

(iii) Overtime for public holidays worked between May 2015 to march 2020.

(iv) Service pay all the Respondents were members of NSSF.

(V) Compensation equivalent to 4 months salary for each Respondent was excessive in the circumstances.

(vi) Any payment to be subject to statutory deductions.

Therefore on the Claim number E475 of 2021 Abdraman UKiru Hassan, we submit in conclusion that the 1st Respondent was a manager and hence no overtime or public holidays payable. The separation having been triggered by Covid-19 pandemic, the Claimant could only be entitled to;

(i) Notice in lieu 1 month salary Kshs. 60,000.00

(ii) Unpaid salary for February,2020 and March, 2020 Kshs. 120,000.00

(iii) 45 days public holiday Kshs. 90,000.00

(iv) (i) - (iii) subject to statutory deductions as per Section 49(2) of the Act.

(v) Having been on yearly contract, no certificate of service to issue.

Total Kshs. 270,000.00 48.

For the Claim number E476 of 2021, Francis M. Zakayo – The Claimant absconded from duty, however, he is entitled to;

(i) Notice in lieu 1 month salary Kshs. 30,000.00

(ii) Unpaid salary for February,2020 and March, 2020 Kshs. 60,000.00

(iii) 41 days public holiday Kshs. 41,000.00

(iv) 10 leave days Kshs. 10,000.00 and subject to statutory deductions as per Section 49(2) of the Act. (vi) Having absconded duty less 1 month salary in lieu of notice Kshs.30,000;00

(vii) Being on yearly fixed term contract, no certificate of service.

Total Kshs.111,000.00

Regarding claim number E477 of 2021- Loise Wangari Njoki, was on contract service therefore entitled to :-

(i) Unpaid salary for February,2020 and March, 2020 Kshs. 36,000.00

(ii) Notice in lieu – 1 month salary Kshs. 18,000.00

(iii) Annual leave Kshs. 18,000.00

(iv) holidays/overtime 48 days Kshs. 64,000.00

(vi) Having been on yearly contract, no certificate of service to issue.

Total Kshs.136,000.00

Respondent's submissions

30. Compensation for unfair termination, -The trial Court awarded the Respondents only 4 months salary each instead of 12 months salary. This is not excessive considering that each worked for the Appellant for over 4 years from May 2015 to March 2020. Further, none of them contributed to their termination. We pray that the Honourable Court upholds the trial court's compensation of unfair termination award. Service Pay dues. The Respondents only claimed service pay for specific months when the Appellant failed to remit their NSSF dues. They all submitted their NSSF statements which were tendered in evidence at pages 45, 82 and 117 of the record of Appeal. The Appellant on the other hand never provided any 7 record to controvert the Respondents evidence that they were not paid service pay/ never remitted NSSF for the months claimed. The trial court at pages 189-190 of the record of appeal considered the evidence on record and its on this basis that it awarded the Respondents Service pay for the specific months when NSSF was never remitted by the Appellant. We pray that the honorable Court upholds the trial court's judgment with regard to this award of service pay.

31. Service Charge- The Respondents claimed service charge for February 2017 to March 2020 which was a term of in their contracts which entitled them to service charge. The Respondents furnished the Court with their Employment Contracts , in which it was a term of the contract that they were entitled to be paid service charge [Refer to the salary clause at pages 24, 26 and 111 of the record of Appeal). The Respondents payslips for 2015 and 2016 clearly indicate that they were paid service charge. The Respondent discontinued the payment of service charge arbitrarily from February 2017 without complying with section 10 of the *Employment Act*. Section 10(5) of the *Employment Act* No. 11 of 2007 provides that:-"Where any matter stipulated in subsection (1) [the employment contract] changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing." The Appellant never disputed the Respondents' claim for service charge in both its Defence dated 7th April 2021 and Witness Statement dated 11th November 2022. We are guided by the case of Justina Mutitu Nyaga v Kenya Civil

Aviation Authority [2017] eKLR, the Employment & Labour Relations Court at paragraph 67 stated as follows in relation to the procedure the employer is to follow when it contemplates changing contractual terms of an employee: "Any changes to the employment status must be in writing and communicated to the employee for the employees consent; the employer should keep such record, where there is a dispute filed in court, the duty is vested upon the employer to produce such work records." Similarly, in Kenya County Government Workers Union v Wajir County Government & another [2020] eKLR the Employment and Labour Relations Court at paragraph 23, 24 and 28 held that unilateral changes in salary of employees was a breach of fair labour practice under Article 41 of the 8 Constitution and proceeded to order the Respondents to pay the Petitioner's unlawfully varied salaries. The Appellant's assertions that the said dues are not provided in the contract are utter lies. The trial court considered the Respondents contracts and payslips which were furnished and the fact that the Appellant never disputed the same (refer to pages 187 and 188 of the record of appeal). We pray that the Honourable Court upholds the trial court's judgment. There's no basis that has been advanced to warrant disturbing of the trial court's judgement.

32. Overtime dues -The Respondents furnished the trial court with copies of their contracts which stated as follow regarding overtime: Overtime will be paid as follows: a. Overtime will be paid at one and half (1.5) the normal hourly rate for a normal day. b. Overtime worked gazetted public holiday will be paid at twice the normal hourly rate. The Appellant has omitted page 2 of Abdaraman Ukiru Hassan's contract page which provides for overtime. [Refer to page 24-25, 26-27 and 29-30 of the record of appeal which clearly show some pages are omitted]. As soon as we noticed this, we filed a supplementary Record of Appeal and brought the same to the attention/ leave of Court on 25th September 2025. [Refer to the Supplementary Record of Appeal dated 22nd September 2025]. It is unfortunate that the Appellant is attempting to steal the match by omitting pages of Respondent's omitted pages. The Appellant only provided an entire contract for Loise at pages 111-113 which has the omitted page 112 which is word for word similar to those of Abdaraman. The above notwithstanding, the trial court analysed the evidence on record and noted that the Respondents contracts had clauses providing for overtime. The Respondent Abdaraman Ukiru Hassan claimed overtime for 80 normal days worked and 45 public holidays pursuant to his contract. He further furnished the court with the Respondent's muster roll and leave form (refer to page 46-47 of the record of appeal). As with regard to Francis Madahana Zakayo, he sought for overtime for 41 public holidays pursuant to his contract. He furnished the Court with the Respondent's muster roll 9 [refer to page 83 of the record of appeal]. As for Loise Wangari Njoki, she sought overtime for 16 normal working days and 48 public holidays. The Appellant did not dispute the fact that the Respondents were owed overtime. The only defence it advanced was against Abdaraman that he should not be paid overtime because he was a manager. Further, during cross examination, the Appellant's witness admitted that the Appellant owed the Respondents overtime but only disputed the amount they were to be paid. [Refer to page 173 of the record of appeal]. The trial court at pages 188 and 189 of the record of appeal analysed the evidence on record and noted that the Appellant's witness admitted that the Respondents are owed overtime but only disputed the amount. The court further took note of the Appellant's written submissions at page 160 to 161 of the record of appeal where the Appellant agreed to pay the Respondent Abdaraman 45 days public holidays despite arguing that he was a manager and was not entitled to be paid overtime for public holidays. The Court also noted that the Appellant had also agreed to pay Francis 41 days public holidays and Loise 48 public holidays. Further the Court also went ahead to look at the Appellant's form and muster roll which all confirmed that the Respondents were owed overtime. [Refer to pages 188-189 of record of appeal]. That only Abdaraman Ukiru Hassan was a manager. The other Respondents were NOT managers and the Appellant did not controvert this by bringing its records. Further, the Respondents furnished the Court with copies of their contracts which are not in dispute. Under the overtime clause the contracts states: Overtime will be paid as follows: a.

Overtime will be paid in one and half (1.5) the normal hourly rate for a normal day. b. Overtime worked in gazetted public holidays will be paid at twice the normal hourly rate. With regard to Abdaraman Ukiru Hassan, we submit that despite being a manager, his contract with the Appellant categorically stated that he is entitled to be paid overtime thus the Appellant bound itself to pay overtime. In the case of Onesmus Irungu Kamau v Faulu Micro-Finance Bank Limited [2017] at paragraph 17 states as follows: "The Claimant was a Branch Manager. His contract stipulated that the nature of his work may require some variation and extension of the normal working hours. He was expected in plain language, to manage his time, to fit the nature of his work as Branch Manager. His contract did not provide for overtime pay. It is not proper for a Branch Manager to assume that overtime regulations applicable to a certain cadre of Employees under the Regulation of Wages Orders [Section 63 [2] of the *Labour Institutions Act* 2007], can apply with regard to Managers. The Wages Orders are meant to protect lower cadre Employees. Bank Managers have the bargaining strength to negotiate their terms and conditions of employment with their Employers. If overtime should be paid to a Manager, it should be captured in his negotiated contract." Based on the foregoing decision, we pray the Honourable Court upholds the trial court's award for overtime for Abdaraman in which he furnished the Court with the Appellant's form and muster roll which all confirms that he is entitled to be paid overtime for 80 normal days worked and 45 public holidays. With regards, Francis Madahana Zakayo and Loise Wangari Njoki, they were not managers. Their cadres are protected under the Wages (General) Order. Further, their contracts filed in court indicate that they were entitled to overtime. Similarly, they furnished the court with the Appellant's muster roll which clearly indicates that they are owed overtime. Also, the Appellant's witness, Joash Okombo, admitted that the Appellant owed Francis 41 public holidays and Loise was owed 16 normal working days and 48 public holidays. The Appellant has not disputed these facts in the Appeal as well as in its submissions before the trial court at pages 160 and 161 of the record of appeal. With respect to employees who are not managers, their overtime dues are regulated by Regulation 6 of Wages (General) Order provides how overtime should be calculated in the following terms: Overtime shall be payable at the following rates— (a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate; (b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate; the Appellant's contracts with the Respondent have adopted the same provisions for overtime as the Wages (General) Order. We pray that the Honourable Court upholds the trial Court's judgement with regard to the award of overtime. Further, the Appellant never tendered any records/ evidence to controvert the Respondents' case. It is now trite law that if in any legal proceedings an employer fails to produce employment records, the burden of proving or disapproving an alleged term of employment shall be on the employer. In Jackson Muiruri Wathigo t/a Murtown 11 Supermarket v Lilian Mutune [2021] eKLR the Court of Appeal at paragraph 24 and 27 of its judgment held that the employer is the custodian of employment records in the following terms: "...Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*... In light of the fact that the appellant failed to produce evidence on the terms of the respondent's engagement as envisioned under Section 10(7) of the *Employment Act*, we, like the ELRC, are inclined to accept the respondent's version..." We therefore pray that the Honourable Court finds that the Appeal lacks merit and the same be dismissed with costs to the Respondents.

Decision

33. The court has held that the reason for redundancy was justified. The procedure under section 40 of the *Employment Act* was not complied with and the respondents were thus entitled to all entitlements under section 40 of the *Employment Act*. The issue of compensation for unfair termination, the reason

being justified, is reduced to 1 month's salary. The award of 4 months is set aside and substituted with 1 month's salary for each of the respondents.

34. Under section 40 of the *Employment Act*, the respondent were entitled to 1 month notice and the same is awarded.

35. The unpaid salary is not in dispute and is upheld.

36. The public holidays claim is not disputed and is upheld.

37. The claim for overtime was disputed on appeal due to the allegations that 2 of the claimants were managers. The court found evidence that Hassan was a manager. The overtime is for workers paid minimum wages. The award of overtime for 80 days worked between may 2015 to march 2020 (normal minimum hourly rate x 1.5 x number of hours worked daily x 80 days= 271.49x 1.5 X 8 1/2 X Kshs. 276,919.80 is set aside.(Mbogo v Shah)

38. The following were dues under section 40 of the *Employment Act* –'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.''The 1 month notice is upheld. The court finds that severance pay was due under section 40 of the *Employment Act*. The trial court erred in not awarding the same. The same is awarded as per the claims. Service pay was not payable as the claimants were under NSSF pursuant to section 35(6) of the *Employment Act*.

39. Service charge-The appellant submitted that the service charge rate was not justified. The court confirmed the submissions of the respondents as true that- The Respondents claimed service charge for February 2017 to March 2020 which was a term of their contracts which entitled them to service charge. The Respondents furnished the Court with their Employment Contracts , in which it was a term of the contract that they were entitled to be paid service charge [Refer to the salary clause at pages 24, 26 and 111 of the record of Appeal) The Respondents payslips for 2015 and 2016 clearly indicate that they were paid service charge. The Respondent discontinued the payment of service charge arbitrarily from February 2017 without complying with section 10 of the *Employment Act*. Section 10(5) of the *Employment Act* No. 11 of 2007 provides that:- "Where any matter stipulated in subsection (1) [the employment contract] changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing." The Appellant never disputed the Respondents' claim for service charge in both its Defence dated 7th April 2021 and Witness Statement dated 11th November 2022. In the case of Justina Mutitu Nyaga v Kenya Civil Aviation Authority [2017] eKLR, the Court at paragraph 67 stated as follows in relation to the procedure the employer is to follow when it contemplates changing contractual terms of an employee: "Any changes to the employment status must be in writing and communicated to the employee for the employees consent; the employer should keep such record, where there is a dispute filed in court, the duty is vested upon the employer to produce such work records." The court found that the sum of Kshs. 7500 was an average amount paid as a service charge before it was discontinued without consultation with the employees. The court found no basis to disturb the finding of the trial court on the award of service charge. (Mbogo v Shah).

40. Certificate of service was due under section 51 of the *Employment Act*, to wit- '(1)An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.'' The respondents had worked for more than 4 weeks and are entitled to certificates of service.

Conclusion

41. In conclusion, the appeal was partially successful on the basis of the court having found the redundancy reason was valid, but the process was unfair. The service pay was not due as the employees were under NSSF. The employees were entitled to severance pay under section 40 of the *Employment Act*. The Judgment and Decree of the Hon. W.K. Micheni (CM) delivered on 5th October 2023 in Nairobi MCLRC Nos. E475 OF 2021; E476 OF 2021; AND E477 OF 2021 is set aside and substituted as follows-

i) In MC.ELRC E475 of 2021-Abdaraman Ukiru Hassan v News Cafe Kenya T/A Vibe Nairobi Limited

a) A declaration that the Respondent's decision to place the Claimant on indefinite unpaid leave amounts to unfair termination;

b) Compensation for unfair termination(procedural unfairness) equivalent to 1 month's salary for the sum of Ksh 60,000 .

c) Notice pay (1 Month's salary). .Kshs. 60,000;

d. Unpaid salary for the months of February and March 2020.... ....Kshs. 120,000;

e. Service charge for the months of February 2017 to March 2020) @ 7,500 per month x 38 months.. Kshs. 285,000;

f. Public holidays pay between May 2015 to March 2020 (normal minimum hourly rate x 2 (twice) x number of hours worked daily x 45 days= 271.49 X 2 X 8 1/2 X Kshs 207,689.85;

g. severance pay - Severance pay for being held redundant @ 15 days for each full year worked ((60,000+26) x 15 x 4 years) = 2307.69x 15 days x 4 years..... .....Kshs. 138,461.40;

h. Interest at court rates on b), c), d), e), f) and g)above from the date of delivery of this judgment till payment in full;

i. Certificate of service

k) Cost of the suit;

ii) In MC.ELRC E476 of 2021-Francis Madahana Zakayo v News Cafe Kenya T/A Vibe Nairobi Limited

a. A declaration that the Respondent's decision to place the Claimant on indefinite unpaid leave amounts to unfair termination;

b) Compensation for unfair termination equivalent of 1 month salary for the sum of Kshs, 30,000

c) Notice pay (1 Month's salary)..... ...Kshs. 30,000;

d) Unpaid salary for the months of February 2020 and March 2020... ..Kshs. 60,000;

e) Service charge for the months of February 2017 to March 2020) @ 7,500 per month x 38 months... 285,000; .Kshs.

f) 41 public holidays worked between May 2015 to March 2020 (normal minimum hourly rate x 2 (twice) x number of hours worked daily x X 2 X 8 .....Kshs 94,610.78;

g) Severance pay for being held redundant @ 15 days for each full year worked ((30,000÷26) x 15 x 4 years) = 1,153.85 x 15 days x 4 years....Kshs.69231

h) Interest at court rates on b), c), d), e), f) and (g)above from the date of delivery of this judgment till payment in full;

i) Certificate of service.

1) Cost of the suit

iii) MC.ELRC E477 of 2021-Loise Wangari Njoki v News Cafe Kenya T/A Vibe Nairobi Limited

a) A declaration that the Respondent's decision to place the Claimant on Indefinite unpaid leave amounts to unfair termination;

b) Compensation for unfair termination equivalent of 1 month salary for the sum of Kshs. 18,000

c) Notice pay (1 Month's salary) ..Kshs. 18,000;

d) Unpaid salary for the months of February 2020 and March Kshs. 36,000;

e) Service charge for the months of February 2017 to March 2020) @ 7,500 per month x 38 months..... 285,000;

f) Overtime for 16 worked between May 2015 to March 2020 (normal minimum hourly rate x 1.5 x number of hours worked daily x 16 days= 132.10 x 1.5 x 8 1/2 x 16) ..Kshs 26,948.40;

g) 48 public holidays worked between May 2015 and March 2020 (normal minimum hourly rate x 2 x number of hours worked dally x 48 hours= 132.10 48 public holidays) .....Kshs. 107, 793.60;

h) Unpaid annual leave for the year 2019 @ salary..... 1 month....Kshs. 18,000;

i) Severance -Severance pay for being held redundant @ 15 days for each full year worked (18,000÷26) x 15 x 4 years) = 714.30 x 15 days x 4 years..Kshs. 42, 858.00;

Interest at court rates on b), c), d), e), f), g), h) and I)above from the date of delivery of this judgment till payment in full;

j) Certificate of service.

k) Cost of the suit.

42. The appeal was partially successful; the court ordered each party to bear its own costs.

. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – absent

Respondent –Respondent