REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 371 OF 2017

RACHAEL NJOKI KARANJA….....1ST CLAIMANT

CLARIS WAMBUI KARIUKI….....2ND CLAIMANT

WINIFRED WAIRIMU NDERITU…….....3RD CLAIMANT

VICTOR KIPLANGAT….....4TH CLAIMANT

NAHUM SYOMBUA MUTISYA…….....5TH CLAIMANT

ERIC MUTWIRI MBAYA…….....6TH CLAIMANT

-VERSUS-

KENYA AIRPORT PARKING SERVICES LIMITED…….....1ST RESPONDENT

PEOPLELINK CONSULTANTS LIMITED….....2ND RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide a memorandum of claim dated the 20th of February 2017, the Claimants sued the Respondents and sought the following Orders:-

a) For the 1st Claimant Kshs. 476,611.70

b) For the 2nd Claimant Kshs. 569,203.50

c) For the 3rd Claimant Kshs. 542,748.70

d) For the 4th Claimant Kshs. 476,611.70

e) For the 5th Claimant Kshs. 569,203.50

f) For the 6th Claimant Kshs. 569,203.50

g) Damages for unlawful detention, unlawful prosecution, unlawful termination, lost earnings and injured reputations.

h) Interest on all the above at court rates.

i) Costs of this claim.

j) Any other relief which this Honourable Court may deem fit and just to grant.

2. The Claimants in support of the claim filed their list of witnesses dated 20th February 2017; 1st Claimant's witness statement of even date; 6th Claimant's witness statement dated 17th November 2023; list of documents also even date with the bundle of documents attached; and supplementary bundle of documents dated 30th April 2025.

3. The 1st Respondent entered appearance through the law firm of Amuga & Company Advocates on 27th March 2017 and filed a response to memorandum of claim dated 29th June 2017. In support of their response, they filed a list of documents dated 29th July 2017 with the bundle of documents attached; and the witness statement of ANNE NABWIRE dated 21st

September 2021 which was later substituted with the witness statement of TED MICHAEL OTIENO dated 22nd October 2024.

4. The 2nd Respondent also entered appearance through the law firm of Paul Ndungu & Company Advocates on 9th March 2017 and filed a memorandum of defence dated 9th March 2017. The 2nd Respondent later filed a response to memorandum of claim dated 21st July 2021; list of witnesses of even date; and witness statement of GORETTI W. KIMANI of even date.

5. To counter the 1st Respondent's response, the Claimant filed a reply dated 11th September 2017, and a supplementary list of documents of even date.

Hearing and evidence

6. The claimant's case was heard on the 7th May 2025 with one witness, CW1 , Eric Mutwiri Nyaga, the 6th Claimant. CW1 had authority to plead dated 20th February 2017 of other claimants. He testified on oath and adopted as the claimants' evidence in chief his witness statement dated 17th November 2023. CW1 produced claimants' documents as evidence as follows- documents under list dated 20th February 2017 as C-exhibits 1-4, list dated 11th September 2017 C-exhibits 5, and list dated 30th April 2023 as C-exhibits 6-9. The witness was cross-examined by counsel for the 2nd respondents, Mr. Wanjohi and counsel for the 1st respondent, Mr. Amuga and was re-examined by his counsel.

7. The 1st respondent's case was heard on the 7th may 2025. The witness of fact was Ted Otieno who testified on oath and adopted as his evidence in chief his witness statement

dated 22nd October 2024 and produced as the 1st respondent's evidence documents under list of 29th July 2017 as 1st Respondent's exhibits 1-7. The witness was cross-examined by counsel for the claimant, Mr. Kamunya, and by counsel for the 2nd respondent, Mr. Wanjohi. He was re-examined by his counsel.

8. The 2n respondent's case was heard on the 3rd July 2025. The witness of fact was Goretti Kimani who testified on oath and adopted his witness statement dated 21st July 2021. The witness produced the outsourcing agreement signed with ethe 1st respondent as its only exhibit. The witness was cross-examined by counsel for the claimants, Mr. Kamunya and by counsel for the 1st respondent Mr. Amuga and re-examined by her counsel, Mr. Wanjohi.

The Claimant's case in summary

9. The Claimants' case is that they were employed by the 1st Respondent on diverse dates in the years 2012 and 2013 to the position of cashiers and stationed in the 1st Respondent's payment booths situated at the Jomo Kenyatta International Airport, Nairobi. The Claimants state that they were unlawfully classified as "Parking Attendants" and paid salaries of Kshs 15,200/= each, despite actually serving as cashiers whose duties included receiving incoming cash and issuing change to motorists on behalf of the 1st Respondent. The Claimant plead that they were underpaid since their salaries due and payable were Kshs 24,719.50 each, meaning that they were underpaid by Kshs 9,519.50 each.

10. On the status of the 2nd Respondent in relation to the Claimants, the Claimants state that the 2nd Respondent conducted the Claimants' employment interviews and were paid commissions from reh Claimants' first salary. Thereafter, the 2nd Respondent masqueraded as the Claimants

employer through whom their salaries were paid in an unlawful arrangement solely intended to deny the Claimants their rightful salary entitlements and allowances, and the relevant bodies the statutory deductions taken out of the Claimant's salaries.

11. Sometime in December 2013, officials from the Aviation & Airport Services Workers Union who had observed the illegalities perpetuated by the 1st Respondent offered to assist the Claimants and invited them to join the Union to enable them secure their legal and fair salary and house allowance entitlements. On 22nd February 2014, as the Claimants were in the process of joining the aforesaid Union, they and their colleagues were arrested and taken to the Police Station where they were accused of stealing. They were released on police bail and ordered not to go anywhere near the Respondents offices or booths.

12. The Claimants complain that they were never subjected to any disciplinary process by their employer and have never been paid their terminal dues nor been served with termination notices. The accusations of theft against the Claimants were invented by the 1st Respondent to prevent the Claimants from securing their entitlements and exposing the Respondents illegal dealings through the said Union.

13. The Claimants' seek the following:

a) 1st CLAIMANT

i.	Salary underpayment (15-6-2013 to 22-2-2014)	Kshs 76,156.00
ii.	1 month salary in lieu of notice	Kshs 24,719.50
iii.	1 month salary for annual leave	Kshs 24,719.50

iv. Salary for the month of February 2014 Kshs 24,719.50

v. Unpaid House allowance Kshs 29,663.20

vi. 12 months salary for unlawful termination Kshs 296,634.00

TOTAL **Kshs 476,611.70**

b) 2nd CLAIMANT

i. Salary underpayment (20-11-2012 to 22-2-2014) Kshs 142,792.50

ii. 1 month salary in lieu of notice. Kshs 24,719.50

iii. 1 month salary for annual leave Kshs 24,719.50

iv. Salary for the month of February 2014 Kshs 24,719.50

v. Unpaid House allowance Kshs 55,618.50

vi. 12 months salary for unlawful termination Kshs 296,634.00

TOTAL **Kshs 569,203.50**

c) 3rd CLAIMANT

i. Salary underpayment (2-2-2013 to 22-2-2014) Kshs 123,753.50

ii. 1 month salary in lieu of notice Kshs 24,719.50

iii. 1 month salary for annual leave Kshs 24,719.50

iv. Salary for the month of February 2014 Kshs 24,719.50

v. Unpaid House allowance Kshs 48,202.70.

vi. 12 months salary for unlawful termination Kshs 296,634.00

TOTAL **Kshs 542,748.70**

d) 4th CLAIMANT

i. Salary underpayment (15-6-2013 to 22-2-2014)	Kshs 76,156.00
ii. 1 month salary in lieu of notice	Kshs 24,719.50
iii. 1 month salary for annual leave	Kshs 24,719.50
iv. Salary for the month of February 2014	Kshs 24,719.50
v. Unpaid House allowance	Kshs 29,663.20
vi. 12 months salary for unlawful termination	Kshs 296,634.00
TOTAL	**Kshs 476,611.70**

e) 5th CLAIMANT

i. Salary underpayment (20-11-2012 to 22-2-2014)	Kshs 142,792.50
ii. 1 month salary in lieu of notice	Kshs 24,719.50
iii. 1 month salary for annual leave	Kshs 24,719.50
iv. Salary for the month of February 2014	Kshs 24,719.50
v. Unpaid House allowance	Kshs 55,618.50
vi. 12 months salary for unlawful termination	Kshs 296,634.00
TOTAL	**Kshs 569,203.50**

f) 6th CLAIMANT

i. Salary underpayment (20-11-2012 to 22-2-2014)	Kshs 142,792.50
ii. 1 month salary in lieu of notice	Kshs 24,719.50
iii. 1 month salary for annual leave	Kshs 24,719.50
iv. Salary for the month of February 2014	Kshs 24,719.50
v. Unpaid House allowance	Kshs 55,618.50
vi. 12 months salary for unlawful termination	Kshs 296,634.00

TOTAL **Kshs 569,203.50**

Respondents' case in brief

14. The 1st Respondent case is that the Claimants were not employees of the 1st Respondent, but of the 2nd Respondent. Further, they were not terminated from employment by the 1st Respondent, but by the 2nd Respondent. The 1st Respondent explains that the 2nd Respondent offers Recruitment Agency Services and describes itself as an agency that delivers a fully comprehensive sourcing strategy that covers standard forms of sourcing as well as innovative solutions to ensure that their clients are attracting the most suitable candidates in the market. Around the year 2012-2014, the 1st Respondent made a strategic business decision to engage an external workforce to undertake the task of collecting sales from users of carparks, and on that basis, the human resource services were outsourced to the 2nd Respondent on the terms and conditions that were agreed in the contract between the parties. As part of the contractual arrangement, the 2nd Respondent was responsible for recruiting and retaining competent, talented, honest and dedicated staff to enable the 1st Respondent meet its service delivery objectives. Given that the 2nd Respondent was fully responsible for recruitment and retention, it exercised all powers and functions relating to the employer-employee relationship including but not limited to paying their salaries and taking disciplinary measures against the external workforce.

15. The 1st Respondent states that the 2nd Respondent billed them in bulk for the services rendered. For example, on 25/8/2013, the 2nd Respondent raised an Invoice for KES. 1,655,943 which was paid on 29/8/2013. Similarly, on 27/03/2014, the 2nd Respondent raised

an Invoice for KES. 1,006,480.00 which was paid by the 1st Respondent. It is presumed that the 2nd Respondent applied some of the funds towards remuneration of the claimants.

16. The 2nd Respondent maintained its own payroll for its employees including the Claimants. In the event the 1st Respondent found an employee of the 2nd Respondent to be engaged in any acts of impropriety or indiscipline, it would alert the 2nd Respondent who would take disciplinary action against the said employees in accordance with its own internal processes. Where such a process led to termination of the employee's contract of employment, the employee would be replaced at the instance of the 2nd Respondent.

17. On the 2nd Respondent's part, they confirm that in 2012, they entered into an outsourcing agreement with the 1st Respondent whereby they would provide Parking Attendants to the 1st Respondent at an agreed fee. Recruitment of staff was therefore carried out by the 2nd Respondent. It was agreed that the staff would work under the direction and supervision of the 1st Respondent; who would also provide the job description of each staff, training on their roles, set the targets and standards of performance of the staff, among other duties.

18. Pursuant to the agreement aforesaid, at the specific request of the 1st Respondent, the 2nd Respondent recruited and hired out parking attendants to the 1st Respondent. The rate set by the 1st Respondent was Kshs. 19,000/- per employee per month. This sum included the salary of the employee, statutory deductions, fidelity cover and the 2nd Respondent's service fee. After these deductions, each employee would earn a gross salary of Kshs. 15,200/- per month. The 2nd Respondent invoiced the 1st Respondent monthly on the 5th day of every month following a confirmation by the 1st Respondent of the employees who served/attended work

in that particular month. From the payments received from the 1st Respondent, the 2nd Respondent would prepare pay slips for each employee and then pay their salaries.

19. The 2nd Respondent states that the Claimants herein were some of the staff outsourced to the 1st Respondent though similar contracts. Their contracts of employment expressly provided that they were employees of the 2nd Respondent, but outsourced to the 1st Respondent. With respect to the alleged unfair termination, the 2nd Respondent states that neither the Claimants nor the 1st Respondent informed the 2nd Respondent as the employer of the Claimants that they had been dismissed. According to Clause 4 (f) of agreement between the 2nd Respondent and the 1st Respondent, the 1st Respondent was required to provide the 2nd Respondent with performance feedback on the employees; and Clause 3 (d) required the 2nd Respondent to replace any non-performing employee within 48 hours of notice by the 1st Respondent.

20. Contrary to the said clauses, the 1st Respondent did not raise any complaint on the performance of the Claimants. They also did not report any arrests on suspicions of theft in order for the 2nd Respondent to take steps to recover the money either from the staff or from the insurance company with which the 2nd Respondent maintained a fidelity cover pursuant to Clause 4 (h) of the agreement between the parties. The circumstances of the case were that the names of the Claimants were missing from the monthly work attendance sheets for the month of February, 2014, and therefore not entitled to receive their salaries. Without any report from either the Claimants or the 1st Respondent of the termination, the only inference the 2nd Respondent could have drawn was that they had either absconded work or voluntarily resigned. In fact, the 2nd Claimant herein returned to the 2nd Respondent's office and was

successfully placed with another company, but did not disclose that they had been terminated or charged in court by the 1st Respondent.

21. On the alleged under-payment, the 2nd Respondent states that the Claimants were employed as Parking Attendants and therefore the salary they received was the legal wage as per their job descriptions. They also clarify that the job description and the wages were set by the 1st Respondent as per Clause 5 of the Outsourcing Agreement on Pricing and Payments, and Appendix 2 which stipulated the fee payable to the 2nd Respondent, which was inclusive of wages, statutory deductions, fidelity guarantee and service fee. The 2nd Respondent was therefore under an obligation to pay the wages set by the 1st Respondent.

22. It is averred that the agreement between the 2nd and 1st Respondents was in July 2014 mutually terminated upon the 2nd Respondent fully automating its parking services. Upon receipt of the termination notice, the 2nd Respondent recalled all its staff and got them job placements elsewhere or declared them redundant.

23. The 2nd Respondent denies that the Claimants were recruited into the Kenya Aviation & Airport Service Workers Union for the reason that any recruitment to join the Union would have been through the 2nd Respondent as the employer of the Claimants. No union recognition agreement was presented to the 2nd Respondent on behalf of the Claimants.

24. Finally, the 2nd Respondent denies being served with a demand notice by the Claimants prior to the filing of the suit.

DETERMINATION

Issues for determination

25. The claimant outlined the following as issues for determination in the suit –

a) Whether the Claimants were employees of the Respondents;

b) Whether Section 45 (3) barred 1st, 3rd and 4th Claimants from filing the complaint;

c) Whether the Claimants absconded and/or voluntarily resigned from duty;

d) Whether the Claimants were unlawfully dismissed/terminated;

e) Whether the Claimants are entitled to the reliefs sought; and

f) Who should pay the costs

26. The 1st respondent addressed the outsourcing arrangement and denied an employment relationship with the claimants.

27. The 2nd respondent outlined the following as issues for determination in the suit –

(a) Whether the 2nd Respondent terminated or is liable for the termination of the Claimants' employment;

(b) Whether the 1st Respondent exercised exclusive operational control over the Claimants and the disciplinary process;

(c) Whether the 2nd Respondent's lack of notice and participation in the disciplinary proceedings absolves it of liability for unfair termination;

(d) What relief, if any, the Claimants are entitled to and against the 2nd Respondent.

28. The court having heard the case and taking into consideration the submissions by the parties finds the issue for determination in the suit to be –

    a. Who was the employer of the claimants?

    b. Whether the Claimants were unlawfully dismissed/terminated;

    c. Whether the claimants were entitled to reliefs sought

Who was the employer of the claimants

Claimant's submissions

29. It is our submission that the Claimants were employees of the 1st Respondent. As stated in our Reply to the 1 Respondent's Response dated 11th September, 2017, the 2nd Respondent was merely the 1 Respondent's agent and/or factor as defined in Section 2 of the Employment Act. The same is also captured in paragraph 2 of 2nd Respondent's Response dated 21st July, 2021, where it avers that it "hired out" the Claimants to the 1st Respondent and that their terms, salaries, job description and duties were dictated and provided by the 1st Respondent and that as an "agent' it could only remit what the 1st Respondent paid. Further in her oral testimony in court, "DW2" Goretti Wanjeri Kimani stated that the "Employee Outsourcing Agreement" between the Respondents was a "corporate arrangement" and its contents were never brought to the attention of the Claimants. In paragraph 7 thereof, the agreement was said to be valid from 1st October, 2012 and listed the job title as "Parking Attendants"(an occupation unknown in Kenya's Employment and Labour Relations law) and yet, all the Six (6) Claimants, were as indicated in their Employment Contracts employed in the subsequent months of November, 2012, February and June, 2013, as "Cashiers" and worked in the 1t Respondent's cash payment booths situated at the JKIA as aforesaid and their sole duty was the collection of parking revenue, tallying and reconciling of the same. In paragraph 3 of the

Third Schedule of the Labour Institutions Act, the occupation of a "cashier" is defined among others as: "an employee who is employed in..... receiving incoming cash, issuing change.....and preparing cash for bank deposits...."indeed, as further stated in our Reply to the 1 Respondent's Response, the Outsourcing Agreement was unlawful, illegal and invalid in relation to the Claimants' employment and was an ill-attempt to cover-up the true and correct relationship between the parties. In Australia, these types of agreements are referred to as "Sham Arrangements" and are prohibited through the Fair Work Act, 2009 (see the case, Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR. The deliberate mistitling of the Claimants' occupation as "Parking Attendants" was without doubt intended to cause confusion and distance the 1 Respondent from the Claimants and their colleagues as well as Workers Unions at the Airport. Even though our Employment and Labour Relations law does not provide for the outsourcing of labour, in the case Wrigley Company (East Africa) Limited v The Attorney General and 2 others [2013] KEELRC 242, at paragraph 39 thereof, a three (3) Judge Bench of this Honourable Court did set the following four (4) key parameters for a credible outsourcing program. These are: "a) Ordinarily, employers are not expected to outsource their core functions; (Emphasis ours) b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees; c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise" It is our submission that the 1st Respondent could not overtly and lawfully outsource its “core function" and as its name clearly suggests, this function is solely the collection of parking

revenue on behalf of the Kenya Airports Authority (KAA) a wholly owned Public body. The company was obviously contracted to perform this critical function based on its apparent strong financial standing as indicated in its nominal share capital of Kshs 45,000,000/= and an extremely high paid-up value of well over Kshs 41,000,000/= (see the Company Record (CR12) in our "Exh 3") This financial strength and maturity (having been registered way back in the year 2000) no doubt enabled the 1st Respondent secure the lucrative contract as it provided security and confidence for KAA. However, contrast this to the 2nd Respondent, a then newly registered "family business" as indicated by "DW 2" in her oral testimony, and whose nominal share capital and paid-up value is a low Kshs 100,000/= (see the Company Record (CR12) in our "Exh 3") It is totally incomprehensible how the 1t Respondent could entrust its core function and pay millions of shillings in employee salaries (see the Revised Invoice dated 231d January, 2014 in the 1st Respondent's Exhibits) through a company whose total liability was the sum of only Kshs 100,000/= . Indeed, well aware of the unlawfulness of the covert "Employee Outsourcing Agreement" and upon whom liability would obviously befall, it is not surprising that in clause 3 (f) of the subject agreement, Respondents formally agreed that: The Consultant shall fully indemnify the Client from claims and demands of whatever nature arising from contractual arrangements between the Consultant and the employee" By the reading of the above clause, it is rather obvious that the Respondents had anticipated a multitude of complaints against the 1st Respondent. Also, it is noteworthy that it is the 1st Respondent alone who has produced some employment records pursuant to Section 74 of the Employment Act. Hence 1st Respondent was no doubt the superior employer and vicariously liable for the errors of its agent and as is stated by the Honourable Judges at paragraph 29 in the Wrigley case the facts of which are very similar to ours: "The relationship created between the Petitioner and the Interested Party by the impugned contracts was one of

an agent and his superior and inherently imported vicarious liability in any dealings between the parties and third parties. Vicarious liability is a common law doctrine of agency and in Latin is stated as respondent superior. It imposes upon the superior responsibility for the acts of the subordinate or, in a broader and more fitting sense as in this case, the responsibility of any third party which had the right, ability or duty to control the activities of a violator" (In this case, the "Petitioner", Wrigley Company (East Africa) Limited had outsourced some of its key functions to the "Interested Party" Sheer Logic Management Consultants Ltd) 20. Further, in the Charge Sheet in Criminal Case No. 393 of 2014 (“Exh. 2") the Claimants who were accused Nos. 5, 1, 4, 8, 9 and 7 respectively, were specifically charged with the offence of Stealing by Servant c/s 281 of the Penal Code. The particulars being that "...between 9th December, 2013 to 20th February, 2014, at Kenya Airport Parking Services Limited payment Stations in Jomo Kenyatta International Airport within Nairobi County, being a cashier of Kenya Airport Parking Service limited stole Kshs 217,440/= the property of Kenya airport parking services limited which came into her possession by virtue of her employment. (The amount of property alleged to have been stolen by each accused over the same period is specified) 21. That from the subject Charge Sheet, the property which they were alleged to have stolen belonged to 1st Respondent. Hence they were the "Servants" of their "Master" the 1st Respondent. There is no mention of the 2nd Respondent anywhere. 22. Also, it is noteworthy that the 1s Respondent alone, produced some employment records pursuant to Section 74 of the Employment Act. Hence 1s Respondent is without doubt the employer!

1st respondent’s submissions

30. The 1st Respondent filed a response dated 29th June 2017. The main defence raised by the 1st Respondent is that the 1st Respondent never employed the Claimants as alleged by them, or at all. The Claimants were employees of the 2nd Respondent and the 2nd Respondent

outsourced the Claimants to the 1st Respondent under an "Employee Outsourcing Agreement dated 1st November, 2012". On its part, the 2nd Respondent agrees, vide its response dated 21st July 2021, that it.....provided outsourcing services to the 1st Respondent and hired out employees to the 1st Respondent....., The law Section 3 (1) of the Employment Act, 2007 (the Act) states that "This Act shall apply to all employees employed by any employer under a contract of service". A contract of service is defined in Section 2 of the Act to mean "....an agreement, whether oral or in writing, and whether express or implied, to employ or to serve as an employee for a period of time..... And it is now settled law in Kenya, that outsourcing of labour, although not anchored on any statutory under pinning, is an acceptable labour practice. The evidence In their evidence, each of the Claimants produced a "CONTACT OF EMPLOYMENT" which contains the following provision:- "We are pleased to offer you this employment contract with Peoplelink Consultants Ltd.....seconded to KAPS Ltd, for a 6 month contract....." As can be seen from the above, the contracts of employment were between the Claimants and the 2nd Respondent, and each of the Claimants individually signed the contracts accepting the terms and conditions contained therein. In their evidence, both the 1st and 2nd Respondents confirmed that the Claimants were indeed employees of the 2nd Respondent at the time material to the claim herein. The 1st and 2nd Respondents also produced in evidence "Employee Outsourcing Agreement" by which the 1st Respondent contracted the 2ndRespondent to provide it with "Parking Attendants" pursuant to a labour outsourcing contract. In view of the clear evidence given by all the parties, including the Claimants themselves, confirming that the Claimants were indeed employed by the 2nd Respondent, the claim against the 1st Respondent is a non-starter. The 1st Respondent has been wrongly dragged to this court. In the case of Onchagwa v Coast Bottlers Limited & Another [2021] eKLR, this Court (Lady Justice M. Mbaru) held as follows: - "23.

On the question of who the employer was, the claimant submitted that he was employed by the 2nd respondent from 1st May 2011 to 1st November 2016. His case against the 1st respondent arose from the fact that he was working at its bottling plant. Indeed, as submitted by the respondents, outsourcing of labour, although not legislated in Kenya, is an acceptable labour practice. There is agreement among the respondents allowing the 1st respondent to outsource its non-core labour to the 2nd respondent. Under such an agreement, the 2nd respondent is the independent contractor. Under the agreement, the claimant was employed by the 2nd respondent. The claimant has admitted to this relationship from 1st May 2011 to 1st November 2016." And in the case of Masai Rolling Mills Limited -vs- Ongaki & another [2025] eKLR, this court (Abuodha, J) said the followings:- "31. The 1st Respondent's employment was not in question. The issue was- whether the employment relationship existed between the 1st Respondent and the Appellant or with the 2nd Respondent. The Concept of labour outsourcing as held in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, is that outsourcing services was an accepted business strategy. Murgor, JA. observed that; "Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs. From the record (p.58 of the Record of Appeal), the 1st respondent stated that from his Bank statements, it showed he was receiving salary payment from Barford Limited, the 2nd respondent herein and further that his NSSF statement showed his employer was the 2nd respondent but denied knowledge of the 2nd respondent. The claimant further stated in his witness statement before the trial court that he was employed on casual basis on from 12th April, 2017. The appellant's witness on the other hand stated (p.59 of the Record of Appeal) that the 2nd respondent came in 2016 when they

signed a labour outsourcing agreement. It therefore means that when the 1st respondent was hired, the outsourcing agreement was already in place. This corresponds with the 1st respondent's evidence in the lower court that his salary to his bank account and NSSF dues were remitted by the 2nd respondent. From the foregoing, it was therefore erroneous for the trial court to reach a finding that there was employer-employee relationship between the appellant and the 1st respondent....." In the instant case, all the Claimants agreed that their salaries were being paid by the 2nd Respondent. They also admitted that they signed employment contracts with the 2nd Respondent, and not the 1st Respondent. In the circumstances, the Claimants have no cause of action against the 1st Respondent.

2nd respondent's submissions

31. Goretti W. Kimani confirmed that the Claimants were employees of Peoplelink but were seconded to KAPS. She stated that training, supervision and daily operational control were wholly undertaken by KAPS. She emphasized that while KAPS could report offences to the police, the Outsourcing Agreement nonetheless required it to notify Peoplelink so that Peoplelink could take contractual or insurance-related steps. 19. This evidence mirrors the finding in Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Sameer Agricultural Livestock (K) Ltd & Another [2025] KEELRC 1976, where the Court held at paragraph 48: "The evidence shows that the 1st Respondent retained the power to set recruitment standards, determine workplace conditions, conduct security searches, and initiate disciplinary action. These are the hallmarks of an employer. The 1st Respondent cannot therefore distance itself from the obligations of an employer merely because the employees were deployed through an outsourcing agent. In law and in fact, the 1st Respondent was a co-employer." Applying this reasoning, the 1st Respondent was the true employer in fact,

retaining the powers of supervision and discipline, and must bear responsibility for the alleged termination.

Decision on issue 1

32. It was not in dispute that the claimants held employment contracts with the 2nd respondent(C-exhibit 1). The contract issued to Kiplgat Victor (4th claimant)was dated 7th June 2013, and it stated that it was an employment contract with Peoplelink Consultants Ltd as a cashier seconded to KAPS Ltd for a 6-month contract. It provided for payable salary, position and statutory deductions. It also provided for duties and disciplinary process, among others. It also provided for termination. Victor accepted the contract on 13th July 2013. The claimants produced a payslip for the 2nd claimant. It was issued by Peoplelink Consultants Limited(C-exhibit 2). Further produced was bank statement of the 1st claimant which reflected salary remittance by the 2nd respondent. During the hearing the 1st claimant admitted she was issued with contract of employment by the 2nd respondent who also paid her salary. The 2nd respondent's witness was Gorreti Kimani . She was asked a specific question. ' You were the employer of the claimants? She answered yes. She confirmed that they recruited and seconded employees to the 1st respondent. She confirmed the 2nd respondent had record of the employees and so did the 1st respondent.

33. The court decides cases based on evidence placed before it to prove or disprove facts. The foregoing evidence disclosed that the 2nd respondent was the employer of the claimants. An employer is defined under the employment act as **employer***" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;''* It is the duty of the employer under section 9 of the

Employment Act to draw the contract of service to wit - *'9(2)An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)''* . Further it is also the duty of employer to pay wages as stated in section 17 of the Act- ' *Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya—'*. The 2nd respondent carried out all the foregoing roles and there was no doubt in the mind of the court 2nd respondent was the employer of the claimants. The Court of Appeal in *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR,* stated that outsourcing services was an accepted business strategy. Murgor, JA. observed that; *"Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.'* Consequently, the outsourcing agreement is held to have been a valid business management strategy and thus the 2nd respondent was the employer of the claimants under the said agreement. The court will not rewrite the contract between the parties as the 2nd respondent appeared to invite the court to find the 1st respondent was the actual employer. The 2nd respondent is declared as the former employer of the claimants.

Whether the Claimants were unlawfully dismissed/terminated;

claimant's submissions

34. Both in her statement and in her oral testimony, "DW2" Goretti Wanjeri Kimani who now described herself as a "Human Resource Consultant" averred that since the Claimants' names

did not appear in the February 2014 monthly work attendance sheets, and that since the Claimants had not notified them that they had been terminated or locked out from their places of work they concluded that the Claimants had either absconded from work or voluntarily resigned. The witness further wrongly averred, that the 2nd Respondent "had no obligation under the law to verify whether the Claimants had either absconded or resigned from duty" No resignation letters were produced and clearly no efforts were ever made to contact the Claimants as by law required. It is not enough for an employer to merely allege that an employee absconded. The employer is by law required to show steps taken to contact the employee who it alleges has absconded work. In the case Paul Opiyo Owudu v Digital Sanitation Services [2024] KEELR 917 (KLR) In paragraph 17, the Honourable Court held: “First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employee" The Honourable Court also referred to several other cases including Chrispine Okinyi Onguso v Devki Steel Mills Ltd [2018] eKLR and Albanus Mbithi Mutiso v Fresh Breeze Limited. Section 10 (2) (a) of the Employment Act requires communication to be made to an employee's last known address. It is our submission that vide paragraph 7 of their Contracts of Employment, the Claimants had each availed Three (3) written References from Two (2) family members and One (1) religious person, and had also provided a "sketch map of current residential address" yet no effort was ever made to contact them either directly or through their said referees. Hence the 2nd Respondent's claim that they had assumed that the Claimants' had absconded duty cannot stand. 26. As regards the alleged "inference" of "voluntary resignation" no

resignation letters nor any other communication from the Claimants was availed to support the same. Indeed, it should be noted that in her oral testimony "DW2" Goretti Wanjeri Kimani stated that the names of 24 Cashiers were missing from the February, 2014 monthly Attendance Sheet issued by the 1st Respondent. It defeats reason how a company claiming to be "the employer" can assume that a total of "its" 24 employees either absconded duty or voluntarily resigned on the same day! we do submit that the Claimants were without doubt unlawfully dismissed and/or terminated. As stated in the Memorandum of Claim, witness statements and the oral testimony in court by “PW 1” Eric Mutwiri Mbaya, the 6th Claimant herein, the Claimants were in the early morning of 22nd February, 2014, arrested in the presence of the Respondents' managers and taken to the JKIA Police Station where they were accused of stealing the 1stRespondent's cash. They were later released upon the payment of cash bail and ordered not to go anywhere near the Respondents' offices or booths and to put it in the witness's own words “tulifukuzwa" (we were chased). 28. Clearly the Claimants were never subjected to any disciplinary processes as by law required. The dismissal was both unlawful and unfair. In the case Paul Ooko Okoth vs. Chemilil Sugar Co. Ltd [2016] eKLR, the Claimant therein had been arrested and charged in court with the offences related to holding a fake Trade Test Certificate. He was later acquitted but dismissed without the conduct of a disciplinary hearing. While entering a finding that the Claimant's dismissal from Employment was unfair and unlawful, the Honourable Lady Justice Maureen Onyango stated thus: "... The procedure through which an employee may be validly terminated or dismissed is now well settled in the numerous jurisprudence of this Court as affirmed by several decisions of the Court of Appeal. There must be valid reason as provided in Section 43 of the Employment Act and the procedure must be fair as provided in Section 41 of the Act. In the present case there was no compliance with Section 41. The reasons for termination though

valid, were never proved through a fair hearing as the Claimant was never taken through any disciplinary process. He was arrested and arraigned in Court in a Criminal case in which the employer was the Complainant and was dismissed two days after being arraigned in Court for the very reasons that he was charged. The termination of his employment was therefore procedurally unfair" 29. Also, in the case, H. Young & Company (EA) Limited v Ng'eno [2022] KEELRC 14654 (KLR) Your Learned sister, Honourable. M Mbaru J, at paragraph 27 puts it thus: "In employment and labour relations, the right to a hearing before employment is terminated is sacrosanct. Whether the employee is of misconduct or gross misconduct, the motions of section 41 and 44 of the Employment Act, 2007 are mandatory that the employee must be issued with notice and allowed to make representations before employment is terminated however gross the misconduct is. Where the employer is unable to hear the employee on his representations, the reasons thereto must be given. Section 41(2) of the Act requires that; (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make. The trial court arrived at a proper finding that there was no notice issued to the respondent and he was not allowed a hearing and the claim for notice pay was justified."

1st respondent's submissions

35. As for the allegation by the Claimants that their contracts of employment were unlawfully terminated by the Respondents, we wish to further submit as follows:-

36. a) The 1st Respondent could not, and did not, terminate the Claimants' contract of employment because it was not their employer. b) The Claimants produced no evidence to prove their allegation that their contracts of employment were terminated by any of the Respondents. All they said was that they were arrested by Police on allegations of theft and that upon their release on Police bail, they were told by the Police not to go back to the Respondents' offices. c) No evidence was tendered by the Claimants to prove that they ever went back to their place of work, or even to their employer's offices, upon being released on police bail/bond.) The evidence on record confirms that the Claimants simply deserted work. They left on their own. As the Claimants' witness confirmed, they decided to first pursue the criminal trial before going back to their place of work. 15. In the case of Joseph Munene Murage -vs- Salome Ndung'u [2019] eKLR, this court (Maureen Onyango J) said the following in a similar case: - "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 employment or wrongful dismissal shall rest on the employer. It was thus the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof. Having failed to prove the existence of an employment relationship the claim has no leg to stand and must thus fail...." (underlining ours for emphasis). The claims made against the 1st Respondent relating to alleged salary underpayment, salary in lieu of notice, unpaid leave, unpaid house allowance, salary for February 2014 and 12 months salary for unlawful termination cannot arise. The claims have no legs to stand on. The claims cannot arise.

2nd respondent's submissions

37. The evidence of Ted Otieno is decisive. On cross-examination by Counsel for Peoplelink, he admitted that KAPS never issued notice to Peoplelink concerning the Claimants' arrests or termination, notwithstanding the obligations under Clause 2, 4(f) and 4(h) of the Outsourcing Agreement. He further conceded that although a fidelity guarantees existed, KAPS never invoked it. He also confirmed that no officer of Peoplelink testified in the criminal case. 22. This testimony is consistent with the criminal judgment, which makes no mention of Peoplelink's involvement. It also aligns with Mwiti's admission that he never informed Peoplelink of his arrest or arraignment. In The Wrigley Company (East Africa) Ltd v Attorney General & 2 Others [2013] KEELRC 242, the Court held at paragraph 29: "The contract between the 1st and 2nd Respondents was one of outsourcing. Such contracts inherently import the principle of vicarious liability, the doctrine of respondeat superior, whereby the person who has the duty, right and ability to control the work of another bears responsibility for that other's acts in the course of employment." At paragraph 30, the Court further cautioned: "The Court must refrain from rewriting employment contracts for parties. Where defects, illegality or breach are disclosed in outsourcing arrangements, the remedy is not to declare a new contract of employment but to hold the parties jointly and severally liable in damages, each according to their role in the arrangement." These authorities underscore that liability attaches only to the party with the duty, right and ability to control. In this case, that party was KAPS. Peoplelink had no notice, no participation and no control over the disciplinary process. It is therefore absolved of liability for unfair termination.

Decision on issue No. 2

38. The threshold for the determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '*45(2) A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

39. The burden of prove is as stated in section 47(5) of the Employment Act to wit- '*For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''* The facts of the case were that the claimants were arrested while at work at the 1st respondent's premises and ordered not to go near the respondent's premises or booths, that they were never subjected to a disciplinary process by the employer, and have never been paid their dues nor been served with termination notices. The claimants produced the charge sheet before the criminal court, which the court noted was a charge 'of stealing property of the 1st respondent, which came into their possession by virtue of their employment'. In the witness statement of RW2, she stated as the employer they were not aware of dismissal or lockout of the claimants by the 1st resident. She

contended that the claimants did not report to the employer of the arrest or lock out and their names were missing form work attendance and she concluded they absconded work.

40. During the cross-examination of Eric Mbaya(CW1) by the 2nd respondent's counsel, he stated the employment was not terminated, he was chased away and taken to police station, he was arrested at work place at JKIA at premises of the 1st respondent, he was arrested on complaint of the 1st respondent and added the 2nd respondent was aware. He stated both respondents complained to the police. CW1 said he did not inform the 2nd respondent of the arrest as they were aware. He confirmed one Kimani of the 2nd representative was around when he was chased away from work. On cross-examination by the counsel for the 1st respondent, CW1 told the court he did not go to the 2nd respondent's office after the release by the police as they were aware. He confirmed he never wrote a complaint to the employer or to the 1st respondent or labor and said he was waiting for the criminal case to end. The logical conclusion by the Court was that the claimants absconded work after the arrest.

41. On absconding from work, the employer had a duty to bring the employment relations to an end by compliance with the provisions of section 41 of the Employment Act. There was no compliance a fact which was not contested. The court found that the claimants were charged in court with a criminal offence which failed on technicalities. There was a valid reason for termination, being suspicion of stealing as per the charge sheet. The termination was procedurally unfair as the 2nd respondent, the employer, did not comply with the provisions of section 41 of the Employment Act by issuing notices to show cause to the claimants for having absconded duty .

Whether the claimants were entitled to relief sought

42. Compensation – on finding unfair termination, the court may award any or all of the reliefs under section 49 of the Employment Act- ‘ *49(1)Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*

(a)the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b)where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c)the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.’’ The court found the reason for termination was valid. The statutory procedure was not followed to terminate the employment. The court finds notice pay of **1 month's salary** was adequate compensation for procedural unfairness and is awarded to each of the claimants.

42. On claim for leave- no evidence was placed before the court by the 2nd respondent to effect that the claimants who worked for at least a year were each afforded statutory 21 days annual leave and the same is awarded for 21 days for each of the claimants.

43. Claim for salary for February 2014- The 2nd respondent produced an invoice for January only and said all invoices were paid. The invoice for the month in dispute, being February, was not produced. The court concluded the salary for February was not paid and the same is awarded to all the claimants.

44. Claim for underpayment – this was contested. The claimants relied on a contract of service to state they were employed as cashiers, hence underpaid in contravention with minimum wages orders. The agreement for outsourcing referred to parking attendants. The claimants were not parties to the said agreement. They were asked whether they were trained, and they said in customer care. The only relevant agreement in the dispute as regards position of employment is that between the employee and employer, which contract stated they were cashiers and not parking attendants. Cashier job is a regulated work under the minimum wages regulations. The claims for underpayment are awarded as sought.

45. On the claim for housing allowance, the prescribed minimum monthly salary is basic. Housing allowance at rate of 15% was due and is awarded as claimed.

Conclusion

46. The court finds that, save for notice payable by the employer, the other claims are jointly due against the respondents, taking into account the agreement for outsourcing under which the 1st respondent was invoiced for the underpaid wages. Judgment is entered for the claimants against the respondents jointly and severally save for Notice pay payable by the 2nd respondent only as follows-

1st CLAIMANT

a. Salary underpayment (1-7-2013 to 30-1-2014)- Kshs 54,967.60

b. compensation equivalent of 1 month salary in lieu of notice-Kshs 22,070.95

c. Unpaid Leave pay (7 months)Kshs 9,012.30

d. Unpaid 21 days salary for February 2014 Kshs 15,449.70

e. Unpaid Housing allowance (7 months)Kshs 23,174.55

2nd CLAIMANT

a. Salary underpayment (1-12-2012 to 30-1-2014)-Kshs 82,641.05

b. compensation equivalent of 1 month salary in lieu of notice-Kshs 22,070.95

c. Unpaid Leave pay (14 months)-..Kshs 17,234.10

d. Unpaid 21 days salary for February 2014-Kshs 15,449.70

e. Unpaid Housing allowance (14 months).-Kshs 44,315.85

3rd CLAIMANT

a. Salary underpayment (1-3-2013 to 30-1-2014)-Kshs 70,159.55

b. compensation equivalent of 1 month salary in lieu of notice.Kshs 22,070.95

c. Unpaid Leave pay (11 months)Kshs 13,846.00

d. Unpaid 21 days salary for of February 2014-Kshs 15,449.70

e. Unpaid Housing allowance (11 months)-Kshs 35,603.85

4th CLAIMANT

a. Salary underpayment (1-7-2013 to 30-1-2014)-Kshs 54,967.60

b. compensation equivalent of compensation equivalent of 1 month salary in lieu of notice-Kshs 22,070.95

c. Unpaid Leave pay (7 months)-Kshs 9,012.30

d. Unpaid 21 days salary for February 2014-Kshs 15,449.70

e. Unpaid Housing allowance (7 months)-Kshs 23,174.55

5th CLAIMANT

a. Salary underpayment (1-12-2012 to 30-1-2014)-Kshs 82,641.05

b. compensation equivalent of 1 month salary in lieu of notice-Kshs 22,070.95

c. Unpaid Leave pay (14 months).....Kshs 17,234.10

d. Unpaid 21 days salary for February 2014-...Kshs 15,449.70

e. Unpaid Housing allowance (14 months)-...Kshs 44,315.85

6th CLAIMANT

a. Salary underpayment (1-12-2012 to 30-1-2014)-Kshs 82,641.05

b. compensation equivalent of 1 month salary in lieu of notice-Kshs 22,070.95

c. Unpaid Leave pay (14 months)-Kshs 17,234.10

d. Unpaid 21 days for February 2014-Kshs 15,449.70

e. Unpaid Housing allowance (14 months)-....Kshs 44,315.85

Cost and interest at court rate applicable to all awards from date of judgment.

47. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimants- Kamunya

1st respondent – absent

2nd respondent -Wanjohi