

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**EMPLOYMENT CAUSE NO. E543 OF 2021**  
**(CONSOLIDATED WITH CAUSE NO. E542, E544 AND E545**  
**OF 2021)**

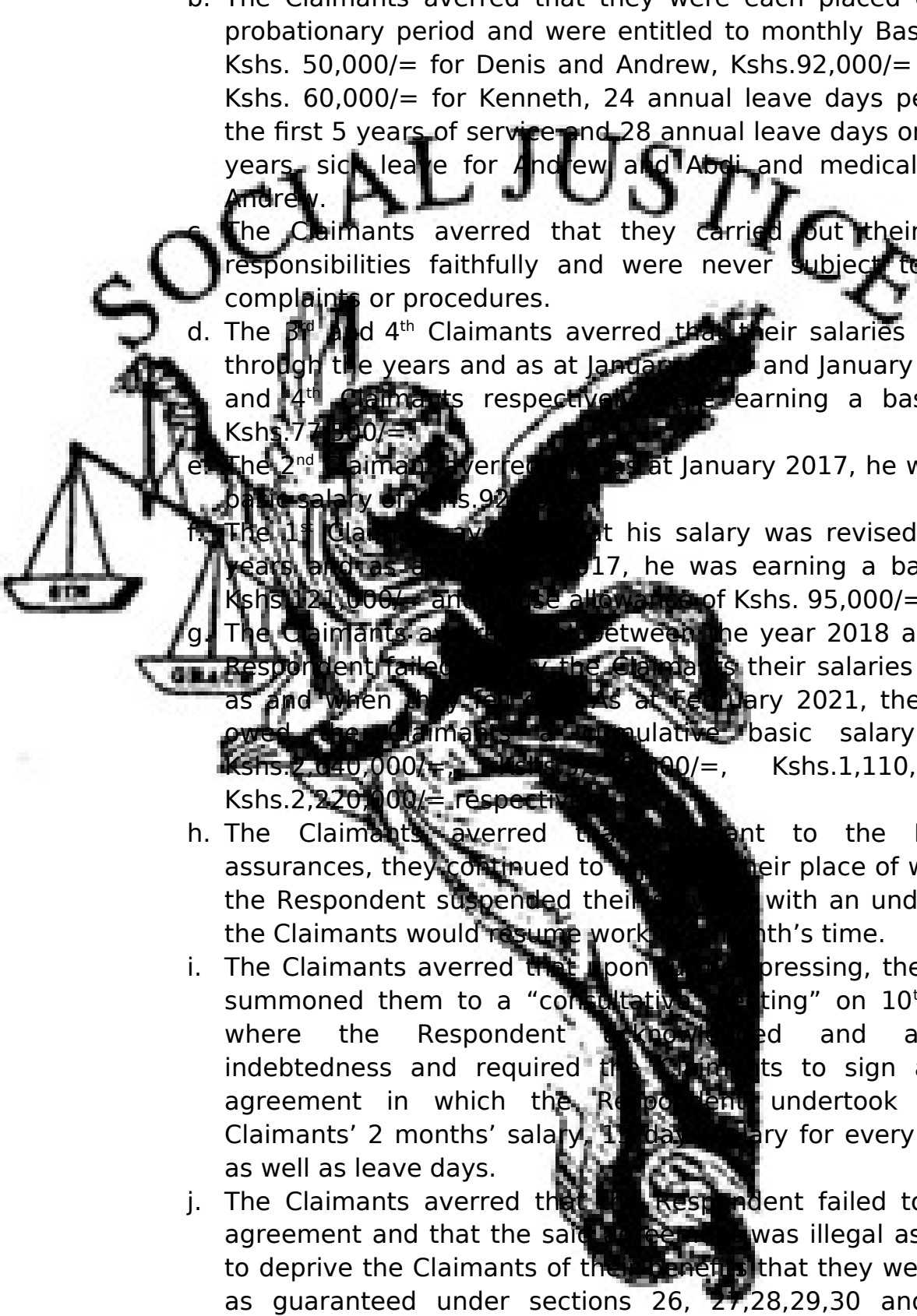
(Before Hon. Justice Abraham Jorum Nelson)

<b>ABDI RAHMAN</b> .....	<b>1<sup>ST</sup></b>
<b>CLAIMANT</b>	
<b>KENNETH AKOKO</b> .....	<b>2<sup>ND</sup></b>
<b>CLAIMANT</b>	
<b>ANDREW MBOYA MNETO</b> .....	<b>3<sup>RD</sup></b>
<b>CLAIMANT</b>	
<b>DENNIS MWANGI GAKURE</b> .....	<b>4<sup>TH</sup></b>
<b>CLAIMANT</b>	
<b>-V-</b>	
<b>DAALLO AIRLINES LIMITED</b> .....	<b>RESPONDENT</b>

**JUDGMENT**

1. The Claimants through their respective Memorandum of Claims dated 30<sup>th</sup> June, 2021 pleaded inter alia as follows: -

a. The Claimants averred that the respondent had employed them in different positions which are Dennis Mwangi as an Accountant as from May 2015, Andrew Mboya as an Office Assistant as from April 2006, Abdi Rahman as a Ticketing & Reservation Agent as from February 2017 and Kenneth Akoko as an Air Operations & Cargo Supervisor as from April 2006.

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- b. The Claimants averred that they were each placed on 3 months probationary period and were entitled to monthly Basic salaries of Kshs. 50,000/= for Denis and Andrew, Kshs.92,000/= for Abdi and Kshs. 60,000/= for Kenneth, 24 annual leave days per annum for the first 5 years of service and 28 annual leave days on subsequent years, sick leave for Andrew and Abdi and medical benefits for Andrew.
- c. The Claimants averred that they carried out their duties and responsibilities faithfully and were never subject to disciplinary complaints or procedures.
- d. The 3<sup>rd</sup> and 4<sup>th</sup> Claimants averred that their salaries were revised through the years and as at January 2017 and January 2017, the 3<sup>rd</sup> and 4<sup>th</sup> Claimants respectively were earning a basic salary of Kshs.77,000/=.
- e. The 2<sup>nd</sup> Claimant averred that as at January 2017, he was earning a basic salary of Kshs.92,000/=.
- f. The 1<sup>st</sup> Claimant averred that his salary was revised through the years and as at January 2017, he was earning a basic salary of Kshs.121,000/= and house allowance of Kshs. 95,000/=.
- g. The Claimants averred that between the year 2018 and 2019, the Respondent failed to pay the Claimants their salaries and benefits as and when they fell due. As at February 2021, the Respondent owed the Claimants cumulative basic salary arrears of Kshs.2,040,000/=, Kshs.1,110,000/=, Kshs.1,110,000/= and Kshs.2,220,000/= respectively.
- h. The Claimants averred that in spite of the Respondent's assurances, they continued to work in their place of work till when the Respondent suspended them with an undertaking that the Claimants would resume work in a month's time.
- i. The Claimants averred that upon their expressing, the Respondent summoned them to a "consultative meeting" on 10<sup>th</sup> April, 2019 where the Respondent acknowledged and admitted its indebtedness and required the Claimants to sign a settlement agreement in which the Respondent undertook to pay the Claimants' 2 months' salary, 15 days' salary for every year worked as well as leave days.
- j. The Claimants averred that the Respondent failed to honour the agreement and that the said agreement was illegal as it purported to deprive the Claimants of the benefits that they were entitled to as guaranteed under sections 26, 27,28,29,30 and 31 of the Employment Act.

k. The Claimants averred that the agreement was unconscionable and illegal as it was signed under duress and coercion and without freewill of the Claimants.

l. The Claimants averred that the Respondent's actions constitute wrongful and constructive termination of their employment contract and the Claimants are entitled to compensation.

2. The Claimants in the upshot prayed for the following against the Respondent: \_

i. A declaration that the Respondent wrongfully and constructively terminated the Claimants' employment and that such termination was unlawful, irregular and wrongful.

ii. The cumulative Back Pay owed to the Claimants.

iii. Salary for 90 days of constructive notice.

iv. Service pay to the Claimants.

v. 12 months salary for wrongful termination

vi. The Respondent issues the Claimants with a Certificate of Service.

vii. Costs of the proceedings.

3. The Respondent failed to participate in the proceedings and the matter proceeded as undefended.

#### **EVIDENCE**

4. The Claimants' case was heard on 1<sup>st</sup> May, 2025 where Dennis Mwangi Gakure the 1<sup>st</sup> Claimant herein testified as the CW1 on behalf of the rest of the Claimants. He adopted his witness statement and those of the other Claimants, the documents filed with the claim as their evidence in chief.

5. CW1 sought for declaration that their termination was unfair and they be paid compensation and terminal dues. That they should be issued with certificates of service.

### **CLAIMANTS SUBMISSIONS**

6. The Claimants Advocates Oringe Waswa & Company Advocates filed written submissions dated 9<sup>th</sup> July, 2025. On the issue of whether the Respondent's dismissal amounted to unfair, wrongful and unlawful termination of the Claimants' employment, counsel submitted that the Respondent's failure to disburse salaries and benefits, coupled with the unilateral suspension and subsequent dismissal of service without affording the Claimants a right to be heard directly offended the right to fair labor practice.

7. Counsel, in addition to other cases, the case of **Aviation & Allied Workers Union v Kenya Airways Ltd & 3 others [2012]** to submit that the Respondent dismissed the Claimants without following fair procedures for termination of employment and failure to provide valid reason for termination of the employment amounted to unfair termination hence unconstitutional.

8. Counsel submitted that the Respondent's actions suspending and dismissing the Claimants without disbursing their due salaries, without valid reason and in manifest breach of statutory procedure amounted to blatant contravention of sections 41 and 45 of the Employment Act 2007 as well as the

constitutional rights to equality, fair labour practices and fair administrative action enshrined in articles 27, 41 and 47 of the Constitution.

9. Counsel submitted that the Respondent neither established a just cause for the dismissals nor conducted the process in a procedurally fair manner. That the same amounted to unfair and unlawful termination of the Claimants' service.

10. On the issue of whether the Respondent's actions of dismissal constitute constructive termination of the employment contracts, counsel submitted that the Respondent's conduct throughout demonstrated a blatant disregard for the constitutional rights of the Claimants. That they were unilaterally suspended with a mere promise of resumption within 30 days. The Respondent acknowledged its indebtedness to the Claimants who forced them in to settlement agreements which it did not honour them hence making continued employment unsustainable and constituting a direct violation of section 18 of the Employment Act on timely remuneration.

11. Counsel relied on article 41(2) of the Constitution and the case of **Johana Martin Martin v Kijochab Brothers Ltd [2014] KEELRC 501 (KLR)** to submit that an employer's failure to pay salary is a fundamental breach of contract and a criminal offence amounting to constructive unfair termination of employment.

12. Counsel relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on both

substantive justification and procedural fairness before termination. The Respondent produced no evidence of misconduct or poor performance to justify the dismissals.

13. Counsel submitted that the Claimants were never afforded a fair hearing a fundamental component of procedural fairness. They were denied any opportunity to present their case or to appeal the decision to dismiss them. This egregious omission was a direct contravention of article 47 of the Constitution of Kenya, which guaranteed the right to fair administrative action including the right to be heard.

14. Counsel submitted that the dismissal of the Claimants was baseless, uncalled for and utterly irrelevant to any legitimate employment concern. That persistent non-payment of earned wages by an employer amounted to constructive dismissal.

15. Counsel relied on the case of **Jane Samba Mukala v Ol Tukai Lodge Limited** to submit that where an employer creates intolerable working conditions, an employee is justified in treating the contract as having been repudiated by the employer.

16. On the issue of whether the Respondent's coercion for the Claimants to sign a settlement was a breach of the Claimant's right to fair labour practices under article 27(1)(1), 42(2) and 47 of the Constitution of Kenya, Counsel submitted that the agreement was null and void for the Respondent having forced the Claimants in to the said agreement hence it was not freely entered into, obtained under duress and coercion

which went against section 10 of the Employment Act on voluntary agreements.

17. Counsel relied on the case of **Elizabeth Washeke & 62 others v Airtel Networks(K) Ltd & Another [2013] eKLR** to submit that for a waiver or settlement of statutory employment rights to be valid, it must be entered freely, voluntarily and with full knowledge of the consequences. Any agreement procured through coercion, undue influence or misrepresentation is unenforceable.

18. Counsel submitted that it was trite law that statutory employment rights and benefits accrue by operation of law and could not be bargained away or waived, particularly where there was evidence of inequality of bargaining power or coercion.

19. Counsel submitted that any attempt to circumvent statutory protections through coercion not only undermines the integrity of the employment relationship but is also contrary to public policy and letter and spirit of the Constitution and Employment Act as demonstrated in the case of **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v North Coast Beach Hotel Ltd [2017] eKLR** that no employer should contract out of statutory minimum standards.

20. Counsel submitted that instead of fostering genuine dialogue during the so-called consultative meeting the Respondent sought to exploit its position of authority to extract illegal concessions from vulnerable employees, contrary to the

principles of fairness, voluntariness and mutual respect that ought to govern employment relations.

21. On the issue of whether the Claimants were entitled to the reliefs sought, including but not limited to unpaid salaries, benefits and compensation for unfair termination, counsel relied on sections 49 and 50 of the Employment Act and the case of **Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR** to submit that where termination of employment is found to be unfair, the employee was entitled to compensation as provided including all accrued salary and benefits up to the date of such termination.

22. Counsel relied on, among others, the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** to submit that if procedures in law and contract were ignored and an employee's employment is unfairly terminated, the remedy is payment of all unpaid dues and compensation for unfair dismissal.

### **DETERMINATION**

23. The Court has reviewed and considered the pleadings, testimonies and submissions of counsel for the Claimants in support of the case. The court has also considered authorities

relied on by counsel. The Respondent did not participate in the proceedings but this did not stop the court from determining the matter on merit.

24. The issues for determination therefore are:-

- (a) Whether the Claimants were constructively terminated by the Respondent.
- (b) Whether the Claimants were entitled to the reliefs sought.

**Whether the Claimants were constructively terminated by the Respondent.**

25. It is not in dispute that there existed employment relationship between the Claimants and the Respondent where Andrew and Kenneth were employed in 2006, Dennis was employed in 2015 and in 2017 earning different salaries as shown above.

26. The Respondent failed to pay the Claimant's their respective salaries between 2018 and 2019 which accumulated to the various amounts claimed by the Claimants. First the Respondent suspended the Claimants in March 2019 on a promise to resume in a month's time only to call them after the said month for a consultative meeting held on 10<sup>th</sup> April,

2019 to settle the matter. Whereas the Respondent acknowledged its indebtedness it did not honour the same.

27. The suspension of the Claimants followed by the consultative meeting then the settlement agreement which never materialized leads to the conclusion that the Respondent acted in bad faith and against fair labour practices despite failing to pay the Claimants their long-earned dues.

28. Whereas section 47(5) of the Employment Act places the employee at a disadvantage to illustrate that unfair termination occurred and the employer to justify the grounds of termination, this case has convinced that the indefinite suspension and the settlement agreement which was against the law leads to the conclusion that the Claimants were constructively dismissed. They did not continue with employment relationship when the Respondent refused to pay their salary, had suspended them and even failed to honour the proposed settlement which was in the first place invalid.

29. The concept of constructive dismissal was aptly articulated by Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp (1978) ICR 221** as follows;

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct.”*

30. Finally, the court is guided by the case of **Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (2015) eKLR**,

where the Court of Appeal adopted the contractual approach test of constructive dismissal and enunciated the guiding principles including fundamental terms of the contract, causal link between the resignation and the employer’s conduct, resignation within a reasonable time and absence of acquiescence, waiver or estoppel among others.

31. In this case although the Claimants never resigned they were suspended indefinitely, no accrued salary was never paid despite the settlement agreement making the continued working relationship untenable hence constructive dismissal. The Claimants had a right to be properly remunerated as per section 10 of the Employment Act.

32. This position was judicially stated in the case of **Metto v Mediheal Group of Hospitals (Cause E052 of 2024)**

**(Judgment)** where the court held as follows:

*Withholding of salary strikes at the core of the employment relationship. Section 17(1) of the **Employment Act** obliges an employer to pay wages when they fall due, and subsection (10) criminalizes failure to do so. Further, Article 41 of the Constitution guarantees every worker the right to fair labour practices, which includes timely payment of wages.*

33. In **Nyabuti v East African Safari Express Ltd, ELRC Cause E682 of 2022 [2022] KEELRC 2064 (KLR)**, the Court held that non-payment of salary for three months was sufficient to establish constructive dismissal.

34. The Respondent failed to pay the Claimants accrued salaries despite entering into a settlement agreement it failed to honor the same making the working relationship untenable. The Claimants' services were therefore constructively dismissed.

***Whether the Claimants are entitled to the reliefs sought.***

35. On the prayer for compensation for unfair termination of employment, having found that the Claimants were unfairly terminated the court therefore proceeds to take in to account the considerations given under section 49(4) of the Employment Act on the nature of the termination and the period of time the Claimants worked for the Respondent. The 1<sup>st</sup> Claimant worked from 2017 -2019(2 years), 2<sup>nd</sup> Claimant

from 2006 -2019(13 years), 3<sup>rd</sup> Claimant from 2006-2019(13 years) and 4<sup>th</sup> Claimant from 2015- 2019(4 years).

36. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants who had served for 12 years which was quite some long time will be awarded 10 months salary as compensation for unfair termination while the 1<sup>st</sup> Claimant and the 4<sup>th</sup> Claimant who had worked for 2 years and 4 years respectively will be awarded two months' salary and four months' salary respectively as compensation for unfair termination. This court takes in to account the nature of the termination which was constructive dismissal at the instance of the Respondent in awarding the compensation. The Claimants are also awarded one- month notice pay since they were terminated without notice.

37. On the claims for leave and house allowances the same are continuing injuries under section 90 of the Employment Act which the Claimants ought to have filed within 12 months after the cessation of employment. In this case the Claimants who were suspended in 2019 March ought to have filed their claim in March 2020 but they filed in June 2021 which was past the limitation period. These claims therefore fail.

38. The court is guided by among other cases the court of Appeal in **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the court held as follows:-

*Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the*

twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

39. On the claim for service pay, since the payslips showed that the Claimants were members of NSSF which is an exception under section 35(6) of the Employment Act they are not entitled to the same.

40. On the claim for accrued salaries since the Respondent did not take part in these proceedings and there was an attempt to settle the matter shows the Respondent accepted his indebtedness and the Claimants are entitled to their accrued salaries as prayed. This is technically the issue which led to the Claimant's constructive dismissal as they could not continue working with persistent failure by the Respondent to pay their salary. The Claimants are also entitled to certificate of service as per requirements of section 51 of the Employment Act.

41. **In conclusion the Claimants' claims were found merited and are hereby allowed with costs as follows**

**a. Abdi Rahman**

- i. **One Month Notice pay.....Kshs 92,000/=**
  - ii. **2 months compensation for unfair termination.....Kshs 184,000/=**
  - iii. **Accrued salary.....Kshs 2,640,000/=**
- TOTAL KSHS 2,916,000/=**

**b. Kenneth Akoko**

i. One Month Notice pay.....Kshs 121,000/=

ii. 10 months compensation for unfair termination.....Kshs 1,210,000/=

iii. Accrued salary.....Kshs 3,330,000/=

**TOTAL KSHS 4,661,000/=**

c. Adrew Mboya Chieto

i. One Month Notice pay.....Kshs 77,500/=

ii. 10 months compensation for unfair termination.....Kshs 775,000 / =

iii. Accrued salary.....Kshs 1,100,000/=

**TOTAL KSHS 1,952,500/=**

d. Denis Mwangi

i. One Month Notice pay.....Kshs 77,500/=

ii. 10 months compensation for unfair termination.....Kshs 310,000/=

iii. Accrued salary.....Kshs 2,220,000/=

**TOTAL KSHS 2,607,500/=**

e. Claimants to be issued with certificate of service.

42. It is so ordered.

Dated at Nairobi this 23<sup>rd</sup> day of January 2026

Delivered virtually this 23<sup>rd</sup> day of January 2026

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**

