REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E720 OF 2022

(Before Hon. Justice Abuodha Jorum Nelson)

KENYA BUILDING CONSTRUCTION, TIMBER, FURNITURE INDUSTRIES & EMPLOYEES UNION……. CLAIMANT

VERSUS

VAGHJIYANI ENTERPRISES LIMITED & LIMITED….. RESPONDENT

JUDGMENT

1. The Claimant through its amended Memorandum of Claim dated 28th October, 2022 pleaded *inter alia* as follows: -

    a. *The Claimant represents the employees and has recruited the grievants into its membership vide the check off forms signed by the grievants. That the grievants were employed by the Respondent on various dates in various job categories.*
    b. *That on various dates of September 2022, the Respondent presented the grievants with Employment contracts dated the 1st September, 2022 for execution which contracts the grievant declined to sign for failure to adhere to the known minimum wage guidelines.*

c. *That Mr Matheka earned a consolidated monthly salary of Kshs 20,000 up until his of termination while the General Wages Order of 2022 provides basic monthly wage of Kshs 23,039 and house allowance at 15% of the basic wage the category of a medium sized urban*

d. *That the grievants declined to sign such employment agreements for being unlawful and discriminatory*

e. *That the terms and conditions of the [illegible] contracts do not conform to the Building and Construction Wages Order. That the said contract offered Mr Matheka [illegible] 6,804 as a consolidated monthly wage while he was employed on the 1st October 2021 and the said Contract [illegible] commencement date of 1st September 2022.*

f. *That the contract did not [illegible] or provide for the duration served before the contract [illegible] Mr. Matheka was served with a letter dated [illegible] September 2022 to show cause for failure to sign the contract, on the 8th [illegible] 2022 the Claimant wrote to the Respondent advising that the same didn't meet the minimum wage requirements and contravened and ought to be withdrawn.*

g. *That it was an unfair labour practice by the Respondent to allege to issue employment contracts that offended provisions of minimum provision in the industry.*

h. *That on or about the 30th September 2022 the Respondent served the 15 grievants with notices of summary dismissal which was served together with their summary dismissal dues. That the said dues did not reflect the total terminal dues owing to the grievants and were rejected.*

2. The Claimant in the upshot prayed for the following against the Respondent: -

a. An order to issue directing the Respondent to withdraw all or any such unlawful employment contracts issued to any of its unionisable employees.
b. An Order to issue directing the Respondent to review and or amend the contracts of employment to align with the minimum legal requirements.
c. A declaration to issue that the summary dismissal of the 15 grievants herein is most unfair.
d. Kshs.3,401,726 being the collective terminal dues owing to the 15 grievants.
e. 12 months Compensation for unlawful loss of employment.
f. Cost of this claim

3. The Respondent filed its Statement of Response dated 7th November,2022 and averred that:

i. The Respondent admitted the contents of Paragraph 5 in so far as it states that the employment contracts dated 1st September 2022 were issued to the grievants. The contracts the said grievants refused to sign but denied that the said contracts failed to adhere to the known minimum wage guidelines as alleged.

ii. The Respondent stated that Mr. Matheka is not a unionisable employee as far as the objectives of the Respondent union are concerned by virtue of the fact that the said Mr. Matheka was not working in the construction industry segment of the Respondent. The said Mr. Matheka was employed by the Respondent as a medium size truck driver, delivering materials from the yard to the site stores amongst other duties he was assigned which were not related to the construction industry. That his employment cannot be subject to the Regulations of wages (Building and Construction Industry) order.

iii. The Respondent further stated in response to paragraph 7 and 8 that the contracts issued to the grievants save for three (3) employees namely; David Matheka, Mourice Mutua and Simon Karanja who do not work at the construction industry, indeed met

the minimum requirements of the Building and Construction Industry Wage Order and other related relevant laws by complying as follows: -

i. Paragraph 11 of the said contracts providing for annual leave of 26 days as opposed to 21 days.

ii. Paragraph 13 of the said contracts is very explicit that an employee will be entitled to a maximum 40 days sick leave with full pay and thereafter to a maximum of 7 days sick leave with half pay and not 7 days with full pay and additional 7 days half pay.

iii. The written contract when to commence on 1st September 2022 and that is why the respondent offered to settle all the past dues with regard to the underpayments and paid leave among other things before entering into written contracts with the grievants, but the grievants became adamant and refused to co-operate without apparent reasons.

iv. On the issue of Saturdays, paragraph 3 of the said contracts was very explicit. The paragraph did indicate that the grievants were to work for 5 ½ hours as alleged hence an attempt to clearly mislead this Honorable

v. Therefore, there was indeed no term of the contract that was introduced which is contrary or contradicts the provisions provided under the Building and Construction industry wages order.

iv. In response to paragraphs 9,10,11 and 12 the respondent averred that Mr. Matheka who is heavily relied upon to hoodwink this Honorable court that the contracts issued by the Respondent did not meet the minimum requirements, is not an unionizable employee as has been clearly stated above.

v. *The Respondent admitted serving the notice to show cause letter dated 6th September 2022 but denied any response received from the said Mr. Matheka.*

vi. *The Respondent admitted the contents of paragraph 15 and 16 of the Amended Memorandum of Response in so far as it states that the grievants were issued with the summary dismissal letters on 30th September 2022 together with the summary dues and further stated that indeed the Respondent rightfully summarily dismissed the grievant after a fair hearing.*

vii. *That the Claimant has been economical with the truth in its claim in a bid to mislead this honorable court as to unfair termination of the grievants as demonstrated;*

a) The Respondent in a bid to restructure the company, it opted to formally issue written employment contracts to all its employees including the 15 employees on whose behalf the suit herein has been brought by the Claimant.

b) Some of the employment contracts were specifically for the case herein; three of the said employment contracts (for Daniel Matheka, Mourice Mutia and Simon Karanja) were issued to the said employees on 2nd September 2022 and the rest of the contracts were issued on 6th September 2022. However, the 15 employees who are subject of the proceedings herein refused to sign the contracts, while verbally stating that the contracts had some unfavorable terms which needed to be addressed and revised first; and that they wanted all their dues for the previous period worked including underpayments for the period worked, paid before they could consider signing the contracts.

c) The Respondent's Human Resource Manager, Mr. Noel Owino asked the said employees to point out the unfavorable terms in the contract in writing as he proceeded to compute the underpayments as per the guiding Minimum Wage Remuneration Order. However,

the said employees did not point out the unfavorable terms as required thus prompting the said Respondent's HR to issue some letters of notice to show cause on 6th September 2022 to the three employees whose contracts were issued on 2nd September 2022 and the rest whose contracts were issued on 6th September 2022 the notice to show cause was issued on 21st September 2022.

d) Some of the letters had indicated that a response should be received within forty-eight hours and some had indicated seventy-two hours as the time within which to respond to the notice to show cause.

e) The said employees still never pointed out the unfavorable terms in the contract or provided any reason for failure to sign the contracts even after receiving the notice to show cause letters. This prompted the HR department to issue a date for hearing of the said employees which was scheduled for 30th September 2022.

f) On the said hearing date, each employee was given a tabulation for the all their dues including unremitted contributions for the previous period worked as per the records held by the respondent company and a hearing was conducted on each of the 15 employees separately.

g) All the said 15 employees at their separate hearing; did not point out the alleged unfavorable terms in the contract. They all gave a similar response that all that they disputed were the dues payable for the previous period worked and the terms worked as per the tabulation which was provided by the said HR.

h) The said Mr. Owino tried to challenge, persuade and give them more time to come up with their separate tabulation and evidence that they had worked for the company the alleged period which was not covered in the provided tabulation but they all refused and stated that it was not their responsibility to keep records and come up with correct tabulations. Further, they all stated that another

hearing was not necessary; all they needed was a correct tabulation from the Respondent's HR and settlement of their previous dues before they could consider whether or not to sign the contract.

i) As at 30th September 2022, no response had been obtained from the said 15 employees as to either acceptance or refusal of the tabulation or signing of the contract thus prompting the summary dismissal.

j) From a similar answer given by the said employees in their separate hearing, coupled with their [illegible] each after being given more time to come up with their own [illegible] of the dues owed; it was evident that the said employees had discussed and agreed to take a similar position in the hearings in a bid to unfairly sabotage the efforts by the Respondent to issue written contracts to all its employees in a bid to [illegible] all the employments.

k) It was therefore evident [illegible] to the Respondent rightfully summarily terminate the services of the 15 employees because there was indeed no reasonable ground for refusal to sign the contracts; and even after the issue of the settlement of the previous dues for the period worked which was the complaining of before signing the contracts being addressed, the said employees still refused to sign the contracts.

viii. *That there is no recognition agreement between the Respondent herein and the Claimant for purposes of collective bargaining as it has not met the threshold.*

EVIDENCE

4. The Claimant's case was heard on 15th February, 2024. CW1 was Elijah Makau. He stated that he was employed on 8/6/2012

as a general worker. That sometimes they would be paid by cash and they were given petty cash. That payment by Mpesa started in December, 2018. That the computation did not reflect when they started working but the Union computation was the right one.

5. In cross-examination he confirmed that he was not given petty cash vouchers for 2017. That he used to be given petty cash voucher which had money for employees as well and the same would be signed by the [illegible] Joseph. That he used to sign the vouchers and be given money. That he was given a contract to sign and they spoke with HR and told him where the problem was. That they wanted to be given previous service. That the HR knew how many years he had worked and knew his dues.
6. In re-examination he clarified that prior to 2018 they were paid using petty cash voucher and the vouchers he attached were the ones he was given. That he used to take photos of some of vouchers.
7. The Second Claimant's witness was Michael Mwania Rose CW2 who testified that he was employed in October, 2012 as a

painter. Just like CW1 he testified that he was given the contract which he refused to sign as they wanted to be paid previous service first. That they were shown computation and he was working prior to 2019.

8. He confirmed that the Mpesa statement was [illegible] with the first entry being 7/12/2019 and the Mpesa analysis record show payment from 1/9/2019 which was [illegible] as he worked before that time. That the labour [illegible] days worked which is for 2016. That they used [illegible] weekly before 2018 December. That they used [illegible] against the labour card and the Respondent never used to remit [illegible] for them.
9. CW2 testified that when he joined the [illegible] was elected a shop-steward. That he joined the union [illegible] and he was aware of the dispute between the union and the Respondent. That he later forwarded the contracts to the union which engaged the Respondent. That they did not sign the contracts.
10. In cross-examination CW2 confirmed that the labour cards were signed by him. That he was given time to present his tabulations in response to what the employer offered. That he has never presented his counteroffer. That he did not give the

HR the labour cards to show when he was employed and he did not attach receipt for payment of union dues.

11. In re-examination he clarified that he signed the checkoff forms dated September, 2017. That the employer had his records.

12. The Respondent's case on the other hand was heard on 30th September, 2025 with the Human Resource Manager of the Respondent Noel Christian testifying. RW1 adopted her witness statement of 7th November, 2022 and the Respondent's documents filed in court with the response as her evidence in chief.

13. In cross-examination she confirmed that the Respondent was engaged in building and construction industry. That the grievants were employed in different years and that Matheka, Karanja and Mutua were employed as drivers and that they were not unionisable employees and not engaged in construction work. That the terms of engagement made them non-unionisable.

14. She confirmed that the drivers ferried construction materials. That they issued contracts to grievants which were dated 1st

September, 2022 which was the commencement date. That the 15 grievants refused to sign the contracts.

15. She confirmed that Michael Mwania stated he was employed in 2015 and he refused to sign the contract because it did not make provision for prior duration served. That from the disciplinary hearing minutes the dispute on tabulation stating he started working in 2015. That when he was asked to provide evidence of engagement he stated that it was not his responsibility to keep employee records.

16. She confirmed that the grievants had issues with tabulation on the date of Disciplinary hearing. That the tabulation of dues took into account previous dues as they started working on 19/1/2019. That he worked for 3 years [illegible] months. That prorated leave was arrived at taking in to account the period worked. That they were casual employees paid daily at the end of the week. There were no written contracts provided.

17. She confirmed that there was a Wages Order for Building industry. That as per Mpesa statement they were they used to pay in cash and signed labour cards until 2018 when payment by Mpesa was introduced. She could not confirm the labour

card dated 3.12.2016 and from the record Mwania was employed in 2018. She went through HR records. That the petty cash voucher for Elijah Makau was not clear.

18. She confirmed that the summary dismissal dues for Mwania were backdated wage difference some workers had a wage difference which was settled. That there was underpayment of some workers.

19. In re-examination she clarified that Matheka was not working in the construction industry and was from head office. That the grievants were not the ones issued with contracts as 20 signed. That the contracts were issued because the workers had been engaged for more than three months hence it was a strategy to regularize the status of the workers in line with the Employment Act. That those who refused were terminated.

20. She clarified that the grievant never had any document to support the claim he was engaged in 2018. The document before court were not produced by the grievants by the Disciplinary hearing. That the tabulation was issued on 6/9/2022 to familiarize the discussions she had with the grievants. That they started paying via Mpesa from January,

2019. That she was interacting with the Mpesa statement for the first time.

CLAIMANTS' SUBMISSIONS

21. The Claimant through its General Secretary Julius M. Maina filed written submissions dated 29th October 2025 and on the issue of whether all of the grievants were unionisable for representation by the Claimant submitted that as confirmed by the Respondent's witnesses and pleadings, it had its operations in the building and construction industry. Its core activities were in the said industry. The Respondent however separated three grievants namely Daniel Matheka, Simon Karanja and Maurice Mutua serving as drivers as not working in the construction segment of the Respondent and for that reason, they were not covered by the Building and Construction Wages Order.

22. The Claimant further submitted that at paragraph 6 (a) Memorandum of Response, Mr. Daniel Matheka is described as being a medium size truck driver delivering materials from the yard to the site stores amongst other duties assigned. That the issue raised by the parties herein were not novel and he relied

on the case of **Kenya Building Construction Employees Union v Vaghjiyan Enterprises Ltd (Employment and Labour Relations Cause 286 of 2022) (2023) KEELRC**, the same parties herein and in near same circumstances as in this case where the Respondent advanced the same argument in relation to two grievants therein who were employed as store keepers. The Respondent argued that the two employees were not engaged in construction but in its operations.

23. Lady Justice Maureen J found that was the sector in which the employer operates that is essential for membership to a union and not the duties performed by the grievants. That the argument by the Respondent would mean that employees performing different roles in one organization would belong to different trade unions which was not the constitutional position.

24. That the Respondent had to date not appealed against the said decision. With this decision of the Honourable Maureen J, which was never challenged on appeal, the Claimant can confidently submit that this issue is now res judicata.

25. On the issue of whether the grievants were in the employment of the Respondent prior to the period their past

service dues were calculated by the Respondent the Claimant's position was that most of the grievants were in employment before the 19th January 2019. That this date was the date reflecting on all the tabulations of past dues for each grievant. It was also the date appearing on the Payment analysis provided by the employer.

26. That of all the grievants none of those past served duration commenced earlier than [illegible] as per the individual tabulations for past dues. The Respondent was on record in its disciplinary hearing minutes [illegible] grievants and through its witness in court as stating that [illegible] the grievants could avail proof of service/employment prior to the dates in the Respondent's records.

27. The Claimant submitted that on who has the duty to keep employment records, the Respondent's witness averred that the onus was on the employer. The Claimant relied on Section 10 Employment Act on particulars of employment. That in this instant case the grievants averred that they were employed on earlier dates than those suggested by the employer. They served under oral contracts. The Claimant relied on Section 8

Employment Act, that the Act applied to both written and oral contracts.

28. The Claimant submitted that the burden to prove or disprove the date of employment for all of the grievants herein lies with the Respondent. The Respondent had done nothing to discharge this burden. The Respondent has instead shifted the burden to the grievants by asking them to provide evidence that they were its employees on the dates they each allege.

29. That the grievants have however supplied such proof to the honourabe court that they were employed employees of the Respondent on the dates they each stated. This was provided through the production of Mpesa statements of each grievant. In these statements there was evidence that the Respondent paid salaries to the grievants in December 2018. What was more compelling was that paybill number 952891 was the same number used to disburse the salaries in December 2018 until September 2022 when the dismissals happened.

30. The Claimant had produced payment for vouchers for the period prior to January 2019 as evidence that they were in service of the Respondent.

31. On the issue of whether the grievants are entitled to the dues conferred by the Building and Construction Wages Order the Claimant relied on Section 26 Employment Act on basic minimum conditions of employment that from the foregoing Clause 19 (I)(d) of the Building and Construction Wages Order forms a term of the employment contracts of these grievants. The Respondent, by failing to pay the grievants the gratuity provided for in this clause, which is indeed a minimum condition of employment in the sector, committed an offence.

32. On the issue of whether the Respondent dismissed the grievants for valid reasons the Claimant submitted that in the memorandum of response, the Respondent avers that it rightfully summarily terminated the services of the grievants because they had no valid reasons to refuse to sign the contracts. Claimant relied on section 44 of the Employment Act which governed summary dismissal. The employer had thus a

right to allege that failure to sign the contracts by the grievants constitutes a justifiable or lawful ground for dismissal.

33. The Claimant submitted that Section 45 of the Act required that such a reason for dismissal be a fair reason to validate the dismissal or termination. The Respondent alleged that failure to sign the contracts was a valid reason for terminating the grievants. The reasons advanced by the grievants was that the contracts had the 1st [illegible]22 as the start date, yet some of the grievants had served for more than 7 years before the said date. That the employer intended not take into account the past served period and proposed less benefits than those duly owed the grievants as a payment for the past served service.

34. The grievants had valid grievances which the Respondent ignored and summarily terminated their. The employer could easily wait to redress the issues of past service benefits first before the grievants could sign the contracts which they all indicated were ready to sign upon clearance of their past dues.

35. Indeed, in the above cited cause **Kenya Building Construction Employees Union v Vaghjiyan Enterprises**

Ltd (Employment and Labour Relations Cause 286 of 2022) [2023] KEELRC 2805, Maureen Onyango J ordered the Respondent to include the past served period of the two grievants in the written contract it offered them or in the alternative discharge the said contracts first.

36. The Claimant prayed that the Court finds that the Respondent has failed to discharge the burden under section 47 and that the summary dismissal was unfair.

RESPONDENT'S SUBMISSIONS

37. On the other hand, the Respondent's Advocates Ondieki Mogambi & Associates filed submissions dated 23rd November, 2025 and on the issue of whether Lawrence Mutheka, Mourice Mutua and Simon Karanja are unionisable employees counsel submitted that they were not unionisable employees by the Claimant. That from the memorandum of claim and during the hearing, it came out clear that the said grievants were employed as general drivers who could at times drive any vehicle for any assignment that they were given including driving the Managing Directors of the Respondents, hence were not working in the construction industry. Counsel

therefore contended that the said three grievants cannot be unionized by the Claimant herein whose members solely are drawn from people who work in the construction industry. That the Claimant did not have the locus to bring the claim on behalf of the three grievants and the same should be dismissed.

38. On the issue of whether the grievants were summarily dismissed unfairly counsel submitted that the grievants were not unfairly summarily dismissed as due process was indeed followed and the summary dismissal was proper in accordance with the laid down procedure and law. Counsel relied on section 43 of the Employment Act on the reason of summary dismissal and the grounds for summary dismissal.

39. Counsel submitted that from the evidence by the Respondent's witness, it was evident that the grievants wilfully refused to obey a lawful command in the course of their employment without a valid reason. That however, the grievants herein refused to sign without knowing that the contracts had unfavorable terms, which unfavorable terms they refused to point out when asked to.

40. That later, the said grievants changed the goal posts and indicated that they wanted all the past terminal dues to be settled before signing the contracts. When the tabulations were given to them, they refused the same, indicating that the date of employment used to calculate the dues was incorrect as they had been employed much earlier.

41. That they were told to provide evidence that they had been employed much earlier as the human resource manager who had just joined the Respondent reviewed the records which were available, they still failed to provide proof. In the circumstances, the Respondent could not have any alternative but to issue them with the notice to show cause letters and after conducting a hearing, summarily dismissed them.

42. Counsel further submitted that by the fact that this information was provided at the time of filing the case and at the time of hearing, the same did not negate the fact that the grounds for summary dismissal were valid as they refused to provide the said information during disciplinary hearing when requested by the Human resource manager.

43. That it was thus evident that the grievants were summarily dismissed because they wilfully refused to sign the contracts without providing valid reasons because when they were asked to provide crucial information which could have substantiated their actions, they wilfully and intentionally refused hence the Respondent had no alternative but to summarily dismiss them after conducting a hearing.

44. On the issue of whether the Claimant was entitled to the remedies sought in the Memorandum of claim counsel submitted that the Claimant was not entitled to the compensation sought in the claim on the following reasons: -

i. prayer (a) and (b) for withdrawal of the contracts and amending the same was untenable as the grievants herein were summarily dismissed before the same had been overtaken by events.

ii. Prayer (c) and (e) on summary dismissal being unfair was also untenable as it was evident from our foregoing submissions that the summary dismissal was proper and the reasons were valid.

iii. Prayer (d) had not been in any iota substantiated by the Claimant herein.

45. Counsel submitted that indeed he who alleges must prove. The Claimant having failed to prove its claim, counsel prayed that the Claimant's claim be dismissed with cost.

DETERMINATION

46. The court has reviewed and considered the pleadings, testimonies and submissions of counsel in support and opposition to the case. The court has also considered authorities relied on by counsel.

47. The court has as a result condensed three main issues for determination which are:-

a. Whether all the grievants were unionizable for representation by the Claimant.

b. Whether the grievants were unfairly dismissed by the Respondent.

c. Whether the Claimant is entitled to the reliefs sought.

Whether all the grievants were unionizable for representation by the Claimant.

48. The Respondent alleged that three grievants that is David Matheka, Maurice Mutua and Simon Karanja were not involved in the Building and Construction industry since they were engaged as drivers to ferry construction materials as well as ferrying the managing directors of the respondents using other vehicles. That due to their duties they were not unionizable for the Claimant to represent. The case submitted by the Claimant the court herein determined was made in the case of **Kenya Building Construction Employers Union v Vaghjiyan Enterprises Ltd (Employment and Labour Relations Cause 286 of 2022) (2023) KEELRC** 1 (KLR) similar parties where Lady Justice Maureen Onyango held that what mattered was the sector the employer was engaged in and not the duties performed by the employees and that it could be incorrect to have employees join different unions in one sector due to the duties they performed. This position therefore stands and the Respondent never challenged the said ruling. All the grievants were therefore unionizable and the Claimant had locus to represent them.

Whether the grievants were unfairly dismissed by the Respondent.

49. In this instant case, it was not in dispute that the grievants were Respondent's employees and the Respondent summarily dismissed them for refusing to sign employment contracts which it termed as disobeying lawful commands as provided for under section 44(4) of the Employment Act. The grievants on the other hand alleged that when they did not sign the contracts was because they did not have a provision for the time served before the commencement of the contract which was 1st September 2022. They also disagreed with tabulation of their dues which was tabulated from January 2019 yet they alleged they were employed before.

50. The Respondent alleged that the grievants did not provide evidence of their earlier engagements since the new Human Resource Manager was relying on records provided. That the evidence of earlier engagement of Mpesa statement and Labour cards was produced only in court and during the disciplinary hearing. This fact was confirmed by the Claimant's

witnesses that they did not furnish the evidence stating that it was not their responsibility to produce employment records.

51. The standard of proof in employment cases is well governed by section 47(5) of the Employment Act where the employee has a duty to prove that termination which is unfair occurred while the employer must prove the reasons for termination. In this case it was not in dispute that the grievants were summarily dismissed on 9th September, 2022. The grievants had a duty to lay a prima facie case of unfair dismissal which in this case was to illustrate they were dismissed and the burden shifted to the respondent to justify the dismissal.

52. It is also now a well established principle that for termination to pass fairness test there should be both substantive and procedural fairness with a number of cases supporting this position including but not limited to the case of **Walter Ogal Anuro *v* Teachers Service Commission [2013] eKLR.**

53. Section 43 of the Act requires the employer to prove the reasons for the termination which reasons must be valid and

fair and the employer must have believed them to exist and to cause the termination of the employee. Failure to prove the reasons for termination of employee amounted to unfair termination under section 45 of the Act. This was clearly stated in the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where it was stated that-

> *Invariably therefore, before an employer can exercise their right to terminate the contract of an employee there must be valid reason or reasons that touch on, misconduct, poor performance or physical incapacity.*

54. The Respondent alleged the grievants refused to obey lawful commands which is a ground under section 44(4) and could lead to summary dismissal which they finally did. The grievants refused to sign the new contract which did not provide for dues past the start date of 1st September, 2022 when most of them were employed past that start date. When they requested to be paid their previous dues the Respondent's calculations only captured January, 2019 and the grievants alleged that they had worked past the January 2019. The Respondent alleged that it requested the grievants to provide evidence of past engagements and they did not.

55. The court notes that the responsibility to furnish employment records is on the employer as per section 74 of the Employment Act and it was upon the employer to prove or disprove the fact of employment when the employment was oral in nature. This Court has held that it will believe the employee's word if the employer had no records to disprove the employee's allegations of the terms of employment.

56. Once the grievants [illegible] date of their engagement being earlier than the time taken by the Respondent it was upon the Respondent to produce employment records and not the grievants. The Respondent went on to terminate their services despite raising valid concerns [illegible] rightfully earned dues during the oral engagement.

57. The test is usually whether a reasonable employer would terminate the employee based on the same facts as was held by Lord Denning in the cited case of **British Leyland UK Ltd v. Swift [1981] IRLR 91** stated:

> *'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered*

that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

58. This court notes that the claimants in the letter dated 8th September, 2022 warned the respondent to desist from forcing the grievants to sign unsupported contracts after the Respondent had issued the suspension letter to Matheka. The Claimant notified the Respondent that the said contracts had been stayed by the court but the Respondent went on to proceed with their harassment by going ahead with disciplinary processes and summarily dismissing the grievants. The court therefore takes the view that the Respondent did not have valid and fair reasons to dismiss the grievants when they raised valid reasons why they were unwilling to sign the new contracts.

59. Regarding procedural fairness section 41 of the Act provides for notification and hearing before termination on grounds of misconduct. It requires that an employee be

explained to, the reason for termination in a language he understands and consider the representations by such employee who should have an employee of his choice present during the explanation.

60. The Respondent had maintained that the dismissed the grievants on grounds of gross misconduct issued them with show cause letters and final disciplinary hearings which were done for formality since the Respondent did not address the grievants' issues raised. The Respondent proceeded to summarily dismiss the grievants. In any case the Respondent gave them 48 hours and 72 hours to respond to the show cause letters which was a short period. The Respondent alleged that the grievants did not respond to the show cause letters when it gave them short period to respond. The grievants were not given adequate time to attend the disciplinary hearing and the tabulations they were against were not issued during the disciplinary hearing.

61. In **Kiilu v Isinya Resorts Limited (Cause 1022 of 2021) [2022] KEELRC 13240 (KLR)** it was held that;

An employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting. Minutes of a disciplinary meeting must be clear on the issues discussed thereat, and must clearly indicate whether the employee was given an opportunity to be heard, and what representation the employee and his fellow employee or union official made.

Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter.

62. This court notes that the Respondent did not give the grievants a fair hearing as they were given short period to respond to show cause letter and inadequate time to prepare for the hearing. The need for procedural fairness was emphasized by the Court in the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** thus:

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

63. In conclusion this court finds that the grievants' summary dismissal was unjustified both substantively and procedurally.

Whether the Claimant is entitled to the reliefs sought.

64. Having established that the grievants were unfairly dismissed the court proceeds to find that they are entitled to compensation for unfair termination under section 49 of the Employment Act. The court is guided by considerations under section 49(4) of the Act. The grievants had served for diverse dates and the summary dismissal was unfair. The Court therefore takes into consideration the period served by each grievant with 1st, 12th and 15th grievant employed in 2021 being awarded one month salary, 2nd and 9th grievant employed in 2015 six months' salary, 3rd and 10th grievant employed in 2016 five months' salary, 4th and 8th grievant employed in 2018 four months' salary, 5th, 6th and 14th grievant employed in 2019 three months' salary, 7th grievant employed in 2020 two months' salary, 11th grievant employed in 2014 seven months' salary and 13th grievant employed in February, 2022 one month salary.

65. On the claim for notice pay this court notes that the Employment Act under section 35(5) provides for one-month notice pay. The grievants are therefore entitled to one-month

notice pay since there was no notice given to them and the purported summary dismissal found as unjustified and unfair.

66. The prayer for service pay is also justified since the grievants confirmed that the Respondent did not remit NSSF or any pension. The grievants did not fall under provisions of Section 35(5) and (6) of the Act which is exception if they were members of NSSF.

67. On the award of unpaid [illegible] and underpayments this court notes that the same are continuing injuries and the claim thereon ought to be brought within 12 months after cessation of employment as provided under section 90 of the Employment Act. In this case the grievants were terminated in September 2022 and the instant claim made in October, 2022. This was within the 12 months limitation period hence the same can be entertained.

68. On the entitlement to leave, the Respondent had a duty to produce records that the grievants proposed for their leave by producing leave application forms. Failure to produce those records entitles the grievants to unpaid leave which is an

entitlement under section 28 of the Employment Act and is pegged at a minimum of 21 working days and equivalent to one month's salary.

69. On the issue of underpayment of wages, the grievants were governed by Building and Construction Wages Order which provided for the minimum wages for every employee hence the grievants were entitled to the same.

70. **In conclusion the Claimant's claim is hereby found merited and is hereby allowed with costs as tabulated in the memorandum of claim in terms of notice pay, leave pay, underpayment, service pay and damages for unfair termination as shown above being Kshs. 3,401, 726/-. The Court further awards compensation for unfair termination as tabulated under paragraph 64 of this judgment.**

71. **It is so ordered.**

Dated at Nairobi this 2nd day of March 2026

Delivered virtually this 2nd day of March 2026

Abuodha Nelson Jorum

Presiding Judge-Appeals Division