REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC NO. E093 OF 2023

DAVID OJOWI KIRUY ……1ST CLAIMANT

ERICK L. BAYA ……2ND CLAIMANT

ALEX NYAMAWI ……3RD CLAIMANT

ELIAS K. MWAMBIRE ……4TH CLAIMANT

PETER C. KIMUNGUNYI ……5TH CLAIMANT

OIMBA EZEKIEL ……6TH CLAIMANT

THOMAS S. KAINGU ……7TH CLAIMANT

WILLIAM MWADIME ……8TH CLAIMANT

PAUL MUSYOKA MATELA ……9TH CLAIMANT

PATRICK N. NYIRO ……10TH CLAIMANT

NICHOLAS J. MACHIO ……11TH CLAIMANT

THEOPHILUS KISANGAU ……12TH CLAIMANT

JAMES ODHIAMBO ……13TH CLAIMANT

SETH AKETCH ……14TH CLAIMANT

ABDALLA ALFAN .....15TH CLAIMANT

ABDALLA MWANZUNGA .....16TH CLAIMANT

GEOFFREY OMONDI OCHOLA .....17TH CLAIMANT

MICHAEL MBOCHA KIARIE .....18TH CLAIMANT

ABDUL KONGONINGA .....19TH CLAIMANT

TOM OKOTH .....20TH CLAIMANT

MACKENZIE M. KAI .....21ST CLAIMANT

DAVID OSURA .....22ND CLAIMANT

JOHN OWINO .....23RD CLAIMANT

STANLEY KETER .....24TH CLAIMANT

COSMAS MWALE .....25TH CLAIMANT

RAJAB ABDALLA TSUTSU .....26TH CLAIMANT

JUMA HAMISI GUSHE .....27TH CLAIMANT

ABDALLA CHINANDI .....28TH CLAIMANT

MARIAM NJAU .....29TH CLAIMANT

HUROUN KILANGO .....30TH CLAIMANT

YUSUF K. KIYEMBA .....31ST CLAIMANT

ISHMAEL BASHISHI .....32ND CLAIMANT

BAKARI ALI SIR .....33RD CLAIMANT

PIUS M. MWANYAMAWI .....34TH CLAIMANT

THOMAS M. SAHA .....35TH CLAIMANT

EDWARD K. LENGEES .....36TH CLAIMANT

STEPHEN KEA .....37TH CLAIMANT

STEPHEN N. NDUNGU .....38TH CLAIMANT

VICTOR MWANZI .....39TH CLAIMANT

HEZRON IBUKA M .....40TH CLAIMANT

JAMES MWANGI MAINA .....41ST CLAIMANT

LABAN CHELAGAT .....42ND CLAIMANT

GEORGE V. OWUOR .....43RD CLAIMANT

YVONNE KHAMISI .....44TH CLAIMANT

ROBERT MWANDOE .....45TH CLAIMANT

NOAH W. KAKAI .....46TH CLAIMANT

KENNEDY M. MUKHEBI .....47TH CLAIMANT

OGUTU DICKSON AMBUMO .....48TH CLAIMANT

JACKSON OMBATI .....49TH CLAIMANT

MIRIAM W. KIVONDA .....50TH CLAIMANT

NICHOLAS JAMBO ……51ST CLAIMANT

DAVID EKATI OKIYA ……52ND CLAIMANT

EMMANUEL BAYA ……53RD CLAIMANT

VIOLET M. WARURU ……54TH CLAIMANT

KARISA KATANA NZAI ……55TH CLAIMANT

GEORGE NJOROGE M ……56TH CLAIMANT

OLONGO J. ACHOLA ……57TH CLAIMANT

KENNEDY SIKUKU OMWANDHO ……58TH CLAIMANT

DAVID KARANJA ……59TH CLAIMANT

AMOS MATERE S. ……60TH CLAIMANT

MICHAEL M. DZUYA ……61ST CLAIMANT

KAUNDA NJERU ……62ND CLAIMANT

OMAR CHENJA H. ……63RD CLAIMANT

AGGREY OKEMA ……64TH CLAIMANT

DICKSON MAGANGA ……65TH CLAIMANT

JUDGMENT

1. By a Statement of Claim dated 9th August 2023, the Claimants sued the Respondent and sought the following reliefs against it;

   a) A declaration that the KPA has contravened the Petitioner's rights to fair labour practices by failing to provide a safe working environment.

   b) A declaration that the KPA has contravened the Claimants' rights to fair labour practices in unilaterally varying the terms of their respective employment contracts by failing to sustain the allowances they previously enjoyed.

   c) A declaration that the KPA has contravened the Claimant's right to fair labour practices by failing, refusing and/or neglecting to address the glaring and apparent salary disparities among the employees of the now defunct KFS.

   d) A declaration that the Claimant's rights to a fair administrative process under Article 47 of the Constitution, socio-economic rights under Article 43 of the Constitution, and the right to a fair hearing under Article 50 of the Constitution have been violated.

e) An order reinstating the special benefits and allowances enjoyed by the Claimants under the defunct KFS.

f) An order compelling the Respondent to effect a uniform date of absorption of all the employees of the defunct KFS, the Claimants included, into its workforce and or payroll.

g) An order directing the Respondent to and the effective date of absorption of July 2021 in respect of unionisable employees be the effective date for the purposes of the Claimant.

h) An order compelling the Respondent to translate and implement the proper horizontal placement, translation and harmonisation of the pay grades the Claimants had immediately prior to the dissolution of the KFS and absorption into the Respondent's payroll.

i) An order compelling the KPA to fast-track the conclusion of the stalled salary negotiations with the interested party that were at an advanced stage prior to the dissolution of the KFS.

j) An order for compensation for loss of earnings, loss of income and revenue and income arising from the lack of full implementation of the horizontal translation,

placement and harmonisation of the Claimant's to their respective pay stations.

k) Costs and interests of this suit.

l) Such other and further orders as this Honourable court shall deem fit and just to grant.

2. The Respondent opposed the Claimant's case through the Response to Statement of Claim dated 20th September, 2024. The Respondent the Claimants' cause of action and entitlement to the reliefs sought.

Claimant's case

3. Under the authority of the other Claimants, Thomas Safari Kaingu, the seventh Claimant, testified on his own behalf and on behalf of the others. The witness stated that he and the Claimants were, at all relevant times, employed by the defunct Kenya Ferry Services (KFS), having joined the organisation at different times and in various roles.
4. He explained that following a presidential directive issued in 2009, KFS was dissolved and merged with the Kenya Ports Authority (KPA), with all employees of the defunct KFS, including the Claimants, transferred to the Respondent [KPA].

5. Before the merger, the Claimants and other non-unionisable employees of the KFS had been engaged in internal negotiations aimed at harmonising revised, improved salaries, allowances and terms of employment. The negotiations and harmonisation process were at an advanced stage of completion but were not concluded due to the merger.
6. The witness further stated that at the time of the presidential directive, the unionisable employees of KPA were equally engaged in negotiations over salaries and terms of service, which negotiations, unlike those of the Claimant and other non-unionisable employees of the defunct KFS, were eventually concluded to the benefit of the unionisable employees of the defunct KFS.
7. In compliance with the presidential directive, KPA commenced the process of absorption of the employees of the defunct KFS and adopted a differential and various divergent treatment of the employees of the defunct KFS, with different categories of the defunct KFS being absorbed within the KPA system at different times and on different terms of absorption. The unionisable employees

of the defunct KFS were the first to be absorbed into the KPA system in the month of July 2021.

8. The witness stated that, by various circulars issued between July 2021 and March 2022, KPA, without the participation, consultation, engagement, and/or involvement of the Claimants and the non-unionisable employees of the defunct KFS, undertook the absorption and/or transfer of the Claimants and the non-unionisable employees of the defunct KFS in secrecy, in a discriminatory manner, and in contravention of the Claimants' constitutional right to fair labour practices, their rights under the Employment Act, and international best practices.

9. The witness contended that KPA undertook the absorption process in a manner that, among other; -

   a) Failed to provide the Claimants with appropriate Personal Protective equipment in contravention of section 76 of the Occupational Safety and Health Act 2007 exposing them to dangerous and unsafe working environment.

b) Discriminated the various cadres of staff in the issuance of the letters of absorption among the cadres of staff of the defunct KFS.

c) Totally disregarded the existing pay levels of the Claimants in the merger process hence curtailing their promotion and annual salary increments which have an adverse effect on their pension and retirement benefits.

d) Curtailed peculiar allowances the Claimants enjoyed under the structure of the defunct KFS while they continue to perform the same functions and duties and exposed to same risks.

e) Failed to recognize the peculiar duties performed by the Claimant and the risk they are exposed to and moving to adequately compensate them.

f) Failed to consider and effect harmonization of the Claimant's negotiations on salary increments that were being spearheaded by the Directors of the defunct KFS that were at an advanced stage prior to the merger.

g) Discriminated against the various cadres of staff by issuing the unionisable members of the defunct KFS

absorption letters for close to one year before issuing the same to the Claimants.

h) Failed, refused, neglected and or blatantly declined to address issues raised by the Claimants and other non-unionisable employees of the defunct KFS within timelines.

i) Failed to address the glaring salary disparities between the unionisable employees of the defunct KFS whose salaries were increased by 20% viz a viz that of the Claimants as the non-unionisable employees of the KFS during the absorption into the employment of the KPA structure.

j) Failing to fully uniformly and fairly implement and comply with its own system of horizontal placement of the Claimants into the respective job grades and harmonization of the pay grades.

10. The witness stated that by reason of the acts complained of, the Claimants have suffered prejudice and have lost income, promotions, equal and fair treatment due to them as former employees of the defunct KFS.

11. He proceeded to illustrate the financial impact of the alleged unfair treatment by presenting tabulated data

showing the claimants' job groups upon absorption, their basic salaries before and after the merger, the salaries they should have received, and the resulting monthly pay disparities. These figures are used to demonstrate the alleged extent of the financial loss suffered by the Claimants due to the failure to standardize their terms.

Respondent's case

12. The Respondent called one witness, Alice Kalekye Mbuvi Mutiso, its Principal Human Resource Officer, to testify on its behalf.
13. She stated that KPA is a State Corporation established under the Kenya Ports Authority Act and is mandated to manage and operate seaports and inland waterways along Kenya's coastline.
14. The witness stated that by a letter dated 16th November 2020, the Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works directed the Managing Directors of the defunct Kenya Ferry Services and the Respondent to take the necessary action to facilitate the transfer of KFS assets, liabilities, staff, and other obligations to the Respondent.

15. Consequently, the defunct KFS and the Respondent signed an Asset and Business Transfer Agreement, transferring all the assets, liabilities, obligations and staff to the Respondent.
16. She asserted that no clause in the said agreement provided for any consultation or involvement of any staff of the defunct KFS in any capacity whatsoever.
17. The witness stated that on 1st July 2021, the defunct Kenya Ferry Services staff were all absorbed by the Respondent at their prevailing KFS salaries.
18. Later in February 2022, the unionisable employees were converted into KPA staff, with all their salaries backdated to July 2021. Between the period 1st July 2021 and 19th April 2022, non-unionisable staff of the defunct KFS expressed their feeling that they were discriminated against because, despite the merger, they retained their KFS salaries, awaiting the finalisation of the restructuring and the subsequent translation of staff onto posts within the new structure.
19. The Respondent completed the restructuring process in July 2023 and incorporated all staff, including those from

the Ferry Services Department, into the new structure, with the appeals process still ongoing.

20. She further states that KPA management received complaints from non-unionisable staff of the defunct KFS and responded via an internal memo dated 19th December 2023. Subsequently, the Respondent approved payment of salary differences for non-unionisable staff to align their earnings with the KPA salary scales.
21. Following the approved translation exercise by the Respondent's Board of Directors, in April 2022, n0n-unionisable employees of KFS started enjoying KPA management salaries and allowances.
22. She emphasised that, in any case, the salaries earned by the Claimants after their absorption into KPA were considerably higher than those earned under KFS, and she provided illustrative examples demonstrating substantial salary increases.
23. The witness further stated that horizontal placement was implemented for the Claimants where feasible; however, in certain instances, it was unfeasible due to the presence of an existing KPA employee occupying the specific

positions. Consequently, the Claimants were placed progressively in a horizontal manner.

24. Regarding the alleged differential absorption, she explains that unionisable and non-unionisable employees were treated differently because unionisable employees were covered by a Collective Bargaining Agreement that was in existence on their absorption, and their positions were distinct and not common between KPA and KFS staff. The Respondent had to create posts in its establishment to accommodate the non-unionisable staff of KFS, as their absorption was not covered by any CBA.

25. The witness further stated that after the payments were backdated to 1st July 2021, pursuant to the approval by the KPA Board of Directors, all backdated payments were made in December 2023, and no staff of the defunct KFS, whether unionisable or non-unionisable, had their allowances curtailed or unpaid. The internal Memo dated 19th December 2023 clearly stated that any outstanding payments included allowances.

26. All the Respondent's employees, including those transferred from the defunct KFS, have been provided with

appropriate Personal Protective Equipment in compliance with the law.

27. The agreement executed between the Respondent and KFS on 17th June 2023, did not stipulate specific timelines within which the Respondent was to complete the absorption of the former staff of the defunct KFS. Equally, it was silent on the procedure of absorbing them. The Claimants have not with specificity and evidence demonstrated that they suffered discrimination.

28. The employees of KFS were absorbed on prevailing conditions of service pursuant to clause 3.1 of the Agreement. The Respondent, being a Government parastatal, pays all salaries to employees strictly in accordance with the job groups and contracts of employment.

The Claimants Submissions

29. The Claimants' Counsel submitted that at the hearing it emerged that the Claimants' salaries that they had lost following their translation into the Respondent's employment had been paid. As such, only two issues remain outstanding for determination in this suit, thus;

a) Whether there was equal, fair, and nondiscriminatory translation of the Claimants by the KPA into the correct salary band under KPA6 and KPA7.

b) Whether the 20% salary adjustments/harmonisation on the Claimants' salaries, which had already been agreed on prior to the presidential directive and eventual merger into KPA, should be awarded.

30. Submitting on the 2nd issue, Counsel for the Claimants submitted that the documentary evidence presented explicitly demonstrates that the Board of KFS had already agreed to the increment and what was being awaited was the approval by the Salaries and Remuneration Commission [SRC].

31. It was further submitted that the salary increment was intended to bridge the salary gap between unionisable and non-unionisable employees of KFS. This would obviate the unfortunate, inequitable situation that obtained, in which Managers were earning less than their juniors. The defunct KFS Board had committed to the increment. Consequently, the Respondent was bound to implement it

at the time of the transition or to pursue the outstanding approval from SRC.

32. Counsel urged this Court to note that the Respondent in its pleading did not deny the claim under this head.
33. By awarding of 20% pay increment to unionisable employees while being lethargic and or refusing to award the same to the Claimants and other nonunionisable employees despite the earlier commitments by KFS, the Respondent contravened the stipulations of Section 5[2] [a] of the Labour Relations Act. The actions constituted unequal treatment of employees.
34. Relying on Dock Workers Union v Kenya Ferry Services Limited & 2 Others; Salaries and Remuneration Commission [interested party], 2020 KEELRC 1857 [KLR], counsel contends that the role of the Salaries and Remuneration Commission (SRC) concerning the salaries of State Corporations is purely advisory. Consequently, it cannot be asserted by the Respondents that the absence of SRC approval restricted the salary increment.
35. Counsel further argues that the delay in absorption and translation of the Claimants into the KPA structure constituted another form of discrimination. Whereas the

unionisable employees were translated almost one year and five months earlier, enjoyed growth in salary bands at the Respondent's, the Claimants and other nonunionisable employees did not. The Claimants lost the period without experiencing any salary band growth.

36. It was further submitted that pursuant to the Staff Circular dated August 4, 2022, the Respondent had undertaken to horizontally translate the employees. This was undertaken only to the extent of the job Group, not with respect to the salary bands that obtained in the relevant and applicable Job Group.

37. The Respondent, having cited horizontal placement, created a legitimate expectation that the Claimants would be placed horizontally within the relevant applicable Job Group and, depending on their number of years, in the relevant equivalent pay Grade. In its ordinary meaning, horizontal means being at or involved in the same level or stage of the hierarchy.

38. To support the submission that the circular created a legitimate expectation, Counsel placed reliance on the case of **Communications Commission of Kenya & 5**

others v Royal Media Services [2014] KESC 53 [KLR].

39. The Respondent did not justify why, despite the indicators, it was to place the KFS staff horizontally, change the tactic midway to a vertically downward approach, resulting in disadvantaging the Claimants while benefiting others. He submitted further that the Respondent's witness admitted that the Respondent's employees were never affected, as they continued to enjoy superior benefits and pay grades, unlike the Claimants, who were placed at the starting/lowest pay grades. This, in his view, amounted to discrimination. The case of **Rose Mambo & 2 others v Limuru County Club & 15 others [2014],** to support this point.

40. Under Section 5[6] of the Employment Act, the burden of proof lay upon the Respondent as the employer to prove that the allegations by the Claimants did not exist. Considering the Respondent's witness's evidence, this burden was not discharged.

41. Under Article 27 of the Constitution, every person is equal before the law and has the right to equal protection, equal treatment and benefits.

The Respondent's Submissions

42. The Respondent's Counsel identified the following issues as the issues that emerge for determination in this matter;

    a) *Whether the Claimants proved a violation of the right to fair labour practices under Article 41 of the Constitution arising from their transition from KFS to KPA.*

    b) *Whether the Claimants proved unlawful discrimination, unequal treatment, or unilateral variation of their terms and conditions of employment.*

    c) *Whether the Claimant proved a violation of their constitutional rights under Articles 47 and 50 of the Constitution and consequently established entitlement to the declaratory and compensatory reliefs sought.*

43. Counsel submits that it is trite law that discrimination is not merely established because two groups of employees are treated differently. The employee asserting discrimination must demonstrate that they were in comparable circumstances with the comparators, they

received less favourable treatment, and that the difference in treatment lacked an objective and lawful explanation. To support the point, Counsel cited the case of **West Kenya Sugar Company Limited vs Lihungu [2023] KEELRC 1354[KLR].**

44. It was further submitted on behalf of the Respondent that differential treatment arising from structural or policy transitions does by itself amount to discrimination does not by itself amount to discrimination. Employees serving under different regulatory and administrative frameworks cannot automatically be treated comparators merely because their remuneration outcomes differ. To fortify this submission, Counsel cited **Mike & 7 others v Salaries and Remuneration Commission & 41 others [2024] KEELRC 2506[KLR].**

45. Distinctions traceable to institutional arrangements, budgetary approvals, or phased implementation of employment structures, the differentiation is objectively justified and therefore constitutionally permissible. Where the employer provides a rational administrative explanation for the difference in treatment, the

constitutional threshold for discrimination under Article 27 and Section 5 of the Employment Act is not met.

46. Contrary to the Claimants' submissions, in employment discrimination, the Court does not begin by examining the employer's justification. The law first requires the employee to establish a prima facie case of discrimination. Reliance has been placed on **Harun v Watu Credit Limited [2025] KEELRC 2542[KLR].**

47. Discrimination in law requires proof of targeted disadvantage directed at a protected class or individual. The testimony of the Respondent's witness and the documents placed before the court demonstrated a phased institutional integration followed by full backdated harmonisation of salary. The Claimants were not denied benefits. They received them after the establishment approval. The facts reveal administrative sequencing, not discriminatory treatment.

48. The unionised employees were governed by a Collective Bargaining Agreement that already defined their pay scales, job categories, and placement framework. The Claimants were management staff whose terms were not governed by a union agreement and whose integration

required approval and the creation of posts within the Respondent's structure. It follows, therefore, that the two categories were not similarly situated in law or in administration.

49. After harmonisation, the Claimants were placed within the Respondent’s salary structure and received substantial increases in remuneration. A process that ultimately improves an employee’s financial position cannot be characterised as discriminatory treatment.

50. Though the Claimants asserted that their rights under Articles 41 and 50 of the Constitution were violated. Contrary to the requirements of the law, they did not with specificity plead the manner in which they have been violated. Their assertion should be disregarded. To support this submission, reliance has been placed on the case of **Ndalut & another v Nairobi City Water & Sewerage Company Ltd [2025] KEELRC 425[KLR]**

Analysis and Determination

51. I have carefully considered the pleadings, evidence- both oral and documentary- and submissions—presented by the parties, and the following issues emerge for determination;

a) Whether the Respondent was obliged to absorb and translate the staff of the defunct KFS, with the 20% salary increment that, allegedly, the Board of the KFS had given a nod to.

b) Whether the Claimants' constitutional rights cited in their pleadings were violated by the Respondent.

c) Whether the Claimants are entitled to the reliefs sought or any of them.

52. The Government, as the employer of the public officers and the custodian of public administration, retains managerial and policy authority to reorganise state agencies in pursuit of efficiency and effective service delivery. This includes the power to abolish a state entity and transfer its functions and staff to another, as happened in this case. Such authority is ordinarily exercised within the framework of statute, public service regulations, and constitutional principles- particularly those relating to fair labour practices, administrative justice, and the rule of law. Consequently, while the state may lawfully redeploy or absorb staff into another entity, the process must be structured, transparent, and

respectful of accrued rights, including terms of service, continuity of employment, and legitimate expectations.

53. Decisions to abolish or merge state entities are often driven by legitimate policy considerations. These may include eliminating duplication of functions across agencies, rationalising public expenditure, enhancing operational efficiency, or aligning institutional mandates with evolving national priorities. In some instances, restructuring may also be prompted by fiscal constraints, recommendations from oversight bodies, or broader public sector reforms aimed at streamlining governance. Where properly undertaken, such decisions are not only lawful but necessary for responsive and sustainable administration.

54. However, the exercise of this managerial prerogative is not absolute and may be subjected to legal challenge under certain circumstances. A decision to abolish an entity or transfer staff may be impugned where it violates constitutional protections- such as the right to fair labour practices or fair administrative action, or where it is undertaken without due process, including consultation [where relevant], notice, or adhering to enabling

legislation. It may be challenged if it results in diminution of benefits, discrimination, or where it is shown to be actuated by bad faith, ulterior motives, or abuse of power. Courts will, in such cases, not question the wisdom of the policy decision per se, but will intervene to ensure that the process and its implementation conform to the law and constitutional standards.

55. I have carefully considered the Claimants' pleadings and evidence, and what is clear is that the 20% salary increment for the defunct KFS non-unionisable employees was under internal discussion before the merger. Additionally, it was subject to approval by the Salaries and Remunerations Commission, pursuant to their constitutional mandate.

56. Contrary to the Claimant’s Counsel’s submissions, the role of the stated Commission is not merely advisory in matters affecting the salaries and remuneration of staff in government agencies. Its advice is mandatory and binding on the entities. As such, any change in salary or remuneration for staff that is subject to Commission approval can only become a term of the employees’ contracts of service or be deemed accrued to them upon

such approval. In the circumstances of this matter, despite the alleged intention by the Board of Directors of the defunct KFS, the salary increment had not accrued to its said staff. The Respondent was therefore not bound to consider and onboard them with the 20% increment. See also. **Teachers Service Commission v Kenya National Union of Teachers & Others [2015] eKLR.**

57. The Claimants contended that the transition from Kenya Ferry Services to the Respondent violated their constitutional rights under Articles 47 and 50 of the Constitution because they were not consulted. In my view, this position lacks any solid legal foundation.

58. Where a merger or transfer of functions results in the absorption of staff from a defunct state entity into another public body, the Government, acting through the receiving entity, is not, as a general rule, required to negotiate the terms of transfer with individual employees. This is particularly so where the employees are non-unionised and therefore not covered by a collective bargaining framework that would otherwise trigger a duty to consult through recognised unions. The transfer is typically an incident of lawful public sector reorganisation, undertaken

pursuant to statute or executive policy, and the employees' continuity of services is preserved. In such circumstances, the receiving entity is expected to take over the affected staff on terms that are substantially similar and not less favourable, safeguarding accrued rights, rank, and benefits, rather than opening the process to individual bargaining.

59. Further, the process should not be conflated with redundancy. The legal incidents of redundancy, such as notice and consultation, do not arise unless it is shown that the purported transfer is a façade that, in effect, extinguishes employment or substantially diminishes employees' terms to their detriment.

60. The Claimants claimed that in the process of translating them, the Respondent committed actions that constituted discrimination against them and thus violated their constitutional right under Article 27 of the Constitution of Kenya 2027, and the statutory right and protection under Section 5 of the Employment Act,2007.

61. I have carefully examined the Claimants' pleadings and the evidence from their sole witness, and I see them as alleging that, first, when compared with unionised

employees, they were discriminated against. Second, when compared with employees already serving in the Respondent entity, they were discriminated against in many respects.

62. This Court takes cognisance of the distinct legal architecture that underpins the determination of the terms and conditions of employment of unionised employees as opposed to non-unionised employees. In the case of unionised employees, such terms are the product of collective bargaining processes conducted pursuant to the framework established under the Labour Relations Act,2007, wherein a recognised trade union negotiates with the employer on behalf of its members. The resultant Collective Bargaining Agreement embodies negotiated rights, benefits and obligations that are *sui generis* to the bargaining unit. Conversely, non-unionised employees derive their terms primarily from individual contracts of service and applicable statutory minima, without the benefit or burden of collective negotiation.

63. In that context, it would be a misapprehension of both fact and law for non-unionised employees to allege discrimination solely on the basis that their terms and

benefits are not at parity with those secured through a Collective Bargaining Agreement. The differentiation in terms does not, without more, constitute unlawful discrimination, but rather reflects a legitimate and legally sanctioned distinction grounded in the voluntary exercise of the right to organise and bargain collectively.

64. Indeed, to hold otherwise would undermine the very essence and incentive structure of collective bargaining, which is constitutionally underpinned by Article 41 of the Constitution of Kenya 2010. Accordingly, disparities arising from collectively bargained agreements, as opposed to individually negotiated contracts, cannot, *per se,* be impugned as discriminatory unless it is shown that such differentiation is arbitrary, lacks any rational basis, or is tainted by unlawful considerations prohibited by law. No doubt, the Claimants haven't shown these.

65. The Claimants contend that they were discriminated against when the Respondent translated the unionised staff of the defunct KFS into their system, and took a long time to onboard the Claimants and other non-unionised staff, thus prejudicing them.

66. This Court appreciates that the merger of Government agencies and consequent transfer of staff from a defunct entity into an absorbing institution is an inherently complex administrative and legal undertaking. This complexity can be particularly pronounced where the respective entities operate distinct human resources frameworks, encompassing divergent job grading systems, remuneration structures, and benefits regimes. In such circumstances, the process of harmonising these frameworks and aligning employees into a unified structure is not merely mechanical; it requires, in my view, careful evaluation, job mapping, fiscal alignment, and, where necessary, policy and regulatory approvals. It is therefore not practical to expect instantaneous parity in terms and conditions of service upon transfer. The Respondent's witness testified, and I find the testimony plausible that the delay was caused by the harmonisation process.

67. A phased or delayed translation of employees into the structures of the absorbing entity, standing on its own, in my view, cannot be construed as evidence of inequity or unlawful discrimination. Rather, it reflects a legitimate,

rational, and administratively necessary approach to institutional restructuring. So long as the process is guided by objective criteria, applied consistently, and undertaken in good faith with a view of eventual harmonisation, temporal disparities in salaries or job grades do not offend the principle of equality

68. The law does not demand uniformity at the expense of orderly transition; it demands fairness, reasonableness, and the absence of arbitrariness. Accordingly, differential treatment arising during the integration period must be assessed within the broader context of the restructuring process. A careful analysis of the Claimant's witness's evidence doesn't reveal unfairness, unreasonableness and or arbitrariness.

69. By reason of the foregoing premises, I inevitably conclude that the alleged disparity in job grades and salary between the Claimants and other non-unionised employees of the defunct KFS, and those of the Respondent at the time of translation, cannot be deemed to constitute discrimination or unequitable treatment. See also **West Kenya Sugar Company Limited vs Lihungu [2023] KEELRC 1354[KLR].**

70. It is important to note that, admittedly, the amounts the Claimants weren't paid as a result of maintaining the same salary they were earning while serving their former employer were made good after the harmonisation process and the translation were concluded.
71. Having found, as set out hereinabove, that none of the Claimants' constitutional rights was violated as alleged or at all, and that the compensation mentioned hereinabove occurred, I find no difficulty in holding that the Claimants are not entitled to any of the reliefs sought.
72. In the upshot, I find the Claimants' claim lacking in merit. It is hereby dismissed with costs.

Read Signed and Delivered this 30th Day of April 2026.

OCHARO KEBIRA

JUDGE