



**Alex & 27 others v Nairobi City County Government & 3 others (Cause E509 of 2023) [2025] KEELRC 1145 (KLR) (9 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1145 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E509 OF 2023**

**SC RUTTO, J**

**APRIL 9, 2025**

**BETWEEN**

**WABUYABO FLAVIANA ALEX & 27 OTHERS & 27 OTHERS & 27 OTHERS ..... CLAIMANT**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**PUBLIC SERVICE BOARD ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. It is common cause that vide a Deed of Transfer which was issued by way of Gazette Notice dated 25<sup>th</sup> February 2020, the Nairobi City County Government, the 1<sup>st</sup> Respondent herein, transferred to the National Government through the Ministry of Devolution some of its functions pursuant to Article 187 of *the Constitution* as read together with Section 26 of the *Intergovernmental Relations Act, 2012*. The functions transferred were:
  - a. County health services
  - b. County transport services;
  - c. County planning and development services; and
  - d. County public works, utilities and ancillary services.
2. It is apparent that as a result of the Deed of Transfer, the Nairobi Metropolitan Services (NMS) was established.



3. It is also not in dispute that the Public Service Commission, the 2<sup>nd</sup> Respondent herein advertised for vacancies of Enforcement Officers II for deployment to the NMS.
4. The Claimants aver through their joint Amended Memorandum of Claim that in the advert, the 2<sup>nd</sup> Respondent indicated that the positions of Enforcement Officers II would be for fixed term contracts of three years but could be renewed based on performance.
5. The Claimants aver that after successfully applying, being shortlisted, interviewed and trained, they were deployed to work in Nairobi City County under the NMS on 8<sup>th</sup> November 2022.
6. According to the Claimants, all fixed-term contracts of employment for public servants who had been employed from May 2019 were converted to permanent and pensionable in February 2022.
7. It is the Claimants' case that the 4<sup>th</sup> Respondent terminated their contracts of employment on an alleged expiry of contract. According to the Claimants, they were directed to cease reporting to work on 2<sup>nd</sup> July 2023, although some Claimants had not been issued with the said notices of expiry of contract three days to 2<sup>nd</sup> July 2023.
8. Against this background, the Claimants have sought declaratory orders as well as an order to compel the 1<sup>st</sup> and 4<sup>th</sup> Respondents to jointly and severally pay each Claimant one (1) month's salary in lieu of notice, salary for seven (7) months worked, unpaid leave and general damages for unfair termination all totalling the sum of Kshs 26,513,130/=. The Claimants have further prayed for interest plus the costs of the suit.
9. Opposing the Memorandum of Claim, the 1<sup>st</sup> Respondent has denied the existence of an employer-employee relationship with the Claimants. The 1<sup>st</sup> Respondent has further contended that it is the mandate of the 4<sup>th</sup> Respondent to recruit employees for the 1<sup>st</sup> Respondent, and if the 1<sup>st</sup> Respondent had purported to retain the services of the Claimants, it would have been perpetuating an illegality. According to the 1<sup>st</sup> Respondent, there is no demonstration that any law has been breached. Consequently, the 1<sup>st</sup> Respondent has asked the Court to dismiss the Claimant's Claim with costs.
10. The 2<sup>nd</sup> Respondent opposed the Memorandum of Claim through a Reply dated 8<sup>th</sup> November 2023. The 2<sup>nd</sup> Respondent has averred that upon request by the NMS, it recruited the Claimants as Enforcement Officers to support the execution of their mandate pursuant to the Deed of Transfer. That the Claimants were engaged on local agreement terms in the defunct NMS during the remainder tenure of the Deed of Transfer with effect from the date each of them assigned duty. That the Claimants were well aware that their contracts would terminate upon the end of the tenure of the NMS.
11. According to the 2<sup>nd</sup> Respondent, asking the Court to absorb them to the staff establishment of its service for the remainder of the contracts is asking the Court to rewrite a valid contract between the parties which has already terminated. Consequently, the 2<sup>nd</sup> Respondent prays that the Claimants' suit be dismissed with costs.
12. The 3<sup>rd</sup> Respondent responded to the Claim through Grounds of Opposition dated 23<sup>rd</sup> February 2023, filed by Ms. Mary Mochoge, Litigation Counsel, in which she contends that:
  - a. The 3<sup>rd</sup> Respondent has been misjoined in the proceedings.
  - b. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are independent legal entities with the mandate to manage their own human resource functions including recruitment and appointment.
  - c. There is no cause of action against the 3<sup>rd</sup> Respondent.



- d. The 3<sup>rd</sup> Respondent's mandate in respect of the subject matter in the proceedings is *functus officio*.
  - e. The 3<sup>rd</sup> Respondent should not be enjoined in the matter as this is a matter of employer/employee relationship and the 3<sup>rd</sup> Respondent is neither an employer nor an employee in the matter.
  - f. The 3<sup>rd</sup> Respondent prays that it be expunged from the proceedings or in the alternative the Claimant's Memorandum of claim be dismissed against it with costs.
13. The 4<sup>th</sup> Respondent did not enter appearance nor file a Response to the Memorandum of Claim. As such, they did not participate in these proceedings.
  14. The matter proceeded for hearing on 28<sup>th</sup> October 2024 and 4<sup>th</sup> December 2024, during which the Claimants as well as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents called oral evidence.

### **Claimants' Case**

15. The 1<sup>st</sup> Claimant, Mr. Wabuyabo Flavian Alex, testified as CW1 on behalf of the other Claimants. In this regard, the other Claimants executed a Letter of Authority to Plead and Act dated 29<sup>th</sup> November 2023, which, by consent, was admitted as duly filed on 24<sup>th</sup> February 2025.
16. At the outset, Mr. Wabuyabo adopted his witness statement to constitute his evidence in chief. He further produced the documents filed together with the Amended Memorandum of Claim as the Claimants' exhibits before Court.
17. It was Mr. Wabuyabo's testimony that after employment through the 2<sup>nd</sup> Respondent, he was deployed to work under the defunct NMS.
18. That the tenure of the NMS was extended in the month of March 2022 for six (6) months ending on 24<sup>th</sup> August 2022 with a handover period of three (3) months ending 30<sup>th</sup> November 2022.
19. That when the NMS tenure ended in the Month of November 2022, the 1<sup>st</sup> Respondent continued to engage him in the same capacity but did not pay his salary since the month of December 2022.
20. Mr. Wabuyabo further averred that in the month of February 2023, the 1<sup>st</sup> Respondent attempted to direct him to return working tools, uniforms and ceremonial dressings to Dagoretti Training College on the 3<sup>rd</sup> day of Friday, 2023.
21. That after going to Dagoretti Training College, the County Assembly of Nairobi City County set out to conduct an inquiry into the status of some 142 employees employed as Enforcement Officer II appointed on 12<sup>th</sup> August 2021.
22. That two (2) months later, the Nairobi County Assembly Sectoral Committee on Labour and Social Welfare tabled a report in the National Assembly which indicated that the 1<sup>st</sup> Respondent does not have the structure to absorb the Enforcement Officer II, to which he belongs.
23. Mr. Wabuyabo further averred that in the month of May 2023, the 4<sup>th</sup> Respondent did a memo which acknowledged that the County Government had continued to engage him and other employees retained from the NMS on an implied contract under the *Employment Act*.
24. That further, the 4<sup>th</sup> Respondent recommended that the 1<sup>st</sup> Respondent compensates him and other employees that they had retained from the defunct NMS. The 4<sup>th</sup> Respondent further recommended



that all the employees who were retained by the 1<sup>st</sup> Respondent be issued with a 30 days' notice for termination of contract.

25. Mr. Wabuyabo stated in further testimony that the 1<sup>st</sup> Respondent issued a 30 days' notice of intention to terminate his contract of employment with them.
26. He further averred that in the Framework to hand back the functions to the 1<sup>st</sup> Respondent, both the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent committed to retain them (Claimants) in employment.
27. Mr. Wabuyabo further averred that at the end of the tenure of the defunct NMS, the 1<sup>st</sup> Respondent retained him and the other Claimants herein to continue working for seven (7) months.

### **1<sup>st</sup> Respondent's Case**

28. The 1<sup>st</sup> Respondent called oral evidence through Ms. Janet Opiata, who testified as RW1. Ms. Opiata identified herself as the 1<sup>st</sup> Respondent's Chief Officer and equally, she adopted her witness statement to constitute her evidence in chief. Ms. Opiata further produced the documents filed on behalf of the 1<sup>st</sup> Respondent as exhibits before Court.
29. Ms. Opiata averred that the Claimants were employees of the defunct NMS and were engaged by the 2<sup>nd</sup> Respondent.
30. She averred that the 2<sup>nd</sup> Respondent appointed the Claimants on local agreement terms of service for the period of the remaining tenure of the NMS.
31. Ms. Opiata denied the assertion that the Claimants were appointed on a three (3) year contract as alleged.
32. It was Ms. Opiata's evidence that the 1<sup>st</sup> Respondent acknowledges that the Claimants continued serving even after the lapse of their contracts in November 2022. That in light of this, the 1<sup>st</sup> Respondent opted to settle the dues owed to the Claimants for the period served under implied contract. This was up to 2<sup>nd</sup> July 2023.
33. Ms. Opiata contended that the 1<sup>st</sup> Respondent was not obliged to absorb the Claimants, as the 2<sup>nd</sup> Respondent unilaterally recruited them without consulting the 4<sup>th</sup> Respondent, who is an employer of the 1<sup>st</sup> Respondent as stipulated in the County Government Act, 2012.
34. She further averred that the issuance of a month's notice was not backdated rather, communication took time to get to the Claimants.
35. Ms. Opiata further averred that the retention of 147 Enforcement Officers was not because of an existing establishment in the 1<sup>st</sup> Respondent's structure, but the officers had valid three (3) year running contracts issued by the 2<sup>nd</sup> Respondent. The said officers were to exit county services upon expiry of the contracts.
36. She further averred that the clearance with relevant departments is a normal human resource procedure for any officer exiting the county public service, and the same does not necessitate exiting the Public Service.

### **2<sup>nd</sup> Respondent's Case**

37. The 2<sup>nd</sup> Respondent called oral evidence through Mr. John Kimani Njorio who testified as RW2. Mr. Kimani identified himself as the Assistant Director, Human Resource Management and Development



- at the 2<sup>nd</sup> Respondent and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the 2<sup>nd</sup> Respondent as exhibits before Court.
38. Mr. Kimani stated in his evidence that on 23<sup>rd</sup> June 2021, the 2<sup>nd</sup> Respondent, on behalf of the now defunct NMS, appointed 300 persons to fill the advertised positions of Enforcement Officer II J/G 'J' on local agreement terms, for a period of three (3) years with effect from the date they assumed duty of the posts. According to Mr. Kimani, the Claimants, although shortlisted and interviewed, were not among the 300 appointed officers but were nevertheless placed on the reserve list.
  39. That on 15<sup>th</sup> December 2021 and 21<sup>st</sup> April 2022, the 2<sup>nd</sup> Respondent on behalf of the now defunct NMS, appointed 28 and 26 persons from the reserve list, among them the Claimants herein, to positions of Enforcement Officer II J/G 'J' on local agreement terms for the remaining tenure of the Deed of Transfer with effect from the date they assumed duty of the posts to replace those who did not take up their appointment.
  40. Mr. Kimani was categorical that the Claimants were not appointed for a period of three (3) years as alleged.
  41. He further stated that the power to appoint persons to hold or act in offices in the public service pursuant to Article 234 of *the Constitution* and to vary the terms of appointment of such persons is vested in the 2<sup>nd</sup> Respondent.
  42. That in exercise of the above function, the 2<sup>nd</sup> Respondent vide its circular Ref. PSC/ADM/13/ (18) dated 3<sup>th</sup> August 2021 clarified that the review of employment on contract terms at entry level did not apply to persons serving on short-term special programmes. That the NMS was created for a short specific period, and as such, persons appointed on contract to the NMS were not eligible for the conversion.
  43. Mr. Kimani further averred that the Deed of Transfer provided for the release of the County Government staff that had been taken to NMS back to the County Government. That the officers that were not serving at the County Government but were directly recruited by NMS through the 2<sup>nd</sup> Respondent were appointed on contract terms. In his view, it would not have been feasible for such person's terms of employment to be converted to permanent and pensionable terms without a resolution of the County Public Service Board to whom they would be under, upon the lapse of the Deed of Transfer.
  44. Mr. Kimani further stated that the contract between the 2<sup>nd</sup> Respondent and the Claimants lapsed with the lapse of the Deed of Transfer since their appointment was for the period of the date they reported for duty and the remaining duration of the Deed of Transfer.
  45. According to him, any other period they may have served after the handover back of the transferred functions can only be construed as an implied contract with the 1<sup>st</sup> Respondent, which could terminate with due process.
  46. It was Mr. Kimani's further evidence that the conversion could not have taken place since the 4<sup>th</sup> Respondent had already issued a disclaimer clearly indicating that it would not be in a position to accommodate/absorb staff being recruited by NMS without reference to the county-approved structure and establishment.
  47. Therefore, upon receipt of a request from the NMS to replace those candidates who had not taken up their appointments, and well aware of the disclaimer, the 2<sup>nd</sup> Respondent appointed the Claimants for the remaining duration of the Deed of Transfer.



48. The 3<sup>rd</sup> Respondent elected not to call oral evidence and instead associated itself with the case of the 2<sup>nd</sup> Respondent.

### **Submissions**

49. Only the Claimants and the 3<sup>rd</sup> Respondent filed written submissions. Despite the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents being granted 21 days' leave to file written submissions, they failed to do so.
50. The Claimants urged the Court to reject any attempts by the Respondents to disown them because of their conduct after the Deed Transfer was signed. It was further submitted by the Claimants that over a year after NMS's tenure lapsed, the 1<sup>st</sup> Respondent retained other employees in the same category who were employed earlier than the Claimants with full, timely pay. That for the Claimants, the 1<sup>st</sup> Respondent retained them for over half a year after the lapse of the NMS Tenure but didn't pay their salary when it fell due.
51. The 3<sup>rd</sup> Respondent submitted that the 1<sup>st</sup> Claimant purports to act on behalf of the other Claimants, but no evidence has been adduced to demonstrate that the 1<sup>st</sup> Claimant has the requisite authority from the other Claimants. In support of this position, reliance was placed on *Mbuthia & 45 others v Kenya National Farmers Federation [Sued Through Its Chairman, Nduati Kariuki, Secretary Professor Kaburu M'ribiru and its Treasurer Grace Ngambil; Kenfap Services Limited & another (Interested Parties) (Cause 1593 of 2018) [2024] KEELRC 1437 (KLR) (14 June 2024) (Judgment)*.
52. That the 1<sup>st</sup> Claimant has failed to tender any letter of authority which grants him the authority to take action on behalf of the other Claimants.
53. According to the 3<sup>rd</sup> Respondent, the absence of evidence of authority to represent, the action brought by the 1<sup>st</sup> Claimant cannot proceed on behalf of the other 27 Claimants.

### **Analysis and Determination**

54. At the outset, it is worth pointing out that the submissions of the 3<sup>rd</sup> Respondent are at variance with the record, seeing that on 24<sup>th</sup> February 2025, the Court by consent, admitted as duly filed a Letter of Authority to Plead and Act dated 29<sup>th</sup> November 2023, signed by all the Claimants.
55. Flowing from the pleadings by all parties herein, the evidentiary material on record as well as the submissions on record, it is apparent that the Court is being called to determine the following issues: -
- i. Who was the Claimant's employer?
  - ii. Whether the termination of the Claimants from employment was unfair and unlawful;
  - iii. Whether there is a case for discrimination against the Claimants; and
  - iv. Whether the Claimants are entitled to the reliefs sought.

### **Who was the Claimant's employer?**

56. The arrangement between the Claimants and the Respondents was one of a kind. Here is why. Pursuant to Article 235 of *the Constitution*, each county government is given the responsibility of establishing and abolishing offices in its public service, appointing persons to hold or act in those offices, and confirming appointments and exercising disciplinary control over and removing persons holding or acting in those offices.



57. The aforementioned functions are exercised through the County Public Service Boards being corporate bodies established in each county under Section 57 of the *County Governments Act*. The functions of the County Public Service Boards are to be found in Section 59 of the *County Governments Act*, which mandates each Board, on behalf of its respective government, to perform certain functions, including but not limited to establishing and abolishing offices in the county public service.
58. In the present case, the Claimants who were rendering services for the 1<sup>st</sup> Respondent County Government were not employed by the Nairobi County Public Service Board, the 4<sup>th</sup> Respondent herein, as stipulated under Section 59 of the *County Governments Act*. Rather, the Claimants were recruited by the Public Service Commission, the 2<sup>nd</sup> Respondent herein.
59. The circumstances leading to the unique scenario presenting in this case can be traced to the Deed of Transfer, which was by way of a Gazette Notice dated 25<sup>th</sup> February 2020. Through the Deed of Transfer, certain functions which were specified in the Deed were transferred from the 1<sup>st</sup> Respondent County Government to the National Government through the Ministry of Devolution. Effectively, the NMS was established as the “vehicle” through which the transferred functions were to be performed.
60. Of relevance in this case is Article 5.7 of the Deed of Transfer, which mandated the 4<sup>th</sup> Respondent to act in consultation with the 2<sup>nd</sup> Respondent in formulating the necessary instruments to facilitate the secondment and or deployment of the necessary human resources in the delivery of the transferred functions.
61. Indeed, it is on the basis of Article 5.7 that the 2<sup>nd</sup> Respondent proceeded to recruit the Claimants, who were subsequently deployed to perform the transferred functions under the NMS.
62. In this regard, the 1<sup>st</sup> Claimant’s Offer of Appointment dated 11<sup>th</sup> January 2022, which was exhibited in Court, stipulates as follows:
- “ This is to convey the decision of Public Service Commission vide letter Ref. No.....dated 15<sup>th</sup> December 2021, that you be appointed to the position of enforcement officer....in Nairobi Metropolitan Services on Local Agreement terms on the remaining tenure of the deed of transfer w.e.f date you assume duty not later than 15<sup>th</sup> February 2022.”
63. It is clear from the Claimant’s offer of appointment that the employment of the Claimants was fixed and tied to the remaining tenure of the NMS. As to the tenure of the NMS, Clause 9.1 of the Deed of Transfer stipulates that the Deed was to remain in force for an initial renewable period of 24 months from the date of execution. Through a Further Addendum to the Deed of Transfer, dated 8<sup>th</sup> March 2022, the parties agreed to extend the duration of the transferred functions by a further period of six (6) months from February 2022 to 24<sup>th</sup> August 2022.
64. On 30<sup>th</sup> September 2022, a Framework for the Handover of the Transferred Functions from the National Government to the 1<sup>st</sup> Respondent was executed by the Cabinet Secretary Ministry of Devolution, the 3<sup>rd</sup> Respondent, and the Governor of the 1<sup>st</sup> Respondent.
65. With respect to the deployment of staff and personnel who were employed by the NMS during the subsistence of the Deed and who had been performing the transferred functions under the NMS, such as the Claimants, Clause 3.3 (b) of the Framework stipulated that the said staff were to be absorbed into the 1<sup>st</sup> Respondent’s staff establishment subject to existing vacancies and based on the Nairobi City County needs.



66. In the ordinary sense, the Claimant's respective contracts of employment having been fixed for the tenure of the NMS, ought to have ended by effluxion of time upon the expiry of the Deed of Transfer and by implication the end of the tenure of the NMS. This is in line with the general principle that fixed-term contracts carry no rights, obligations, or expectations beyond the date of expiry.
67. It is not disputed that the Claimants continued rendering their services to the 1<sup>st</sup> Respondent following the expiry of the Deed of Transfer and, by implication, the end of the tenure of the NMS. Differently expressed, the Claimants continued rendering their services to the 1<sup>st</sup> Respondent despite the expiry of their fixed-term contracts.
68. In light of the foregoing, the question that this Court must now answer is who the Claimants' employer was at the material time.
69. As it is, all the Respondents save for the 4<sup>th</sup> Respondent, who did not participate in these proceedings, have disowned the Claimants. On its part, the 1<sup>st</sup> Respondent has contended that it is the 2<sup>nd</sup> Respondent that employed the Claimants. The 1<sup>st</sup> Respondent has further contended that at no time were the obligations between the Claimants and the NMS transferable to the 1<sup>st</sup> Respondent.
70. The 1<sup>st</sup> Respondent has maintained that it had no obligation to retain or absorb the Claimants into its workforce.
71. On the part of the 2<sup>nd</sup> Respondent, it has been contended that the contracts of the Claimants expired upon the expiry of the Deed of Transfer and if the 1<sup>st</sup> Respondent continued engaging the Claimants beyond the time that the National Government handed over the transferred functions to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent was not a party to the contract and/or arrangement.
72. In view of the above contestation, it is imperative to revisit the concept of employer- employee relationship.
73. The *Employment Act* defines an employer to mean "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company" while an employee is defined to mean "a person employed for wages or a salary and includes an apprentice and indentured learner".
74. Applying the statutory definitions to the case herein, this Court is of the view that the evidence on record supports the position that the Claimants became employees of the 1<sup>st</sup> Respondent upon the expiry of the Deed of Transfer and the NMS being rendered defunct. Why do I say so? Despite the 1<sup>st</sup> Claimant's Offer of Appointment providing explicitly that the employment of the Claimant was fixed for the remaining tenure of the NMS, the 1<sup>st</sup> Respondent continued engaging the services of the Claimants. This was coupled with the fact that the 1<sup>st</sup> Respondent paid the Claimants' salaries for the period they were engaged.
75. Therefore, it is apparent from the foregoing that the statutory definitions of employer and employee under the *Employment Act* fit the relationship that existed between the 1<sup>st</sup> Respondent and the Claimants after the expiry of the Deed of Transfer.
76. What's more, the 1<sup>st</sup> Respondent, through the County Secretary and Head of County Public Service, admitted to the existence of an employment relationship between the Claimants and the 1<sup>st</sup>



Respondent in the letter terminating the Claimant's employment. For context, I will reproduce the said letter of termination, dated 2<sup>nd</sup> June 2023, in part:

“The Nairobi City County Government has continued to engage you for your services as enforcement officer (2) Job group “J” after the expiry of your contract issued by the defunct Nairobi Metropolitan Services (NMS), which ended on 30<sup>th</sup> November 2022 and or March 2023.

The county public service board vide memo no...dated 31<sup>st</sup> May 2023 has acknowledged that your continuous engagement by the County Government constitutes a “contract of service” as per the *Employment Act* 2007. You shall be fully paid your salaries for the period that you served.”

77. In light of the foregoing, I am led to question why the 1<sup>st</sup> Respondent would continue to engage the Claimants after the expiry of the Deed of Transfer, end of the tenure of NMS, admit to the existence of a contract of service with the Claimants and proceed to pay them their salaries if it did not consider them their employees. This is bearing in mind that Article 3.3(b) of the Framework gave the 1<sup>st</sup> Respondent leeway to absorb the Claimants into its establishment subject to existing vacancies.
78. As a matter of fact, the 1<sup>st</sup> Respondent was not mandated to absorb the Claimants into its service in the event there were no vacancies within its establishment. Why did it continue engaging them?
79. For the foregoing reasons, the Court has no reason to doubt that upon expiry of the Deed of Transfer and by implication the end of the tenure of the NMS, the 1<sup>st</sup> Respondent by its own conduct implied the existence of a contract of service with the Claimants. Indeed, this fact was admitted by the 1<sup>st</sup> Respondent in the Claimants' letters of termination.
80. This being the case, the Claimants' contract of employment evolved from fixed-term contracts to open-ended contracts. In this regard, the Claimants were protected against unfair termination of employment and in any event, such termination was to be undertaken procedurally and in compliance with the provisions of Sections 41,43 and 45 of the *Employment Act*.
81. That said, the next logical question to ask is whether the termination of the Claimants' contracts of employment was fair and lawful.

#### **Unfair and unlawful termination?**

82. The *Employment Act*, 2007, prohibits unfair and unlawful termination from employment. In this regard, an employer is required to prove that an employee's termination from employment was fair substantively and procedurally. The legal parameters for determining whether the employer acted fairly and lawfully in terminating the employment of the employee are to be found under Sections 41, 43 and 45 of the *Employment Act*.
83. Whereas substantive justification entails proof of the reasons which resulted in an employee's termination from employment, procedural fairness has to do with the process applied in effecting an employee's termination from employment. I will start by considering substantive justification.
84. In terms of Section 43(1) of the *Employment Act*, an employer is required to prove the reason or reasons for the employee's termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of Section 45.



85. With respect to Section 45 (2) (a) and (b) of the *Employment Act*, termination of employment is unfair in substance if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
86. In the present case, the reason for the termination of the Claimants' contract of employment is not discernible from the letters of termination. In this regard, the Claimants were merely notified that their contracts of employment were being terminated upon expiry of contract. This is notwithstanding the fact that the Claimants' fixed term contracts had long expired, but the 1<sup>st</sup> Respondent had continued to retain their services. Indeed, the 1<sup>st</sup> Respondent's only contention was that the Claimants were not their employees. However, as stated herein, this position is contrary to the evidence on record.
87. The long and short of it is that the 1<sup>st</sup> Respondent did not present any evidence to prove that the termination of the Claimants from employment was fair, valid and related to their conduct, capacity or based on its operational requirements in terms of Sections 45(2) (a) & (b) of the *Employment Act*.
88. With regards to compliance with fair procedure, the 1<sup>st</sup> Respondent yet again failed to lead evidence to prove the same. Indeed, there was no indication, let alone a suggestion, that the Claimants were subjected to due process prior to being terminated from employment.
89. In light of the provisions of Section 45(2) (c) as read together with Section 41 of the *Employment Act*, the 1<sup>st</sup> Respondent was bound to subject the Claimants to a fair process prior to the termination of their employment contracts. In the absence of evidence to this effect, I can only conclude that no such process was undertaken.
90. In sum, the Court finds that the termination of the Claimants' contracts of employment was both unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*.

### **Discrimination?**

91. The Claim for discrimination is declined as it is evident that the first lot of the Enforcement Officers who were employed earlier than the Claimants were serving under different terms of service compared to the Claimants.
92. As such, and in view of the definition of the term "discrimination" under the Black's Law Dictionary, (10<sup>th</sup> Edition), in that it is differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured, the Court finds that the two groups of Enforcement Officers were not comparable. They had their own different terms of service hence are not comparable.

### **Appropriate Reliefs**

93. Having found that the termination of the Claimants from employment was unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*, the Court awards each Claimant one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4) months of their last salary. This award has taken into account the length of the employment relationship between the Claimants and the 1<sup>st</sup> Respondent which was considerably short and the unique circumstances under which the said employment relationship came to be.
94. At the time the matter proceeded for hearing, the Claimants admitted that they had received their outstanding salaries. To this end, this claim falls by the wayside.



95. The declaratory reliefs with respect to deployment and absorption of the Claimants into the service of the 1<sup>st</sup> Respondent are declined, given the unique manner in which the employment relationship came to be. Besides, there is no tangible evidence that the 1<sup>st</sup> Respondent had made an express commitment to absorb the Claimants into its establishment. If anything, Article 3.3(b) of the Framework for Hand Over of the Transferred Functions back to the 1<sup>st</sup> Respondent left it open for the 1<sup>st</sup> Respondent to consider the absorption of the Claimants into its establishment subject to the existence of vacancies and based on its needs. In no uncertain terms, such absorption was not mandatory.

### Orders

96. In the final analysis, the Court enters judgment in favour of the 28 Claimants against the 1<sup>st</sup> Respondent and each Claimant is awarded:
- a. One (1) month's salary in lieu of notice being Kshs 45,270.00
  - b. Compensatory damages in the sum of Kshs 181,080.00, being equivalent to four (4) months' salary.
  - c. The total award is Kshs 226,350.00.
  - d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.
97. The 1<sup>st</sup> Respondent shall bear the costs of the suit as it is their actions and omissions that triggered the instant suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL 2025**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimants Mr. Rakweri

For the 1<sup>st</sup> Respondent Mr. Isinta

For the 2<sup>nd</sup> Respondent Ms. Wangechi

For the 3<sup>rd</sup> Respondent Ms. Jepkemei instructed by Ms. Mochoge

For the 4<sup>th</sup> Respondent No appearance

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

