



**Kenya Union of Commercial Food Allied Workers v Morison Engineering  
Limited (Employment and Labour Relations Cause 1454 of 2017)  
[2024] KEELRC 382 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 382 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1454 OF 2017  
K OCHARO, J  
FEBRUARY 23, 2024**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD ALLIED WORKERS .... CLAIMANT  
AND  
MORISON ENGINEERING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a duly registered trade Union under the provisions of the *Labour Relations Act*, 2007, whose mandate is to represent the interest of workers in the commercial and food manufacturing sector.
2. The Respondent is an engineering company dealing with plumbing services, fire services, and repairing and maintenance of fire extinguishers and borehole drilling.
3. It is averred that the Claimant and respondent herein have a valid Recognition Agreement pursuant to which a Collective Bargaining Agreement was concluded and came into force in January 2016 to December 2017.
4. The Claimant sued the Respondent herein for the unfair/unlawful termination of Eunice Wanjiku Kibethi and Geoffrey Njeru Ileri, who were employed by the Respondent on diverse dates as follows:



No.	Name	Date of appointment	Position	Salary	Date of termination
1.	Eunice Wanjiku Kibethi	1 <sup>st</sup> September, 2014	Service Technician	Kshs. 17,000	27 <sup>th</sup> August, 2016
2.	Geoffrey Njeru Ileri	3 <sup>rd</sup> January, 2005	Service Technician	Kshs. 13,000	27 <sup>th</sup> August, 2016

5. That the grievants' engagement was on a contractual basis which was renewed from time to time.
6. The Claimant averred that the grievants performed their duties diligently and to the respondent's satisfaction until 27<sup>th</sup> August 2026 when the 1<sup>st</sup> grievant was terminated through a telephone call from the Respondent's Technical Manager, one Mr. Suleiman Maina and the 2<sup>nd</sup> grievant was terminated on the same day but through SMS.
7. The trade dispute, subject of the instant Claim was first reported to the Ministry of Labour and Social Protection in accordance with the provisions of Section 62 of the Labour Relations Act and a conciliator appointed. A report of the conciliator was subsequently shared and a referral certificate issued in line with the provisions of Section 69 of the Labour Relations Act, 2007.
8. The Claimant contended that the grievants' termination was unlawful and was on account of their union membership.
9. Aggrieved by the respondent's decision to terminate the grievants' employment, the Claimant union filed the instant claim seeking the following reliefs:
  - a. Reinstatement the two grievants to their respective position and treat them as if their contract was not terminated
  - b. Pay the two grievants all the salaries for the period they have been out i.e. from September 2016 upto date
  - c. Pay the two grievants all the accrued annual leaves.
  - d. Pay the two grievants 12 months gross salary compensation for wrongful termination and discrimination.

In the alternative and where the reinstatement is not favourable remedy the Claimant prays that this Honourable Court to Order the Respondent to pay the grievant as follows:

Eunice Wanjiku

- i. One month in lieu of notice Kshs. 23,925.90
- ii. Accrued annual leave for 2 years Kshs. 41,627.60
- iii. Salary for August 2016 kshs. 23,925.90
- iv. Salary arrears/underpayment per the CBA for Sept 2015 to August 2016 Kshs. 83,110.80
- v. Maximum compensation for Unlawful termination Kshs. 287,110.80



vi. Service gratuity Kshs. 24, 015.90

Total Claim Kshs. 418,163.40

Godfrey Njeru Ileri

i. One month in lieu of notice Kshs. 23,925.90

ii. Accrued annual leave for 2 years Kshs. 228,951.80

iii. Salary for August 2016 kshs. 23,925.90

iv. Underpayment per the CBA for Sept 2015 to August 2016 Kshs. 83,110.80

v. Service gratuity Kshs. 228, 915.80

vi. Maximum compensation for Unlawful termination Kshs. 287,110.80

Total Claim Kshs. 875,977.00

e. Together with costs of the claim in favour of the Claimant.

10. In response to the claim, the respondent filed a statement of response dated 13<sup>th</sup> November 2017 and filed in Court on 23<sup>rd</sup> November 2017, in which it admits having engaged the grievants on fixed-term contracts. The Respondent however denied unlawfully or unfairly terminating the grievants' contracts maintaining that the same came to an end based on the effluxion of time.
11. The Respondent further admits the existence of a Collective Bargaining Agreement, it was however the Respondent's contention that the same came into effect on 21<sup>st</sup> July 2016 the date the agreement was executed. It is on this basis that clauses of the Collective Bargaining Agreement did not apply to the grievants as contended.
12. On the claim for payment of house allowance, the Respondent averred that the grievants are not entitled to the same as their respective employment contracts did not provide for payment of house allowance. The respondent argues that the grievants having been employed under a term contract were bound by the terms stipulated in their respective contracts.
13. The Respondent denied terminating the grievants' employment contracts in the manner alleged in the Claim.
14. The respondent maintains that the conciliator's report was fair and just given that it gave the correct representation of the circumstances of this case.
15. In conclusion the Respondent urged this Honourable Court to find the instant Claim without merit and prayed that the same be dismissed in its entirety with costs to the Respondent.
16. The matter proceeded for hearing on 22.02.2023 with both grievants testifying as CW1 and CW2 respectively and the Respondent calling one witness to testify on its behalf.

### **Claimant's Case**

17. CW1, Eunice Wanjiku Kibethi adopted her witness statement dated 6<sup>th</sup> July 2017 as her evidence in chief. She further relied on the list and bundle of documents marked HN 1 to HN18 as exhibits in this case. In her statement, CW1 reiterates the averments made in the Memorandum of Claim.



18. Similarly, CW2, Godfrey Njeru Ileri also adopted his witness statement as his evidence in chief and relied of the list and bundle of documents.
19. Both grievants urged this Honourable Court to find in their favour and allow their claim in terms of the reliefs sought in the Memorandum of Claim.
20. RW1, Francis Mukua, an accountant at the Respondent Company adopted his witness statement dated 13<sup>th</sup> October, 2017 as his evidence in chief. He further relied on the List and Bundle of Documents filed in Court on 23<sup>rd</sup> November 2017 as exhibits in this matter. In his witness statement, RW1 reiterated the averments made in the Statement of Response.
21. Parties thereafter filed and exchanged their written submissions.

### **Submissions by the parties**

21. In its submissions the Claimant argues that it has made a case on behalf of the grievants thereby urging this Honourable Court to allow the claim as prayed.
22. The Claimant further submits that the dispute went through Dispute Resolution Mechanism at the Ministry of Labour. It, however, faulted the conciliator for not taking into consideration all facts in arriving at his recommendation. Being dissatisfied with the findings and recommendations of the conciliator the Claimant sought for a referral certificate and filed the instant claim.
23. The Claimant submits that both grievants are entitled to one month's pay in lieu of notice and relied on the provisions of Clause 12 (b) of the Collective Bargaining Agreement. This fact the Claimant submits was not considered by the conciliator.
24. With regards to payment for days worked in August 2016, the Claimant submits that both grievants are entitled to compensation under this head given that no evidence was adduced by the Respondent confirming payment of such salary.
25. On the claim for underpayments, the Claimant submits that both grievants are entitled to the same by dint of clause 22 (a) and (b) (i) on the Regulated wages and conditions of employment effective 1<sup>st</sup> May 2015. The claimant urged this Honourable to be guided by the provision and award compensation under this head.
26. On accrued leave days, the claimant submitted that it had no idea of how the Respondent arrived at the leave balances appearing on the leave forms. It maintained that the leave forms produced by the Respondent were mere forgeries. The Claimant union urged this Honourable Court to award the grievants compensation under this head as per the Claimant's tabulation.
27. The Claimant further submitted that in the absence of proof of payment of the August 2016 salaries for the grievants they are entitled to the same.
28. The Claimant further submitted that the Respondent is bound by the Collective Bargaining Agreement as signed between the Claimant union and the Respondent and that the CBA supersedes any other law. For emphasis, the Claimant cited and relied on the Court findings in the case of Kenya National Private Security Workers Union vs. Wells Fargo Limited CBA 165 of 2019.
29. In conclusion the Claimant urged this Honourable Court to find that it had made a case for the grievants and therefore urging this Court to allow the Claim in terms of the reliefs sought in the Memorandum of Claim.



## Respondent's Submissions

30. The Respondent on the other hand submits that the grievants were not terminated as alleged as no evidence was adduced of the alleged termination. The Respondent further submits that the contracts lapsed by effluxion of time and did not amount to a dismissal and/or termination. To fortify this argument, the Respondent relied on the Court of Appeal decisions in the cases of Transparency International – Kenya Vs Teresa Carlo Omondi (2023) eKLR and Registered Trustees of the Presbyterian Church of East Africa & Another Vs Ruth Gathoni Ngotho (2017) eKLR and the High Court decision in the case of Anne Theuri Vs Kadet Limited (2013) eKLR on fixed term contracts.
31. The Respondent further submitted that it had demonstrated that the grievants were in fact not terminated as alleged and that their employment with the Respondent came to a natural end following the expiry of their fixed term contracts. The Respondent therefore urged this Honourable Court to find that the grievants termination was by effluxion of time.
32. With regards to reliefs sought by the Claimant, the Respondent submits that the grievants are not entitled to the remedies sought in the Memorandum of Claim for the reason that their employment terminated by effluxion of time.
33. The Respondent further submits that the Collective Bargaining Agreement which the Claimant union relies on did not apply to the grievants in total having been executed on 21<sup>st</sup> July, 2016 and was to take effect from 1<sup>st</sup> January 2017. The Respondent contends that the same can only apply with limitation.
34. With regards to the claim for house allowance the Respondent submits that the grievants will only be entitled to 8 months (from 1<sup>st</sup> January 2016 to 31<sup>st</sup> August 2016) being Kshs. 17,600/- for both grievants.
35. On leave days the Respondent urged this Honourable Court to consider the leave forms produced in evidence indicating the leave entitlements to both grievants. It was also submitted that it is on this premise that it calculated dues with respect to leave days and wrote cheques in favour of both grievants but the same remained uncollected. The Respondent submitted that the grievants are entitled to Kshs. 15,912/- and Kshs. 14,132/- as compensation under this head.
36. The Respondent further submitted that the total dues for each grievant are Kshs. 33,512/- for the 1<sup>st</sup> grievant and Kshs. 31,732/- for the 2<sup>nd</sup> grievant.

## Analysis and Determination

37. I have carefully considered the material placed before this court, inclusive of the submission by the parties and the following issues commend themselves for determination;
  - a. What was the nature of the grievants' employment at the time of separation?
  - b. Were the contracts of the grievants terminated unfairly?
  - c. Are the grievants entitled to the reliefs sought?

### **a) What was the nature of the Grievants' employment at the time of separation in employment with the Respondent?**

38. The parties herein took diametrically opposite positions on the nature of the grievants' contracts of employment, making it imperative for this court to determine the issue at the onset. The determination



is so very necessary as it will have a huge implication on the award or otherwise of the reliefs sought by the grievants.

39. It is significant to note that it does not matter what label the parties have placed on their relationship. Even in a situation where there is an express term in the contract indicating the nature of the relationship, the courts will not hesitate in cutting through the label so as to reveal the true actual relationship between the parties – see *Ferguson -vs. John Dawson & Partners (Contractors) Ltd* (1976) 3 All ER 817.
40. The Respondent contended that the grievants’ contracts of employment were fixed term contracts and that the separation in employment between it and the grievants came about when the contracts came to an end by effluxion of time. The Claimant holds a contrary view.
41. It is common cause that the 1<sup>st</sup> grievant (Eunice Wanjiku Kibathi first came into employment on or about September 2014. Further, the relationship between her and the Respondent was birthed by, and anchored on, the contract of employment dated September 01, 2014.
42. The contract provided for the period of the contract, thus;
- “Your contract will run from 1<sup>st</sup> September 2014 to 31<sup>st</sup> August 2015 (both days inclusive).
43. Further, there is a consensus between the parties that at the lapse of the contract period above stated, the contractual relationship between the parties was extended for one year with effect September 01, 2015. The extension was under the letter dated September 01, 2015, which read in part:
- “..... We refer to your contract with us Ref: RDM/mn/temp/14 dated September 01, 2014, and are pleased to advise that the same has been extended for one year from September 01, 2015, to August 31, 2016 (both days inclusive).
- All the other terms and conditions of the contract remain unchanged.”
44. Equally, the employment relationship between the 2<sup>nd</sup> grievant (Godfrey Njeri Ireri) was first founded on a contract of employment that was entered into between him and the Respondent on the 1<sup>st</sup> of September 2014, under Clause 1 it provided:
- “Period of Contract
- Your contract will run from 1<sup>st</sup> September 2014 to 31<sup>st</sup> August 2015 (both days inclusive).”
45. Just like the 1<sup>st</sup> Grievants’ contract, this contract was extended by the Respondent’s letter dated September 01, 2015, and the letter read in part;
- “We refer to your contract with us Ref: Rmm/mn/temp/14 dated September 01, 2014, and are pleased to advise that the same has been extended for one year from September 01, 2015, to August 31, 2016 (both days inclusive).
- The other terms and conditions of the contract remain unchanged.”
46. From the material placed before me, I have no doubt that at the time immediately before the separation, each of the Grievants had been serving under a one-year fixed-term contract with an appointed lapse date of 31<sup>st</sup> August 2016.



**(b) Were the contracts of the Grievants terminated unfairly?**

47. The Claimants contended that the Grievants' contracts of employment were terminated unfairly for a reason which was unfair and invalid. The termination was retaliatory. It was as a result of their membership and or union activities.

48. Article 33 (1) of *the Constitution* of Kenya 2010 provides for the right to freedom of association, thus;

“ Every person has the right to freedom of association, which includes, the right to form, join and participate in the activities of an association of any kind.”

2. ....

3. ....”

In my view, the provision inter alia speaks to, protects, and, contemplates the promotion of, unionism.

49. Article 41 of *the Constitution* of Kenya, 2010 specifically provides for labour rights;

(1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.”

50. Section 4 of the Labour Relation Act codifies the employee's right to freedom of association. The section provides:

“ 4.

(1) Every employee has the right to –

(a) participate in forming a trade union of federation of trade unions;

(b) join a trade union; or



- (c) leave a trade union.
- (2) Every member of a trade union has the right, subject to *the constitution* of that trade union to -
  - (a) participate in its lawful activities;
  - (b) participate in the election of its officials and representatives;
  - (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and The *Labour Relations Act*, 2007 11.
  - (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to *the constitution* of that federation to –
  - (a) participate in its lawful activities;
  - (b) participate in the election of any of its office bearers or officials, and
  - (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.”

Subsection 5(2) thereof outrightly prohibits the dismissal of, or visiting of any prejudice on, an employee or a person seeking employment on the reason that that person is a member of a trade union or was a member of a trade union and or is engaged in union activities.

51. Lastly, Section 46 of the *Employment Act*, categorically, categorizes any termination of the employee's employment or dismissal of an employee from employment on account of his or her trade unionism activities or engagements, as automatically unfair. Such termination or dismissal shall be on account of prohibited grounds.

52. The Section provides:

”46. Reasons for termination or discipline

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

- (a) a female employee's pregnancy, or any reason connected with her pregnancy;
- (b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
- (c) an employee's membership or proposed membership of a trade union;



- (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
  - (e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
  - (f) an employee's refusal or proposed refusal to join or withdraw from a trade union;
  - (g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
  - (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or
  - (i) an employee's participation in a lawful strike.
53. In my view the above provisions give effect, to the constitutional right to fair labour practice. Consequently, it is easy to state that where an employee(s) satisfactorily demonstrates to the court, that his/or her dismissal was a result of the prohibited ground(s) mentioned above, the inescapable holding by the court shall be that the dismissal was automatically unfair.
54. The question that springs up then at this point is, did the Claimant satisfactorily prove that the Grievants' alleged termination was on account of the prohibited grounds, above stated?
55. I have carefully considered the Grievants' evidence on the reason for termination, and hold that though they want this court to believe and hold that their dismissal was retaliatory, in my view and with great respect, the allegations were bare allegations, incapable of belief.
56. Having stated as I have, I come to the conclusion that the Grievants' contracts of employment came to termination by effluxion of time. The contracts have clear commencement dates and end dates. They terminated automatically on the appointed end dates.
57. Contracts came to an end in various legally recognized ways. Termination by effluxion of time is one of them. As a result, I can only state that the Grievants' contracts of employment were not terminated in the manner alleged by them, but by lapse of their contractual periods.

#### **Whether the Grievants are entitled to the reliefs sought**

58. The reliefs sought by the Claimant on behalf of its members, the Grievants are two-fold, those that are directly related to their claim for unfair termination and those that are independent thereof.
59. Having found as I have hereinabove, that there was no unfair termination of the Grievants' employment, then those reliefs that are professed to be anchored on the claim for unfair dismissal must fall and fall at this point.
60. As a result, the remedies sought for, reinstatement, payment of all the salaries for the period the Grievants have been out of employment [ September 2016 up to date,], compensation for unfair termination of employment, and notice pay (one month's salary in lieu of notice are hereby rejected.
61. I now turn to those remedies sought but that are independent of the claim for unfair termination. They include (a) service gratuity (b) salary for August 2016 (c) underpayments and (d) compensation for earned but unutilized leave days.



62. Both the Grievants contended that throughout their tenure of employment with the Respondent, the latter paid them salaries in amounts that were below those that were provided for in the Collective Bargaining Agreement. In paragraph 36 of the memorandum of claim, it was pleaded;
- “That the two Grievants were being underpaid far below the salaries in the Collective Bargaining Agreement and they were not earning house allowance.”
63. The Respondent contended in its submissions that the Collective Bargaining Agreement upon which the reliefs independent of the unfair termination claim are anchored is defective, to say the least. That the agreement domiciles Clause 23, which states that it was to come into effect from 1<sup>st</sup> January 2016 only to be executed on 21<sup>st</sup> July 2016. It had a retrospective effect, making it defective. This Court should not uphold it, in its form or substance, as in so doing, the Court shall be legitimizing what is clearly defective.
64. With great respect, this submission does not make much sense. First, I have carefully considered the averments in the Respondent’s pleadings and see nowhere where the validity of the Collective Bargaining Agreement has been assailed or any clause therein, for one reason or the other, or is there a counter-claim for nullification of the agreement or a declaration that one or more of its clauses are defective and/or unlawful. Secondly, the business of the court has never been to re-write contracts for the parties but to give effect to the intention of the parties as agreed in their contracts.
65. As a result, I hold that the Collective Bargaining Agreement is relevant and applicable in the instant matter for the period 1<sup>st</sup> January 2016 to the date of separation in employment between the Grievants and the Respondent.
66. A careful look at the Collective Bargaining Agreement reveals that the negotiated salaries and benefits of employees were to be paid based on their job grades. There is no doubt that the 1<sup>st</sup> Grievant (Eunice Wanjiku Kibathi) was employed as a service technician and therefore her job grade for purposes of the agreement was Grade D. The salary for this grade was KShs.19,095.20, per Clause 21 and 22 of the agreement.
67. In my view therefore, during the period 1<sup>st</sup> January 2016 – 30<sup>th</sup> August 2016, the 1<sup>st</sup> Grievant was underpaid monthly by, (KShs.19,095.20 – 17,000), Kshs.2,095.20. Therefore, cumulatively, KShs.16,700.00.
68. The 2<sup>nd</sup> Grievant asserted that he was a technician and during the material time, earning a salary of KShs.9,000/-. The Respondent did not dispute this fact. Equally, the Collective Bargaining Agreement applied to him for the period hereinabove stated. He was in the same job Grade with the 1<sup>st</sup> Grievant as per Clause 21 of the agreement. Looking at the stipulation of the agreement, as against this salary that he was earning, there cannot be any doubt that the salary was an underpayment of KShs.10,095.20, monthly. During the eight months, he was underpaid by KShs.80,760.
68. The Grievants contended that they were not paid their salary for August 2016, conversely, the Respondent argued that it paid them. In his statement, the Respondent’s witness asserted that the payment is evidenced by the bank transfer statement it presented before the court. I have scanned through all the documents that were presented by the Respondent before this court. It is clear, the alleged transfer document is not among them. Consequently, I do not hesitate to conclude that there was none. The Grievants were not paid for August 2016. As a result, I award each of them a sum of KShs.19,075.20 as unpaid salary for the month above stated.



70. The Claimants sought for service gratuity. Neither their contracts nor the Collective Bargaining Agreement provided for this benefit, I note.
71. It is settled law that gratuity is a contractual benefit only payable under the terms of a contract of service or where it is provided for by statute. Having stated as I have hereinabove, that neither the CBA nor the Grievants' contracts of employment provided for gratuity. The relief cannot be availed to the Grievants.
72. They further claimed that at all material times, the Respondent did not allow them to proceed for annual leave. They were very particular in their pleadings as regards for what period. In light of this one could reasonably expect the Respondent to deny their assertion, to plead and testify with specificity, when the Grievants' entitled leave days were earned and paid for. I have carefully considered the Respondent's evidence and pleadings on this issue, and find no difficulty in saying that in their answering content, they are just general and destitute for specificity. In paragraph 12 of the response to the memorandum of claim, the Respondent pleaded;
- “The Respondent asserts that the two Grievants were occasionally allowed to go on leave. This is evidenced by the leave application forms that are part of the Respondents' list of documents. They indicate days requested by the individual grievant and approvals by the Respondent's agents.” (emphasis mine).
74. Word by word, the Respondent's witness repeated the above-stated averment in paragraph 13 of his witness statement.
75. The Respondent asserted that upon separation, they computed sums for compensation of the Grievants for earned but unutilized leave days. Consequently, they raised cheques for the Grievants based on the computation, cheques for KShs.15,912 and KShs. 14,132 for the 1<sup>st</sup> and 2<sup>nd</sup> Grievants, respectively. The Grievants refused to pick up the cheques. The Respondent's witness didn't at all explain to the Court how the cheque figures were reached.
76. The acts of computing the sum payable for earned but unutilized leave days and raising cheques in favour of the Grievants, coupled with the unclear response by the Respondent on the claim on unpaid leave days, propels this court to be persuaded that at all material times, the Grievants did not enjoy their statutory leave rights as and when they fell due.
77. The 1<sup>st</sup> Grievant urged the court to award her compensation for earned but unutilized leave days for the two years 2015 – 2016. I am inclined to make the award. Consequently, I award her  $26/30 \times 19,075.20 \times 2 = 33,063.68$ .
78. The Court notes that under this head the 2<sup>nd</sup> Grievant sought compensation for a period of 11 years. In my view, this relief has been sought in ignorance of the limitation of actions of three years stipulated under section 90 of the Employment Act, 2007. Considering the provisions of the section, I can only grant the 2<sup>nd</sup> Grievant compensation for earned but unutilized leave days for two years. The year 2015 and 2016. He shall equally get KShs.33,063.68 under this head.
79. This court must state at this moment, that annual leave is a statutory right for an employee to take, and a statutory obligation on the employer to avail, under section 28 of the Employment Act. Where the employer asserts that he or she discharged this statutory obligation, the onus is on him or her to prove sufficiently either, that the leave days earned by the employee were taken as paid leave days and utilized, or that there was compensation in lieu. Only then it can be said that the obligation was discharged.
17. In the upshot, judgment is hereby entered in favour of the Grievants in the following terms:



- a. Earned but unutilized leave days:
  - i. First Grievant .....KShs.33,063.70
  - ii. Second Grievant.....KShs.33,063.70
- b. Salary underpayment
  - i. 1<sup>st</sup> Grievant .....KShs.16,760.00
  - ii. 2<sup>nd</sup> Grievant .....KShs.80,760.00
- c. unpaid salary for August 2016.
  - 1<sup>st</sup> Grievant .....KShs.19,075.10
  - 2<sup>nd</sup> Grievant .....KShs.19,075.10
- d. The Respondent to issue the Grievants with a Certificate of Service, within 30 days of this Judgment.
- e. Interest.
- f. Costs of this suit.

**READ, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**OCHARO, KEBIRA**

**JUDGE**

In the Presence of;

Ms Manene for the Claimant

Mr. Waweru for the Respondent.

**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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

