Sinohydro Corporation Limited v Gufu (Employment and Labour Relations Appeal E001 & appeals Number E002 – E035 of 2022 (Consolidated)) [2024] KEELRC 844 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 844 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS APPEAL
E001 & APPEALS NUMBER E002 – E035 OF 2022 (CONSOLIDATED)

ON MAKAU, J

APRIL 18, 2024

BETWEEN

SINOHYDRO CORPORATION LIMITED ..... APPELLANT

AND

ROB SALIM GUFU ..... RESPONDENT

(Being an appeal from the Judgments and decrees of Hon. (Mr) Wafula Senior Resident Magistrate Marsabit delivered on 16th May 2022)(Before Hon.Justice Onesmus Makau on 18th April, 2024)

JUDGMENT

Introduction

1. This judgement determines this Appeal together with Appeals E002- E035 of 2022 which are consolidated with it. All the Appeals arise from employment between the Appellant and the thirty-five (35) respondents between the year 2018 and 2020. Each respondent filed separate suit before the Principal Magistrates Court at Marsabit accusing the appellant of unfair termination of their employment contracts. They then prayed for declaration that the termination was unlawful, compensation for unfair termination, salary *in lieu* of notice, gratuity/service benefits, underpayment, annual leave, unpaid house allowance and Sundays worked. They also quantified their claims based on what they deemed to be their rightful salary.

2. The appellant filed responses to each Claim denying liability and blaming the respondents for terminating their employment either through voluntary resignation or absconding. The appellant further averred that it paid the respondents all their dues and prayed for the suits to be dismissed with costs.

3. During the trial, the suits where consolidated into three clusters depending on the appellant's defence, that is, those suits where the respondents were accused of resignation, and those where the respondents were accused of absconding. Again,during the trial the claimant in each lead file in the said clusters gave evidence and the appellant called one witness Mr. Zhang Yang, whose testimony was adopted in all the other files.

4. In brief, the respondents' case was that they were employed by the Appellant on diverse dates under different capacities to work on the Marsabit Water & Sewerage Infrastructure Project and Marsbait Moyale Road. They contended that they executed their duties diligently until their employment was terminated by the respondent. They maintained that the termination was unfair because it was done without prior notice, without being heard, without a justifiable cause and without being paid terminal dues. As regards the resignation letters produced by the appellant, the respondents disowned the same on grounds that the signatures and the Identification card numbers indicated therein were not theirs.

5. On the other hand, the Appellant's case was that it was constrained to suspend its activities as a result of the Covid-19 directive by the government on scaling down to prevent the spread of the virus. It contended that when the directive was lifted, it called back the Respondents to work but only a few returned. It contended that it, was not able to reach all the Respondents as they were from the larger Marsabit. Further that, some of the Respondents who reported back to work absconded from duty and the rest resigned voluntarily. The Appellant then produced letters referenced "Termination Letter" that it alleged to have been signed by the Respondents.

6. After considering the evidence tendered, the court (Hon Wafula SRM) delivered three judgments on 16th May 2022 according the said cluster of suits:

    i. Judgement in E001 of 2020 consolidated with E002 of 2020, E005 of 2020, E010 of 2020, E001A of 2021, E001B of 2021, E004 of 2021 and E008 of 2021.

    ii. Judgement in E008 of 2020 consolidated with E003 of 2020, E002A of 2021, E002B of 2021, E005 of 2021, E006, E007 of 2021 and E009 of 2021.

    iii. Judgement in E10 of 2021 consolidated with E006 of 2020, E007 of 2020, E011 of 2021, E012 of 2021, E013 of 2021, E014 of 2021, E015 of 2021, E016 of 2021, E017 of 2021, E018 of 2021, E019 of 2021, E020 of 2021, E021 of 2021, E022 of 2021, E023 of 2021, E024 of 2021, E025 of 2021 and E026 of 2021.

7. In the three judgments, the trial court made declaration that the appellant had unfairly terminated the respondents' employment and awarded each six months' salary as compensation for the unfair termination. It further awarded each respondent one-month salary in lieu of notice, leave, and underpaid salary. The court also dismissed the claim for service benefit/gratuity for the reason that the employer had remitted their statutory deductions. However, when the court computed the awards, it awarded some the respondents twelve months salary compensation and service benefit/gratuity to all of them.

8. The Appellant was aggrieved by the decision of the Trial Court and filed the thirty (35) appeals herein. The Memoranda of Appeals are dated 16th June 2022 and they all seek the following orders, that:

    a. The Judgment of Hon. M. Wafula (Mr.) on 16th May 2022 and the resultant decree be wholly overturned.

    b. The Respondent's Claim in the lower Court be dismissed.

    c. The Cost of this appeal and the suit in the lower Court be borne by the Respondent.

d. Further and other orders be made as are just in the circumstances of this case.

9. The grounds of the appeal are identical, thus:

i. The Learned Magistrate erred in both law and fact in holding that the termination of the Respondent's employment was unfair and contrary to section 41 of the *Employment Act*, 2007.

ii. The Learned Magistrate erred in both law and fact in failing to hold that the Respondent resigned voluntarily.

iii. The Learned Magistrate erred in both law and fact in failing to hold that the Respondent was remunerated fairly.

iv. The Learned Magistrate erred in both law and fact in awarding the Respondent six month's salary for unfair termination.

v. The Learned Magistrate erred in both law and fact in awarding the Respondent leave allowance.

vi. The Learned Magistrate erred in both law and fact in in awarding the Respondent one-month salary *in lieu* of notice.

vii. The Learned Magistrate erred in both law and fact in awarding the Respondent gratuity/service benefits.

viii. The Learned Magistrate erred in both law and fact in holding that the Claimant had proved his claim against the Respondent.

10. The appeal was canvassed by written submission but before a judgment date was fixed, the appellant, vide a Notice of Motion Application dated 12th June 2023, applied for leave to tender additional evidence. It contended that its previous counsel on record omitted crucial evidence, which greatly prejudiced its case in the lower Court. However, upon consideration of the issues raised therein I dismissed the Application vide its ruling rendered on 1st August 2023.

11. Subsequent to the ruling, the appellant filed supplementary submissions and highlighted the same. However, the respondents were comfortable with their written submissions filed on 18th April 2023.

Appellant's submissions

12. From the onset, the appellant submitted that the appeals herein arise from termination of employment contracts through frustration. It fortified the foregoing submission by citing the definition of the doctrine of frustration in the English case of *Davis Contractors Ltd versus Fareham U.D.C.* [1956] A.C. 696, adopted by our Court of Appeal in *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR.

13. The Appellant submitted that it hired the services of the 35 Respondents between March 2019 and December 2020 as unskilled labourers to work on the upgrade of the Moyale/Marsabit road (the project). It submitted that 20 out of the 35 were general labourers whereas the rest were assigned as concrete mixers, steel fixers, roller operators, mason, welders, foreman, tipper driver and security guards.

14. The Appellant further submitted, that none of the respondents worked for over a year as most served between 3 and 6 months. It also submitted that it paid the Respondents daily wages in arrears at the end of the month at their request. It therefore clarified that the Respondents were neither engaged in full time employment nor were they given contracts.

15. The appellant reiterated that it suspended operations in the project and also suspended 31 out of the 35 Respondents from employment in line with the Covid-19 pandemic containment measures imposed by the government. Subsequently it resumed operations, but most of the respondents failed to report back to work and only few reported back but then resigned shortly thereafter.

16. In view of the foregoing matters, the Appellant argued that the trial Court was wrong in its finding that it terminated the Respondents' employment unfairly. The Appellant further submitted that its business was frustrated by the Covid-19 Pandemic and as such it could not continue to engage the Respondents as labourers.

17. It further submitted that the trial Court failed to record and take into account, the Appellant's evidence while writing the impugned judgments since the typed proceedings supplied did not contain whatever the Appellant's witness stated in testimony. Consequently, it argued that the failure to take into account its witness's evidence was a significant error of law and the whole judgement of the Court ought to be set aside.

18. It also faulted the trial Court for holding that, it did not comply with section 41 of the *Employment Act* before terminating the respondents' employment and maintained that the Respondents were casual labourers who resigned on their own. The Appellant also faulted the Court's finding that the resignation letter must be in writing, and contended that the said finding was not supported by any authorities.

19. It further contended that the letter referenced 'termination letter' was used loosely to mean 'acceptance of resignation' as the Appellant was a Chinese company whose main language was mandarin. It also contended that most of the Respondents were casual labourers who didn't know how to read or write, and when they approached it with desire to leave employment, it made the mistake of terming the resignation letters as "termination letters". Consequently, it argued that the said mistake ought to be excused on ground of language barrier, and the respondents be deemed to have left employment voluntarily after signing the letters, which also indicated that the Respondents were paid all their terminal dues.

20. As regards the issue of reliefs, the Appellant submitted that the Court awarded 6 months' salary as compensation for unfair termination but in the tabulation, it awarded 16 of the Respondents 12 months' salary as compensation for unfair termination. It further argued that the award of the compensation was wrong because the Court did not give reasons for huge awards. Further that, the Court failed to consider that the Respondents were casual labourers who had served for a short time and were engaged in a project that would last for only eighteen (18) months.

21. For emphasis, the Appellant relied on the case of *Catherine Kanaiza Aradi v Little Lambs Company Limited (Little Lambs Children Centre)* [2017] eKLR and *CMC Aviation Limited v Mohammed Noor* [2015] eKLR where the Court of Appeal substituted the award of 12 month's salary with 1 month's salary as compensation. Consequently, this Court was urged to reduce the award of compensation to one, or two months' salary, if the finding of unfair termination is upheld.

22. The Appellant further submitted that the Trial Court erred by computing and awarding gratuity/service pay yet it had noted already made a finding of fact that they were not entitled to the same by dint of section 36 (6) (b) of the *Employment Act* since the employer had remitted statutory deductions to the NSSF. consequently, it urged the Court to set aside the Gratuity/service pay awarded to the Respondents as the same was legally untenable.

23. With regard to the issue on underpayment, the appellant sought to demonstrate by a table in its supplementary submissions that the Respondents were paid more than the wages published in the

Regulation of Wages (General) (Amendment) Order, 2018. Accordingly, it further submitted that the wages paid to the respondents was inclusive of housing besides them being allocated houses by the company. Consequently, the Appellant prayed for the award of underpayment and house allowance ought to be set aside. It further prayed for the award of leave days and off days set aside for lack of merits.

Respondent's submissions

24. The Respondents, on the other hand, reiterated that they were victims of unlawful termination, underpayment of wages, non-compliance with the law and that they never resigned from employment as alleged by the Appellant. They contended that their employment was terminated by the appellant without compliance with section 41 and 45 of the *Employment Act*. In support of their submission, they relied on the case of *Bernard Ngugi v G4s Security Services Kenya Limited* [2013] eKLR, *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] eKLR, *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, and *Alphonce Machanga Mwachanya v Operation 680 Limited 680 limited* (2013) eKLR.

25. On the issue of resignation, the Respondents submitted that the termination letter was authored by the Appellant and thus the same could not be a resignation by any of them. They observed that the letters were prepared by the appellant in Nairobi and sent to its Marsabit office for them to sign but they never signed the same.

26. They further argued that a resignation letter should be drafted by the employee and addressed to the employer, stating reasons for resignation. Since the respondents never did so, they submitted that they were summarily dismissed in contravention of sections 41, 44 and 45 of the *Employment Act*.

27. As regards the award of damages, it was submitted that the employment of the respondents had converted to a contract of service following of their continuous service for months. They further argued that, due to the said conversion from casual employment, they were now protected from unfair termination, and therefore the trial court was right in awarding them compensation for unfair termination, salary in lieu of notice, annual leave and overtime allowance.

28. For emphasis, they relied on *Evans Katiezo Aligulah v Eldomatt Wholesale & Supermarket Limited* [2016] eKLR wherein the Court held that the claimant's casual employment had converted to contract of service after serving continuously for thirteen (13) months. The court went further to hold that Rule 6 of the *Regulation of Wages (General) Order* provides for the formula to be used in calculating overtime pay.

29. As regards the allegation of absconding, the Respondents argued that the Appellant's witness confirmed during cross examination that he had no work schedule to show that the respondents had absconded. He further did not produce payslips to prove deductions from the respondents. He also did not produce as exhibit, the notice vide which the employees were instructed to go home due to covid-19 pandemic pursuant to government directive.

30. In addition, the respondents submitted that the appellant's witness also admitted that there was strike at the Appellant's company and the matter was referred to the labour office for reconciliation. However, the respondents submitted that the appellant refused to sign the return to work formula. Consequently, they submitted that the Trial Court was right in concluding that they did not abscond but they were dismissed. They relied on the case of *Nicholus Muasya Kyula V Farmchem Ltd* [2012] eKLR to fortify their submissions and urged this Court to uphold the impugned decision because it was anchored on law and judicial precedents.

Issues for determination and analysis

31. This being a first appeal, this Court is empowered to re-evaluate the evidence on record and proceed to make its own independent conclusions on the case before it. I gather support from the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212, where the Court of Appeal stated as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

32. In the instant appeal, I have perused and considered the evidence contained in the record of Appeal and also the submissions by the parties. It is without doubt that the respondents were employed by the appellant between the year 2018 and 2020. Although they started as casual employees, their continuous service converted their casual employment into contract of service. Section 37 of the *Employment Act* provides as follows:

1.

> "Notwithstanding any provisions of this Act, where a casual employee—
>
> a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
>
> b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months. or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

2. In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

5. A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of *this Act* shall apply."

33. The issues falling for determination are:

    a. Whether the testimony of the appellant's witness during the trial was recorded and considered in the impugned judgment.

    b. Whether the respondents were unlawfully dismissed or they voluntarily resigned or absconded from work.

    c. Whether the damages awarded vide the impugned judgment should stand.

Testimony by the appellant's witness

34. The Appellant argued that the Court did not record its witness's testimony which amounts to an error of law which warrants setting aside of the entire judgement. I have perused all the lower court's files and confirmed that the trial Court recorded the testimony of Mr. Zhang Yang, and which was adopted in all files. He also produced documents as exhibits to support his testimony. It is therefore wrong for the Appellant to deliberately mislead this Court yet it is its Counsel who left out part of the typed proceedings which contains the Appellant's witness's testimony.

35. I have also noted that, the record of Appeal has not included a further list of documents which were produced as exhibit by the said witness. The list included the work suspension letter dated 29th March 2020 which is crucial in this appeal. Therefore, it is clear that the record of appeal is incomplete due to the missing part of the typed proceedings and the further list of documents produced as exhibit by the DW1.

36. Nevertheless, I will not strike out the appeal but will consider its merits because I have established from the lead files E008 of 2020 and E010 of 2020 that, the evidence of the appellant's witness was recorded by the trial court and it is in the files. I have also confirmed that the trial court mentioned the appellant's witness in the judgments and considered his evidence in the decisions. Therefore, I am satisfied that the Appellant was not condemned unheard.

Unlawful dismissal versus voluntarily resignation/absconding

37. The appellant's case is that the respondents were suspended due to covid-19 and when they were summoned to resume work, only a few reported. Subsequently, those who reported back, resigned by signing termination letters. The respondents have however denied the alleged absconding and resignation. I have perused and copied below the said work suspension letter dated 29th March 2020:

> " Work Suspension Notice
>
> Date 29/03/2020.
>
> We are regret but have to inform you that, due to multi-factor uncontrollable reasons, the work at Marsabit Water & Sewerage Infrastructure Project will be suspended from date April 22nd 2020.
>
> In accordance with the *Employment Act* 2007, we hereby give you one month (26 working days) prior notice before your work suspended, to enable your good arrangement of your days at home.
>
> Please note that, your contract will be automatically terminated on April 22nd 2020; we will immediately give notice once the project continues.
>
> Together we will eventually overcome the difficulties we encountered today

End”

38. The message in the above letter is very clear and straight forward. The respondents were notified that the appellant would suspend operations from 22nd April 2020 due to covid-19 pandemic and that their employment contracts would automatically terminate on that same date. The respondents were promised a notice when the operations resumed. It is therefore incorrect for the appellant to allege that it never terminated the employment of the respondents but only suspended them. What was suspended was operations but the employment contracts were terminated effective 22nd April 2020 by a notice of 26 days.

39. The above termination amounted to summary dismissal or redundancy. Section 44 of the *Employment Act* defines summary dismissal as follows:

> “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.
>
> (2) subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.”

41. The termination was also akin to redundancy as defined in section 2 of the *Employment Act*, thus:

> “ The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;”

41. Section 45 (1) and (2) of the *Employment Act* provides as follows:

> “(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove:
>
> a. that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason—
>
> i. related to the employee’s conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
>
> c. that the employment was terminated in accordance with fair procedure.”

42. In this case, the reason for the termination of the respondents’ contracts of service was covid-19 Pandemic. The court takes judicial notice of the pandemic and the government containment measures that including restrictions in movement and interactions. That reason may have been justified at the time but the employer had a legal obligation to follow a fair procedure as set out under section 35, 40 and 41 of the Act.

43. Section 35 provides for a termination notice of 28 days for employees who are paid on monthly intervals. Section 40 sets out the procedure for termination employment on account of redundancy. Finally, section 41 provides for the procedure to be followed before terminating employee's services for misconduct, poor performance and physical incapacity.

44. In this case the appellant did not comply with section 35, 40 and 41 of the *Employment Act* before terminating the services of the respondents and therefore I agree with the trial court that the termination was unfair within the meaning of section 45 of *the Act*. I also gather support from the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016 eKLR where the Court of Appeal held that:

> " Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken."

45. I gather more support from the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court held that:

> " However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness ..."

46. The appellant alleged that it notified the respondents to resume work but only a few showed up. The Notice stated as follows:

> " Work Resumption Notice
>
> Date: 30/05/2020
>
> As encouraged by the Government of Kenya, the company is planning to resume the works of Marsabit Water & Sewerage Infrastructure Project.
>
> We hereby give notice to our former employees who were terminated of their contract on April 22nd 2020, to report your availability at present, for the Company to arrange resuming your work as soon as possible.
>
> Failure to report your availability before June 15th 2020 would be considered to have given up the priority to be recruited on your own opinion.
>
> Your cooperation will be highly appreciated."

47. The above notice acknowledged that the respondents' employment had already been terminated and the appellant was inviting them back for fresh engagement. To that extent, I find that the respondents had no obligation to report back to work after their employment were terminated on 22nd April 2020.

48. As regards the alleged resignation of the respondents who reported back after the termination, I have copied the letter dated 14th December 2020:

> " In accordance with the Regulation of wages (Building and Construction Industry) Order, 2009, the *Employment Act*, 2007 and the Company's Regulations and Rules, Mr. Rob Salim (1.D. No. xxxxxxxx) gets the termination notice from the Company with effect from the date of this notice as the reason of leaving by his own opinion. The abovenamed person has

got all the salary and allowance and shall not ask any claim from Sinohydro Corporation Ltd forever."

49. There is no doubt that the grammar in the above letter is not the best. However, it is clear to me that the letter was for termination of employment, authored by the appellant, and signed by the employee and officials of the appellant. It was copied to the Labour Officer. The letter was written at the appellant's head office in Nairobi and dispatched to Marsabit for signing. It is therefore incorrect for the appellant to allege that the letter constituted voluntary resignation by the respondents.

50. On the contrary, I find that the appellant terminated the respondents' new employment by the said termination letter. There is no evidence to prove that the respondents understood the import of the letter before signing. The appellant's witness admitted that the respondents were illiterate. It is also clear that they signed the letter before the appellant's Chines officers who could not have interpreted the contents to the respondents in their mother tongue or at least in Swahili language. Consequently, I agree with the trial court that the second employment of the concerned respondents, was also unfairly terminated by the appellant and they did not resign voluntarily as alleged.

Whether the awards should stand

51. The Court of Appeal in the case of *Butt v Khan* [1978] eKLR provides the threshold upon which a court's decision may be disturbed as follows:

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

52. Guided by the above precedent, I will now proceed to consider each item awarded.

Compensation

53. The trial court awarded the respondents six months' salary for unfair termination. In view of the finding above, that the termination was unfair, I must hold that the trial court was right in finding that the respondents were entitled to compensation. However, I agree with the appellant that the trial blundered in two ways; first the awarding of six months' salary was manifestly on the higher side, and second by doubling the said award for some respondents in the final computation.

54. The second blunder was an outright mistake or error on the face of the record which could have been rectified by an application for review or even by the court on its own motion under Rule 34 of the *ELRC Procedure Rules* or section 99 of the *Civil Procedure Act*.

55. As regards the first blunder, the trial court awarded six months' salary after taking into consideration the fact that the respondent had legitimate expectation to continue working until the completion of the road project as opposed to permanent employment for many years. The said factor was a good consideration, but the court failed to consider the fact that they had served for short periods of about one year or even less.

56. As pointed out above, an appellate court is entitled to interfere with a discretionary award where it is demonstrated that the trial court failed to take into account a relevant factor or took into account an irrelevant factor while making the award. In this case the most relevant factor which was not taken into account was the duration of service by the respondents before the termination on 22nd April 2020 and

also for the few who reported back after the company resumed operations. The appellant urged for reduction of the compensation to one or two months' salary.

57. In exercising its discretion to award compensatory damages to a dismissed employee, the Court ought to be guided by section 49 (4) of the Act, which outlines the factors to be considered. For purposes of this case, section 49(4) (e), and (f) ought to have been considered: -

> " (e) the employee's length of service with the employer.
>
> (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;"

58. In the case of *OlPejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, the Court of Appeal expressed itself as follows concerning compensation for unfair termination: -

> " The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention."

59. Having considered the duration of service, the expected period of service of the project being one and a half years, and the proposal by the appellant, I reduce the award of compensation for each respondent to two-month gross salary.

Overtime

60. In his testimony at the trial in cause MCELRC E001 of 2020, Mr. Tarada told the Court that he worked 7 days a week, from 7am to 6pm and he was earning Kshs 650 daily wage instead of Kshs 1200. I note that the Appellant paid the Respondent through his Equity Bank Account where he was paid various amounts ranging from Kshs Kshs 15,507 to 36,919 as per his bank statement. The Appellant's witness admitted, during cross examination, that the payments were made as evidenced by the bank statement and the discrepancies were due to days worked including Saturdays and Sundays when the need arose.

61. In the probation letter contained in MCELRC E001 of 2020, overtime was provided for as follows:

> " overtime will be determined in accordance with company needs and be paid at appropriate rate in accordance with laws."

62. It follows that the appellant paid the respondents varying amounts depending on overtime hours worked. The respondents have not explained why they received varying wages if they worked for equal hours per week and month. I am, therefore convinced by the appellant's evidence that it paid the respondents compensation for the overtime worked.

63. I further find that the Respondents claim for overtime is generalized and lacking material particulars. The fact that an employer is obliged to keep a record containing the employees' information under section 74 of the *Employment Act* does not entitle an employee to make generalized claims and then get

the same, just because the employer has failed to produce his employment records in court. Production of employment record is mainly restricted to disproving verbally alleged terms of a contract of service and not to disprove everything alleged by an employee. As such, the burden of precise pleadings and proving of claims in legal proceedings, rests with the party claiming. Consequently, I am inclined to set aside the award of overtime pay because it lacks material particulars and supporting evidence.

One month pay in lieu of notice

64. From the termination letter, the Respondents were given shorter notice than they were entitled to under the law and therefore I uphold the award of one month pay in lieu of notice.

Annual leave days

65. Section 28 of the *Employment Act* provides that:

> "(1) An employee shall be entitled—
>
> a. after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
>
> b. where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively."

66. The respondents served for short periods between six months and slightly above one year and the trial court awarded leave at the rate of one month per year. The said assessment was not supported by the above provision or evidence and therefore the court erred. Consequently, I set it aside and substitute it with an award of leave assessed at the rate of 21 leave days per year or 1.75 days for each month served.

Salary underpayment

67. The Respondents argued that their pay ought to be aligned with the *Regulation of Wages (General) (Amendment) Order*, 2018. The Appellant, on the other hand argued that the Respondents were remunerated above market rate. From the probation letter, the Respondent herein was employed at a salary of Kshs 16,907/= exclusive of 20% house allowance of which the appellant maintained that it provided house to the respondent.

68. The following table provides a comparison between what the Respondents earned and what was minimum wage under the *General Wage Order*. The captured minimum wage is less housing allowance.

	Appeal Numbers	Respondents in the appeals	Work Assigned	Monthly wages respondents allege they were paid	Wages scale under the Regulation of Wages (General) (Amendment Order, 2018
1.	ELRCA/ E001/2022	Rob Salim Gufu	Steel Fixer	14,400	13,975.55
2.	ELRCA/ E002/2022	Dub Godana Cholta	Night Watchman	12,000	8,636.30
3.	ELRCA/ E003/2022	John Wago Duba	Foreman	14,400	12,152.20
4.	ELRCA/ E004/2022	Daniel Makina Barasa	Mason	15,600	13,975.55
5.	ELRCA/ E005/2022	Juma Ibrahim Tarada	Driver of light tractor	15,600	13,341.30
6.	ELRCA/ E006/2022	Dadacha Katelo Surupa	General worker/ laborer	8,160	7,240.95
7.	ELRCA/ E007/2022	Guyo Wario Guyo	Day watchman	8,160	7,240.95
8.	ELRCA/ E008/2022	Hassan Dida Guyo	General worker/ laborer	8,160	7,240.95
9.	ELRCA/ E009/2022	Joseph Guyo Galgallo	General worker/ laborer	8,160	7,240.95
10.	ELRCA/ E010/2022	Guyo Ifa Boru	Welder	13,200	7,240.95
11.	ELRCA/ E011/2022	Hassan Duba Talicha	General worker/ laborer	8,160	7,240.95

12.	ELRCA/ E012/2022	Aila Nuro Bunge	Roller Operator	15,600	11,602.90
13.	ELRCA/ E013/2022	Boru Halake Guyo	General worker/ laborer	8,160	7,240.95
14.	ELRCA/ E014/2022	Hillary Nura Diba	Master Roll Clerk	12,000	7,240.95
15.	ELRCA/ E015/2022	Halkano Huka Jattani	General worker/ laborer	9,600	7,240.95
16.	ELRCA/ E016/2022	Roba Kanchora Muga	General worker/ laborer	8,160	7,240.95
17.	ELRCA/ E017/2022	Mohamed Galma Huka	Steel Fixer	15,600	13,975.55
18.	ELRCA/ E018/2022	Goldana Dida Wario	General worker/ laborer	8,160	7,240.95
19.	ELRCA/ E019/2022	Guyo Sora Galgallo	General worker/ laborer	8,160	7,240.95
20.	ELRCA/ E020/2022	Adan Galma Huka	General worker/ laborer	8,160	7,240.95
21.	ELRCA/ E021/2022	Abdi Galma Huka	General worker/ laborer	8,160	7,240.95
22.	ELRCA/ E022/2022	Ali Guyo Jarso	General worker/ laborer	8,160	7,240.95
23.	ELRCA/ E023/2022	Guyo Jarso Galgallo	General worker/ laborer	8,160	7,240.95
24.	ELRCA/ E024/2022	Hassan Boru Sharamo	Mason	14,400	13,975.55

25.	ELRCA/ E025/2022	Wako Guyo Huka	General worker/ laborer	9,600	7,240.95
26.	ELRCA/ E026/2022	Halkano Halake Wario	General worker/ laborer	9,600	7,240.95
27.	ELRCA/ E027/2022	Ganna Koshe James	General worker/ laborer	9,600	7,240.95
28.	ELRCA/ E028/2022	Halkano Guyo Bika	General worker/ laborer	8,160	7,240.95
29.	ELRCA/ E029/2022	Iman Duba Talicha	Roll Operator	14,400	11,602.90
30.	ELRCA/ E030/2022	Salat Guyo Sharomo	General worker/ laborer	8,160	7,240.95
31.	ELRCA/ E031/2022	Hassan Duba Golicha	General worker/ laborer	8,160	7,240.95
32.	ELRCA/ E032/2022*	Moses Masa Khatsete	Machine Operator	14,400	11,602.90
33.	ELRCA/ E033/2022	Philip Omare	General worker/ laborer	8,160	7,240.95
34.	ELRCA/ E034/2022	Bonaya Gideon Nteere	Welder	13,200	13,975.55
35.	ELRCA/ E035/2022	Boru Wario Doyo	Steel Fixer	16,800	13,975.55
36.	ELRCA/ E036/2022	Somo Dida Hassan	Concrete Mixer	14,400	11,602.90

69. The above table provides a comparison between the minimum wages prescribed by the *General Wage Order* and the actual wages received by the respondents as per the Bank statements produced. The witnesses from both sides testified that there was a strike by the employees on allegation of underpayment. There was also evidence that the matter was reported to the Labour Office and

settlement was reached between the appellant and the respondents' Trade Union but failed to sign a return to work agreement.

70. Having carefully considered the evidence on record, I am inclined to find that the appellant paid the Respondents above the minimum wages prescribed by the General Wage Order then in force except Hillary Nura Diba who was underpaid. He was a Master Roll Clerk earning Kshs 12000 instead of the minimum salary of Kshs 16295 per month. The total underpayment between 1st March 2019 when he was employed and 22nd April 2020 when termination was done is Kshs 4296 x 12 = Kshs 51,540. All the respondents were also provided with housing by the employer and consequently, save for Hillary Nura Diba their claim for underpaid salary and unpaid house allowance must fail.

Gratuity/ Service Pay

71. The trial court made a finding of fact that the appellant had remitted NSSF contributions in favour of the respondents and concluded that they were not entitled to gratuity/service pay. The basis of the said conclusion was section 35 (6) (d) of the *Employment Act* which provides as follows:

> (5) "An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
>
> (6) This section shall not apply where an employee is a member of—
>
> a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
>
> b. a gratuity or service pay scheme established under a collective agreement;
>
> c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
>
> d. the National Social Security Fund"

72. The Respondents did not appeal against the said decision and therefore I will not reverse it. Instead I find that the court erred by computing and awarding gratuity/service pay even after dismissing that claim. Consequently, I set aside the said award entirely.

Conclusion

73. The Appeal succeeds partially. The finding that the termination of the Respondents' employment was unfair for want of procedural fairness is upheld. However, the damages awarded by the trial court are disturbed for being manifestly excessive or not based on evidence. consequently, the impugned judgement is set aside and substituted with the following:

a. A declaration that the termination of the respondents' employment was unfair and unlawful.

b. Each respondent is awarded one-month salary *in lieu* of notice.

c. Each respondent is awarded two-month salary compensation for unfair termination.

d. 1 days annual leave if awarded to the respondents who served for one year and above and 1.75 leave days per month for each respondent who served for less than one year.

e. Underpayment for Hillary Nura Diba being Kshs 51,540.

f. An order that the Respondents are entitled to Certificates of service to be issued within 60 days hereof.

g. Since the appeal partially succeeds, each party will bear own cost of the appeal but the Respondents will have cost of the suit in the lower court.

h. The awards will attract interest at court rate from the date of the impugned judgment but the awards are subject to statutory deductions.

i. The appellant is given 30 days from today to compute the above awards and file a report in this court for adoption as part of the judgment. In default the respondents will be at liberty to do so.

j. The matter is fixed for mention on 27th May 2024 for adoption of the said assessment as part of the court judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF APRIL, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE