



**Mwamchera & 33 others v Kaluworks Limited (Cause 519 of 2016 & 424 of 2018 & 100, 101 & 102 of 2023 (Consolidated)) [2024] KEELRC 799 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 799 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 519 OF 2016 & 424 OF 2018 & 100, 101 & 102 OF 2023 (CONSOLIDATED)**

**M MBARŪ, J  
APRIL 11, 2024**

**BETWEEN  
SWALEH ALI MWAMCHERA & 25 OTHERS ..... CLAIMANT  
AND  
KALUWORKS LIMITED ..... RESPONDENT  
AS CONSOLIDATED WITH  
CAUSE 424 OF 2018**

**BETWEEN  
CHARO KITSAO & 5 OTHERS ..... CLAIMANT  
AND  
KALUWORKS LIMITED ..... RESPONDENT  
AS CONSOLIDATED WITH  
CAUSE 100 OF 2023**

**BETWEEN  
CHARO KARANI KAHINDI ..... CLAIMANT  
AND  
KALUWORKS LIMITED ..... RESPONDENT  
AS CONSOLIDATED WITH  
CAUSE 101 OF 2023**



**BETWEEN**  
**KAZUNGU KAHINDI TUVA ..... CLAIMANT**  
**AND**  
**KALUWORKS LIMITED ..... RESPONDENT**  
**AS CONSOLIDATED WITH**  
**CAUSE 102 OF 2023**

**BETWEEN**  
**JUMA KAZUNGU KITSAO ..... CLAIMANT**  
**AND**  
**KALUWORKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The matters herein are consolidated for hearing and determination.

Cause No.519 of 2016 relates to 25 claimants. Several filed Notices to Act in Person and also a Notice of Withdrawal of Suit. These include the following;

3<sup>rd</sup> claimant, Mrambu Chirunga Mwagago;

5<sup>th</sup> claimant, Mathias Charo Mwalimu;

6<sup>th</sup> claimant, George Muteti Mtongwe;

7<sup>th</sup> claimant, Lwambi Fondo;

10<sup>th</sup> claimant Malile Syokau;

13<sup>th</sup> claimant, Changawa Katembe Nzembe;

14<sup>th</sup> claimant, Wismas Katana Mbogo;

16<sup>th</sup> claimant, Mzee Ayub Mzungu;

17<sup>th</sup> Mugambi Mwachanda;

21<sup>st</sup> claimant Masumbuko Mzee Mlive; and

24<sup>th</sup> claimant, Mbui Dadu Chome.

2. The only claims pending relates to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup> to 20<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimants.
3. Through an Order of 5<sup>th</sup> December 2024, the court consolidated Cause No. 424 of 2019 with Cause No.519 of 2016 for hearing and determination. This relates to 6 claimants;

Charo Kitsao Ngora;



Ndune Chigwado Chai;  
Ndundi Disii Buraa;  
Emanuel Kithi Kayaa;  
Matthias Charo Mwalimu;  
Mbui Ndandu Chome.

4. In the consolidation, through the ruling delivered on 5 December 2019, the court noted that Cause No.424 of 2018 was filed after termination of employment while Cause No.519 of 2016 had been filed when employment subsisted. Hence some claimants under Cause No.424 of 2018 were similar to Cause No.519 of 2016.
5. Cause No.424 of 2018 has since been marked as settled. A consent dated 1<sup>st</sup> July 2022 is filed.  
Cause 100 of 2023 was previously filed under CMELRC No.262 of 2019 and was consolidated with Cause No.424 of 2018.  
Cause No.101 of 2023 was originally Mombasa CMELRC No.261 of 2019 consolidated under Cause No.424 of 2018.  
Cause No.102 of 2023 was previously Mombasa CMELRC No.260 of 2019 consolidated under Cause No.424 of 2018.
6. All files are placed under Cause No.519 of 2016. However, there are no responses to these claims under the lower court files, the causes consolidated herein or under any other file.
7. The cause of action under Cause No.519 of 2016 is that there were unfair labour practices, underpayments and pending leave days. The claimants were at the time, the employees of the respondent under different roles, duties and wages. They claimed that they were not issued with payment statements or allowed to take annual leave and the wages paid were an underpayment.  
Each claimant particularised his/her claim.
8. 1<sup>st</sup> claimant Swaleh Ali Mwamchera was employed in April 2000 as a machine operator earning a daily wage of Ksh.625. He claimed the following;
  - a. Annual leave for 15 years and 9 months Ksh.542 x 21 days Ksh.179,266.50;
  - b. Underpayments for 12 months for working 12 hours each day (4 extra hours daily) Ksh.991,153.
9. 2<sup>nd</sup> claimant Isaac Mzungu Maluki was employed as a machine operator earning ksh.475 per day. He claims;
  - a. Payment in lieu of annual leave for 7 years and 3 months Ksh.14,092;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.145,953.60.
10. 4<sup>th</sup> claimant Emmanuel Kithi Kayaa was employed in May 2009 as a machine operator earning Ksh.602 per day. His claim is for;
  - a. Annual leave for 7 years Ksh.80,622.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.106,325.60.



11. 8<sup>th</sup> claimant James Maluki Mnalo was employed on 1<sup>st</sup> January 2009 as a machine operator earning ksh.461 per day. He claims the following;
  - a. Annual leave for 7 years and two months Ksh.81,571;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.150,321.60.
12. 9<sup>th</sup> claimant Juma Kazungu Kitsao was employed in July 2008 as a machine operator earning Ksh.546 per day. He claimed the following;
  - a. Annual leave for 7 years and 11 months ksh.90,170;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.123,801.60.
13. 11<sup>th</sup> claimant Joanes Kitsao Kazungu was employed in May 2009 as a machine operator earning ksh.474 per day. He claims the following;
  - a. Annual leave for 7 years and one month's Ksh.80,622.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.146,265.60.
13. 12<sup>th</sup> claimant Isaac Matano Jaji was employed in March 2008 as a machine operator earning Ksh.294 per day. His claim is for;
  - a. Annual leave pay for 8 years and 3 months Ksh.93,901.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.202,425.60.
14. The 15<sup>th</sup> claimant Safari Joseph Biryra was employed on 1st October 2006 as a machine operator earning Ksh.296.50 per day. His claim is for;
  - a. Annual leave pay for 9 years and 8 months ksh.110,026;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.201,801.60.
15. 18<sup>th</sup> claimant John Joseph Kada was employed in September 2000 as a machine operator earning ksh.296 per day. His claim is for;
  - a. Annual leave for 12 years and 9 months Ksh.145,120.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.201,801.60.
16. 19<sup>th</sup> claimant Matano Ali Karisa was employed in January 2000 as a machine operator at a daily wage of Ksh.416. His claim is for;
  - a. Annual leave for 16 years and 5 months Ksh. 186,854.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.164,361.60.
17. 20<sup>th</sup> claimant Kiio John Kimweli was employed in August 2011 as a machine operator earning ksh.449 per day. His claim is for;



- a. Annual leave for 4 years and 8 months Ksh. 55,013;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.154,065.60.
18. 22<sup>nd</sup> Ndunda Disii Buraa was employed in January 1998 as a machine operator earning ksh.444 per day. His claim is for the following;
- a. Annual leave for 18 years Ksh. 208,076;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.155,625.
19. 23<sup>rd</sup> Claimant Kioko Mutongwe Mutua was employed in February 2005 as a machine operator at a wage of ksh.383 per day. His claim is for the following;
- a. Annual leave for 10 years 11 months ksh.124,253.50;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.174,657.
20. 25<sup>th</sup> claimant Kahindi Tuva Kazungu was employed on 8 October 2010 as a machine operator earning ksh.474 per day. His claim is for payment of the following dues;
- a. Annual leave for 5 years and 2 months Ksh.58,807;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.146,265.60.
21. The 26<sup>th</sup> claimant Charo Karani Kahindi was employed on 15 July 2011 as a machine operator earning ksh.296 per day. His claim is for payment of the following;
- a. Annual leave for 4 years and 6 months Ksh.51,219;
  - b. Underpayments for 12 months for working for 12 hours each day (4 extra hours daily) Ksh.201,801.60.

## **Response**

22. In reply to the claim, the respondent admitted that the claimants were employees but denied the claims made. There was no work for 7 days each week or 12 hours each day as alleged.
23. Each claimant was allowed to take annual leave and there were no underpayments as alleged. Each worked for 8 hours each day.
24. 1<sup>st</sup> claimant Swaleh Ali Mwamchera was employed as a machine operator at a daily wage of Ksh.265 for 7 years, 2 months and 25 days commencing 6 March 2009. Being a machine operator, he was engaged on piece rate and paid based on the number of pieces produced and he earned more irrespective of the time taken per day. He was cushioned by being paid a minimum wage despite the agreement. Under such agreement, overtime was not applicable and the claimant was in control of his work hours on account of the pay being based on the task and not time. The claim for annual leave pay does not arise.
25. The 2<sup>nd</sup> claimant Isaac Mzungu Maluki was employed as a machine operator earning ksh.475 for 7 years and 22 days from 9 May 2009. The category of machine operator was for piece rate and payment was based on the number of pieces produced and not based on time present at work. The minimum



- wage paid was to cushion the claimant and hence the claim for annual leave and underpayment does not arise.
26. The 4<sup>th</sup> claimant Emmanuel Kithi Kayaa was a machine operator earning ksh.602 for 7 years, 1 month and 7 days from 24 April 2009.
  27. 8<sup>th</sup> claimant James Maluki Mnalo was employed as a machine operator on a daily wage of ksh.461 for 7 years, and 17 days from 14 May 2009. This category provided for piece rate work based on pieces produced and hence leave and underpayment are not due.
  28. The 9<sup>th</sup> claimant Juma Kazungu Kitsao was employed as a trainee machine attendant at a daily wage of Ksh.444 for 5 years and 9 months from 31 August 2011.
  29. The 11<sup>th</sup> claimant Joanes Kitsai Kazungu was employed as a machine operator earning a wage of Ksh.474 per day for 7 years and 30 days from 1<sup>st</sup> May 2009.
  30. 12<sup>th</sup> claimant Isaac Matano Jaji was employed as a machine operator on a piece rate work and paid based on pieces produced.
  31. The 15<sup>th</sup> claimant Safari Joseph Biryra was employed as a general helper at a daily wage of ksh.296.50 for 9 years and 8 months from 1<sup>st</sup> October 2006. He has no cause of action with regard to the claims made and claims above 3 years are time barred.
  32. 18<sup>th</sup> claimant John Joseph Rada was employed as a machine attendant at a daily wage of Ksh.296 for 2 years and 9 months from 1st September 2003. His claims beyond 3 years are time-barred.
  33. 20<sup>th</sup> claimant Kiio John Kimweli was employed as a machine attendant at a daily wage of ksh.449 for 4 years and 10 months from 1<sup>st</sup> August 2011.
  34. The 22<sup>nd</sup> claimant Ndunda Disii Buraa was employed as a machine operator earning a daily wage of ksh.444 for 4 years, 4 months and 21 days from 21 October 2011.
  35. The 23<sup>rd</sup> claimant Kioko Mutongwe Mutua was employed as a machine operator at a daily wage of Ksh.383 for 6 years, 10 months and 14 days from 17 September 2009.
  36. 25<sup>th</sup> claimant Kahindi Tuva Kazungu was not a machine operator as alleged and if so, he was employed on piece rate work.
  37. 26<sup>th</sup> claimant Charo Karani Kahindi was employed as a machine operator on a daily wage of Ksh.296 for 5 years, 2 months and 15 days.
  38. The respondent's case is the claimants were on piece rate work but provided with a minimum wage to cushion them. They were paid based on pieces produced and hence left in control of their time and should not claim for leave or underpayment.
  39. The respondent filed work records for timesheets, material transfer slips, production records, payment sheets, and casual payment sheets.
  40. The claim under Cause No.424 of 20118 is similar to claims under Causes 100, 101, and 102 of 2023. These relate to facts that the claimants were employed by the respondent as machine attendants of Machine operators or general workers on various dates and paid different wages. Their claim is that there was termination of employment without due cause or reasons. They have claimed the following;
    - a. Notice pay;
    - b. Compensation for unfair termination of employment,



- c. Severance pay;
- d. Underpayments of salary;
- e. Annual leave pay;
- f. Costs.

## Evidence

41. Under the consolidated file Cause No.519 of 2016 the claimants called one witness, the 15 claimant, Joseph John Kenya. He testified on behalf of all claimants that they were all employed on different dates as machine operators and worked continuously and uninterrupted but earning different daily wages. During the period of employment, the claimants were overworked and underpaid contrary to the minimum wage Orders. The claimant worked for 7 days each week for 12 hours a day without compensation. Several claims did not take their annual leave for the entire period of employment. Despite the claimants making demands for payment of their annual leave and underpayments, the respondent failed to address them.
42. Mr Kenda testified that he worked for the respondent for 13 years. His daily wage was ksh.105 and every time the government increased the minimum wage, the respondent would make an increase to ksh.293 per day. This was the last wage earned at the end of his employment. The daily wage due would accumulate and be paid at the end of the week.
43. The claimant testified that while working for the respondent the last 6 months were under a contract beginning in the year 2016. Before this contract was issued, he was employed on casual terms. He did not go on annual leave and there was no compensation.
44. Upon cross-examination, the claimant testified that for the entire period of their employment with the respondent as claimants, they would earn a daily wage that was paid every 7 days. They were placed as casual employees. It was not a case of being called for work when available. The claimants worked continuously and without stoppage.
45. The respondent called Hezron Rachilo the human resources consultant at the time and currently the Group Human Resources for the respondent. He testified that the claimants were employed on a casual basis to work on a piece rate daily. They were paid weekly. They would sign a register, and Casual Wages Payment Sheet and note the following; Time; Earnings; No. of days worked; Deductions; Total paid.
46. The deductions would be applied to pay NSSF and NHIF. The wages paid were not constant but based on piece rate work and based on Minimum Wage Orders for Kilifi County.
47. Mr Rachilo testified that the respondent is based in Kilifi County and every time the government increased the minimum wage, the respondent would effect as confirmed by the claimants. In the vent there was a delay in payments of wages due to the release of the Wage Orders Gazette Notice, the respondent would apply and pay wage arrears from the 1<sup>st</sup> of May. The respondent has filed its work records as evidence of the employment status of the claimants.
48. Mr Rachilo testified that in the case of John Joseph Keda, he was on a written contract of employment that included leave but he refused to take his annual leave. For the other claimants, the claim for leave relates to a period of over 3 years which is time-barred. The piece rate work was based on target at Amory or foundry. The claimants would work based on the availability of work and materials. The claimants had no complaint about the wages paid. While in employment, none declined to take the paid wages or seek to take annual leave. The evidence that work was continuous is not correct. Any



overtime worked was fully paid for. It was voluntary overtime. Some claimants withdrew their claim and separation was voluntary.

49. Upon cross-examination, the witness testified that all the claimants were employees of the respondent until the year 2016 when they were issued with contracts. There was no settlement of dues. The claimants did not ask to take annual leave.

At the end of the hearing, both parties filed written submissions.

50. The claimants submitted that the claimants worked for the respondent for continuous periods of over 3 months and hence not casual employees. In response, the respondent admitted that;

- a. The 1<sup>st</sup> claimant worked for 15 years and 9 months;
- b. The 2<sup>nd</sup> claimant worked for 7 years and 9 months;
- c. The 4<sup>th</sup> claimant worked for 7 years and 1 months;
- d. The 8<sup>th</sup> claimant worked for 7 years and 2 months;
- e. The 9<sup>th</sup> claimant worked for 4 years and 8 months;
- f. The 15<sup>th</sup> claimant worked for 9 years and 8 months;
- g. The 18<sup>th</sup> claimant worked for 12 years and 9 months;
- h. The 19<sup>th</sup> claimant worked for 16 years and 5 months;
- i. The 20<sup>th</sup> claimant worked for 4 years and 4 months
- j. The 22<sup>nd</sup> claimant worked for 18 years;
- k. The 23<sup>rd</sup> claimant worked for 10 years and 11 months;
- l. The 25<sup>th</sup> claimant worked for 5 years and 2 months; and
- m. The 26<sup>th</sup> claimant worked for 4 years and 6 months.

51. In the case of *Charles A Songoro v China Wu Yi Limited* [2016] eKLR the court held that the burden of disproving a term of the contract is on the employer. Section 10(7) of the [Employment Act, 2007](#) (the Act) requires the employer to file work records.

52. The claimants having worked for a long period had employment converted under the provisions of Section 37 of the Act with rights and benefits under the Act. In the case of *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* [2013] eKLR the court held that where a casual employee is not terminated at the end of the day and work continues for over a month, such converts to a contract term employment.

53. On the claims made, the claimants are entitled to payment for leave days not taken and the underpayment of their wages as pleaded.

54. The claimant submitted that the 9th, 25th and 26th claimants had their employment unfairly terminated under their claims consolidated herein not being opposed. The claims under Cause No.100, 101, and 102 of 2023 were on the basis that the claimants were unfairly terminated in their employment by the respondent without payment of terminal dues there was no notice or any effort to address the due process before termination of employment contrary to Section 43 of the Act. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the court addressed the



motions of due process and that before termination of employment, the same must be fair and for a substantive reason. This is lacking in the case of the 9th, 25th and 26th claimants.

55. The claimants submitted that they are entitled to the dues outlined under their Memorandum of Claim for notice pay, annual leave and compensation for unfair termination of employment. Overall, the claimants are entitled to payment in lieu of taking annual leave and underpayments as pleaded.
56. The claimants also submitted that they had not been issued with Certificates of Service as required under Section 51 of the Act. Costs should also be awarded taking into account the time taken to resolve the dispute and the fact that the terminal dues claimed having accrued during employment and was not paid.
57. The respondent submitted that the parties agreed to use Cause No. 519 of 2016 as the test suit for Causes No.100, 101 and 102 of 2023 and further agreed to only call evidence in the same file.
58. The respondent submitted that the delay in finalising this matter was occasioned by acts beyond its control such as the closure of courts due to Covid pandemic and the fact that the respondent was placed under a Court Annexed Administration from May 2021 to August 2022.
59. The respondent submitted that it is situated at Mariakani in Kilifi County and is involved in the manufacturing and forming of aluminium cookware and roofing products. The claimants were employed as casual labourers responsible for manually casting sprouts from molten aluminium using hand-held manual moulds and not machines. No claimant was engaged as a machine operator and do not possess the qualifications for such positions. They worked as general labourers.
60. The respondent submitted that the claimants were paid consolidated wages per day inclusive of the house allowance which they opted to collect weekly. The applicable Minimum Wage Orders applied to the claimants and cannot justify claiming annual leave pay or underpayments.
61. During the period of employment, there was no continuous employment. The claimant took rest days, overtime pay and wages paid were inclusive of house allowance as prescribed in the Minimum Wage Orders. The claim for underpayment is therefore based on the wrong bracket of the Wage Orders as held in *Joseph Muka Khabonekha v Turaco Limited* [2021] eKLR. The respondent is based in Kilifi County, and the area is covered under a different wage bracket. In the case of *Kennedy Ogweno Otieno v Bedrock Holdings Limited* [2022] eKLR the court held that claims made after 3 years are time-barred and hence in this case, such apply to claims premised under untaken leave days for beyond 3 years.
62. The claimants failed to adduce any evidence that they applied for leave and were denied such right. In the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR the court held that the claimants failed to prove that there was termination of employment as alleged. Section 47(5) of the Act requires the employee to discharge his burden to allow the employer to justify the reasons leading to termination of employment which is lacking in this case. In the case of *Monica Wanza Mbavu v Roofsec & Allied Works Co Ltd* [2021] eKLR the court held that where an employee alleges that there was verbal termination of employment and the employer asserts that the employee failed to report to work, the employee should call evidence to prove the assertions made.
63. In this case, notice pay is not due for lack of proof that there was termination of employment. The claims for annual leave are not justified and there were no underpayments. The claims should be dismissed with costs.



## Determination

64. The issues for determination under the consolidated files are whether the claimants were employed as casual employees; whether they are entitled to payment of annual leave and underpayments as claimed, and whether the 9<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimants were unfairly terminated and hence entitled to the remedies sought.
65. Whether one is a casual employee or not is a matter now addressed by the court in many decisions. Section 2 of the Act defines a casual employee as one who is paid at the end of each day. As one whose employment is not continuous and ends within each day with payment without the possibility of renewal.
66. The Court of Appeal in the case of *Kenyatta University v Esther Njeri Maina* [2022] eKLR held that retaining an employee on casual terms before the period allowed under Section 2 of the Act is an unfair labour practice. This position of reiterated in the case of *Humphrey Nyaga Thomas & 25 others v Kenyatta University* [2021] eKLR.
67. In *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* [2015] eKLR, the court in addressing the question of who a casual employee is held that;

...Our consideration of the issue of whether the appellants were casual employees, there is no dispute by parties that there was no letter of appointment issued to the appellants. The respondent contends that the appellants were casual employees while the appellants hold the contrary view. Section 2 of the repealed *Employment Act* defined a casual employee to mean an individual the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. ...

The court, as cited above, further held that;

...With the enactment of the *Employment Act* 2007, considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37(5) provides that an employee whose contract of service has been converted (on account of continuous service of three or more months like in the petitioners' case) and who has worked for two or more months 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 the Act had he not initially been employed as a casual employee.

68. Hence, under Section 37 of the Act, where an employee is in the continuous service of the employer and is not paid daily, cumulatively for periods beyond the month, such an employee converts to enjoy rights and benefits under the Act.
69. The respondent filed work records including time sheets for the claimants. These are weekly work and payment sheets from 1<sup>st</sup> to 6 January 2016;
- 7 to 13 January 2016;
- 14 to 20 January 2016;
- 21 to 27 January 2016; and
- 25 to 31 January 2016.



70. Similar worksheets and payment records are replicated for different divisions/departments.
71. In response to the claims, the respondent did an elaborate enumeration of the duties, wages and date of employment for each claimant. There are admissions that the claimants were employed as machine operators save for the 9<sup>th</sup> claimant who is defined as a trainee machine attendant, the 15<sup>th</sup> claimant is defined as a casual labourer and the 25<sup>th</sup> claimant is not defined. However, in the written submissions, the respondent offers that the claimants were general labourers because they largely worked using their hands, had no qualifications as machine attendants and hence, cannot justify the claim that they were machine operators.
72. These records are crucial to the extent that they outline the work hours for each claimant per week. A random sample reveals the following;
73. In the week of 25 to 31 January 2016, Joseph Kada worked for 48 hours. Overtime hours are factored in; In the week of 7 to 13 January 2016, the highest number of hours is Ali Karisa Kitsao at 73 for the week. This is factored into his payments for the week. His wage is Ksh.7, 126; and For the week of 21 to 27 January 2016, the highest number of hours is 74 with overtime factored total paid to Ali Karisa Matano is ksh.7, 299.
74. Save for underpayment of the minimum wage, the overtime hours worked are factored into the wages paid for each week. The work records confirm this fact.
75. The respondent in the pleadings has admitted the claimants were machine operators. However, no employment letter was issued. By application of Section 37 of the Act, the claimant converted from casual employees to machine operators save for the 9<sup>th</sup>, 15<sup>th</sup> and 25<sup>th</sup> claimants. The rights and benefits under the Act apply to the claimants as machine operators at the end of their employment with the respondent.
76. The response that the claimants were on piece-rate work is without evidence. Although piece-work is allowed under Section 18(1) of the Act, the legal duty is on the employer to issue a written contract spelling out the terms and conditions for such piece-work performance. Payment for piece-work is at the end month or as agreed by the parties. Evidence of such an understanding is necessary to remove doubts. Section 18(1) of the Act requires that;
- 1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—
    - (a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or
    - (b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier
77. Hence, the employer's burden in this regard is not discharged. The response is that the employees were cushioned with payment of minimum wage and then left in control of their time and paid for piece production is left bare. The worksheets, payment sheets and records filed on their own do not tell a similar story that the claimant was cushioned with a minimum wage to allow them the freedom to undertake piece-work and be in control of their timelines.



78. The purpose of a Minimum Wage Order is to secure employees from underpayment. The purpose of casual employment is to protect an employee who continuously reports to work for the same employer for work that is not likely to be completed within a day or in the foreseeable future.
79. On the claim for untaken leave days over the years, the claimants assert that they were not allowed to take their annual leave or compensated for not taking annual leave. The respondent's case is that the claimants did not apply to take annual leave and in any event, the minimum daily wage paid was inclusive. That the claimants remained in control of their work hours under piece-rate work. This is addressed with a finding that the claimants enjoyed protection under Section 37 of the Act. Such came with the benefit of taking annual leave or payment in lieu thereof.
80. Section 28 of the Act gives the right to every employee to take annual paid leave for at least 21 working days. The employer should ensure that the employee has taken such annual leave or with the consent of the employee address how to take such annual leave. However, the annual leave should not be accumulated beyond 18 months per Section 18(3) of the Act. The employee, the beneficiary of Section 28 provisions should be proactive to secure his right by allowing the employer to give approval beyond such period as otherwise, rest cannot be postponed and accumulated for over 7 years or beyond the period of 18 months contemplated under Section 18(3) of the Act.
81. In this case, based on the basic minimum wage for a machine operator working in Kilifi County, each claimant is entitled to untaken leave days of up to 18 months. The 9<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimants' wages will be addressed in this context but as general employees.
82. All the claimants claim underpayment of wages for 12 months in the application of the Wage Orders for the year 2015. Each will be assessed based on the last wage applied by the respondent.
83. 1<sup>st</sup> claimant Swaleh Ali Mwamchera was a machine operator at a daily wage of Ksh.265. Under the Regulation of Wages (General) (Amendment) Order, 2015 a machine operator working in Kilifi County had a minimum wage of Ksh.452.30 the difference is Ksh.187.30. For 12 months, the due underpayment is ksh.68, 365.50.
84. For 18 months of annual leave based on the basic wage, the due amount is ksh.14, 925.90.
85. The 2<sup>nd</sup> claimant Isaac Mzungu Maluki was a machine operator earning ksh.475. This is above the minimum wage.  
On his last paid wage, the annual leave pay due is ksh.15, 675.
86. The 4<sup>th</sup> claimant Emmanuel Kithi Kayaa was a machine operator earning ksh.602. This is above the minimum wage. His leave allowance is Ksh.19, 866.
87. 8<sup>th</sup> claimant James Maluki Mnalo was employed as a machine operator on a daily wage of ksh.461 which is above his minimum wage. The leave pay due is Ksh.15, 213.
88. The 9<sup>th</sup> claimant Juma Kazungu Kitsao was employed as a trainee machine attendant at a daily wage of Ksh.444. An underpayment of ksh.8 per day. For 12 months, the underpayment is ksh.2, 920. Annual leave pay is Ksh.14, 925.90.
89. The 11<sup>th</sup> claimant Joanes Kitsai Kazungu was employed as a machine operator earning a wage of Ksh.474 per day. This is over the minimum wage due. Annual leave pay is ksh.15, 642.
90. 12<sup>th</sup> claimant Isaac Matano Jaji was employed as a machine operator. He claimed that his last wage was Ksh.294 per day. There was an underpayment of Ksh. 158.30. Total underpayment is Ksh.57, 779.50. Annual leave pay is ksh.17, 895.90.



91. The 15<sup>th</sup> claimant Safari Joseph Birywa was employed as a general helper at a daily wage of ksh.296.50 a General worker under the applicable Wage orders had a minimum wage of ksh.296.20. There was no underpayment. Annual leave is due at ksh.9, 784.50.
92. The 18<sup>th</sup> claimant John Joseph Rada was employed as a machine attendant at a daily wage of Ksh.296.50. The minimum wage due is ksh.452.20 per day hence an underpayment of ksh.155.80. Total underpayment is Ksh.56, 867. Annual leave pay ksh.14, 922.60.
93. The 20<sup>th</sup> claimant Kiio John Kimweli was employed as a machine attendant at a daily wage of ksh.449 less by Ksh.3 and for 12 months the underpayment due is ksh.1, 095. Annual leave pay is Ksh.14, 925.90.
94. The 22<sup>nd</sup> claimant was employed as a machine operator earning a daily wage of Ksh. 444 less Ksh.8 per day. Total underpayment is Ksh.2, 920. Annual leave pay is ksh.14, 952.90.
95. The 23<sup>rd</sup> claimant Kioko Mutongwe Mutua was employed as a machine operator at a daily wage of Ksh.383 an underpayment of Ksh.69.30 and a total underpayment is Ksh. 25, 294.50. Annual leave pay is ksh.14, 952.90.
96. 25<sup>th</sup> claimant Kahindi Tuva Kazungu was not a machine operator earning Ksh.474 per day which is above the minimum wage. The annual leave pay due is ksh.15, 642.
97. 26<sup>th</sup> claimant Charo Karani Kahindi was employed as a general worker on a daily wage of Ksh.296 without an underpayment. The Annual leave pay is ksh.9, 768.
98. The 9<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimants had separate claims for unfair termination of employment. The basis is that upon employment, each claimant would be paid a daily wage accumulated over a week. However, on 1<sup>st</sup> October 2016, the claimants reported to work but the manager told them that their employment had been terminated with immediate effect. There was no prior notice or any reasons given for such action.
99. The court has addressed the issue of underpayments and the non-payment of accrued leave days. Without any response, termination of employment fails the mandatory test of fairness of substantive reasons in terms of Sections 41, 43 and 45 of the Act. This is an imperative as held in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. Notice must be issued and the employee must give reasons leading to termination of employment. Furthermore, the employee should be given a fair chance to defend himself. All these ingredients are missing in this case.
100. The respondent has heavily relied on the case of Monica Wanza Mbavu v Roofsec & Allied Works Co Ltd [2021] eKLR. But the facts therefrom are separate and distinct from this case. In that case, the court held there was no communication with regard to the status of employment and hence the employee could not prove there was summary dismissal. However, I beg to differ with these findings. The employee does not terminate her employment. Where the employee fails to report to work as required, the employer has the legal duty to summon the employee to attend and address as such is gross misconduct. Persistent refusal to attend and address is cured under Section 18(5) (b) of the Act where the employer is allowed to issue notice to the labour officer. Hence the cause of action in this case and the cited legal authority are foundationally different.
51. For the 9<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimant, their employment was terminated unfairly. They are entitled to notice pay and compensation.
52. Under Section 35 of the Act together with Section 37, the due benefit is payment for one month in notice pay.



53. The 9<sup>th</sup> claimant was last earning Ksh.444 per day and the notice pay due is Ksh.13, 320.
54. The 25<sup>th</sup> claimant was last earning ksh.474 per day. The notice pay due is Ksh.14, 220.
55. The 26<sup>th</sup> claimant was last earning Ksh.296 per day. The notice pay due is Ksh.8, 880.
56. Compensation for unfair termination of employment is due. For lapse in both due process and substantive justification, compensation is hereby allocated at two months gross salary.
- The 9<sup>th</sup> claimant is awarded ksh.26, 640 compensation;
- The 25<sup>th</sup> claimant is awarded ksh.28, 440 compensation; and 26<sup>th</sup> claimant is awarded ksh.17, 760 compensation.
57. The claimants are seeking severance pay. The finding that there was unfair termination of employment factors the unlawful and lapse in addressing the due process. Severance pay only arises in a case where the employer declares a redundancy which is not the case here.
58. On the claim for issuance of a Certificate of Service, this is a legal requirement at the end of employment in terms of Section 51 of the Act. Each claimant is entitled to a certificate of Service. The respondent did not make a case that the claimants failed to clear or attend to any matter unresolved at the shop floor.
59. On the question of costs, this matter was filed way back in the year 2016. The claimants were still in employment. Circumstances have since changed resulting in the 9<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> claimants filing separate claims to address termination of employment. The respondent blamed the Covid pandemic and the fact of being placed under the Court Annexed Administration in the year 2021. This was way after the fact of this case being filed in the year 2016. The claimants are entitled to the due costs at 50%.
60. Accordingly, judgment is hereby entered for the claimants against the respondent in the following terms;
- 1<sup>st</sup> claimant Swaleh Ali Mwamchera is awarded the following;
- a. Underpayment is ksh.68, 365.50.
  - b. Annual leave ksh.14, 925.90.
- 2<sup>nd</sup> claimant Isaac Mzungu Maluki is awarded the following;
- a. Leave pay ksh.15, 675.
- 4<sup>th</sup> claimant Emmanuel Kithi Kayaa is awarded the following;
- a. Leave pay is Ksh.19, 866.
- 8<sup>th</sup> claimant James Maluki Mnalo is awarded the following;
- a. The leave pay due is Ksh.15, 213.
- The 9<sup>th</sup> claimant Juma Kazungu Kitsao is awarded;
- a. ksh.26, 640 compensation;
  - b. Notice pay due is Ksh.13, 320.
  - c. The underpayment is ksh.2, 920.
  - d. Annual leave pay is Ksh.14, 925.90.



The 11<sup>th</sup> claimant Joanes Kitsai Kazungu is awarded as follows;

- a) L leave pay is ksh.15, 642.

The 12<sup>th</sup> claimant Isaac Matano Jaji is awarded the following;

- a. Underpayment is Ksh.57, 779.50.
- b. Annual leave pay is ksh.17, 895.90.

The 15<sup>th</sup> claimant Safari Joseph Biryia is awarded the following;

- a. Annual leave is due at ksh.9, 784.50.

The 18<sup>th</sup> claimant John Joseph Rada is awarded the following;

- a. Underpayment is Ksh.56, 867.
- b. Annual leave pay ksh.14, 922.60.

The 20<sup>th</sup> claimant Kiiio John Kimweli is awarded the following;

- a. Underpayment due is ksh.1, 095.
- b. Annual leave pay is Ksh.14, 925.90.

The 22<sup>nd</sup> claimant Ndunda Disii Buraa is awarded the following;

- a. Total underpayment is Ksh.2, 920.
- b. Annual leave pay is ksh.14, 952.90.

The 23<sup>rd</sup> claimant Kioko Mutongwe Mutua is awarded the following;

- a. Underpayment ksh.25, 294.50.
- b. Annual leave pay is ksh.14, 952.90.

The 25<sup>th</sup> claimant is awarded;

- a. ksh.28, 440 compensation; and
- b. Notice pay due is Ksh.14, 220.
- c. Annual leave pay due is ksh.15, 642.

26<sup>th</sup> claimant Charo Karani Kahindi is awarded the following;

- a. ksh.17, 760 compensation.
- b. Notice pay due is Ksh.8, 880.
- c. Annual leave pay is ksh.9, 768.

60. The claimants are awarded 50% of costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:



Court Assistant: Japhet  
..... and .....

