Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v Kima Mission Hospital (Employment and Labour Relations Cause E004 of 2023) [2024] KEELRC 1376 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1376 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS CAUSE E004 OF 2023

JW KELI, J

JUNE 6, 2024

BETWEEN

KENYA UNION OF DOMESTIC WORKERS, HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS UNION (KUDHEIHA) ..... CLAIMANT

AND

KIMA MISSION HOSPITAL ..... RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals, and workers in the hotel industry.

2. The Claimant on 6th June 2023 filed the Statement of Claim dated 11th May 2023 supported by the Verifying affidavit sworn on even date by the Branch Secretary- Kakamega of the Claimant, Mr. Thomas Mboya.

3. The suit had been triggered by the dismissal of the Claimant's members Evans Amudavi, Fred Andanje, and Ruphers Lumumba ("the Grievants") from employment by the Respondent. Vide the Statement of Claim, the Claimant prayed for the following reliefs:-

    a. Payment of terminal dues as indicated to the Respondent by the Claimant in his letter to dated 24th July 2022 and supported by the Collective Bargaining Agreement.

    b. Four month salary in lieu of notice.

    c. 15 months' salary reduction due to Covid 19

    d. Salaries arrears between September 2009 and December 2012

e. Service gratuity for period worked.

f. Maximum compensation for loss of employment pursuant to the law.

g. The costs of this suit to be paid by the Respondent.

4. Also filed together with the Statement of Claim is the Claimant's list of witnesses dated 11th May 2023, the list of witnesses of even date, the witness statements of Chibinda Evans Amudavi, Ruphers Lumumba Shiokhonjila, and Fred Liseno Andanje all of 28th November 2021, the list of documents dated 11th May 2023 and its Bundle of Documents.

5. Through submission filed on 30th October 2023 and dated 29th September 2023, the Claimant prayed for the court to grant any other relief the court deems fit.

6. The Respondent on 4th October 2023, appointed the firm of Bruce Odeny & Company Advocates and on 1st November 2023 filed its Response to Statement of Claim dated 31st October 2023. On 31st January 2024, the Respondent, filed its list of witnesses dated on an even date and the witness statement of Charles Omutoko dated 31st January 2024.

Hearing

The Claimant's case

7. The Claimant's case was heard on 26th February 2024, when Chibinda Evans Amudavi (CW1), Ruphers Lumumba Shiokhonjila (CW2), and Fred Liseno Andanje (CW3) testified on oath, and all adopted their written witness statements dated 28th November, 2021. They were cross-examined by the Respondent's Counsel, Ms. Omondi.

The Respondent's case

8. The Respondent's case was heard on the same day 26th February 2024, when its witness Charles Omutoko (DW) testified on oath as the Respondent's witness of fact. He adopted his statement dated 31st January 2024 as his defence evidence in chief and produced the documents in the Respondent's list of documents as the Defence exhibits D Exh- 1, 2, 3a, 3b,3c, 4a,4b & 4c. DW was cross-examined by Mr. Kamuye of the Claimant.

Claimant's Case at the Hearing

Chibinda Evans Amudavi (CW1)

9. CW1 was engaged by the Respondent in 1995 as an AIDS Prevention Assistant earning Kshs.3000/-. In 1999 he was sponsored by CHAK to a two-and-a-half-year certificate course in Pharmaceutical Assistant accredited by the University of Western Cape-South Africa hosted by Mission for Essential Drugs and Supplies (MEDS). On graduating in 2002, he was deployed to be in charge of the pharmacy by the Respondent earning Kshs. 8,000 until 2012, when the salary was raised to Kshs. 18,000 and later another increment of Kshs. 21,000.

10. CW1 joined the union on 6th July 2008(App-3).

11. CW1 testified that the employees were informed that there was a new management in April 2017, which took over and after a few months his salary was increased to Kshs. 26,500. He testified that they were required to sign new contracts with Port Florence, which he did not sign. He stated that he was

not aware of any MOU, and as a staff of KIMA Hospital, there was no explanation of the fate of their existing contracts with KIMA if they were to sign the new contracts with Port Florence.

12. CW1 stated that it was on his failure to sign the new contract that he his services were terminated.

13. CW1 stated that he paid his union dues directly as a staff and claimed for his salary arrears for September 2009 to December 2012, as evidenced in the tabulation of arrears from the office of Kshs. 284,000/- (Pg.51).

14. CW1 confirmed that he had signed a salary reduction agreement during the COVID-19 period, and the same agreement did not provide for a refund of the deducted salaries. He stated that his salary was Kshs. 26,500/-, as they signed at the account's office, though he had no proof.

15. CW1 confirmed he received payment through a cheque dated 22nd July 2021 on termination which was for arrears for 2020 to early 2021, but the same did not account for 2009 to 2012.

16. CW1 contended that he never received any other payments from the Respondent and said that the union was following up on the same with the respondent as it has a CBA with it, through the Christian Health Association.

17. CW1 stated that he received a letter from Port Florence on 30th June 2021 terminating his services in the hospital.

Ruphers Lumumba Shiokhonjila (CW2)

18. CW2 was employed as an Accounts Clerk in 2016 with a starting salary of Kshs. 15,091, and in 2018 his salary was increased to Kshs. 18,500. He joined the union on 6th January 2018.

19. CW2 testified that he was employed as a cleaner. He confirmed that he signed a consent agreement for a reduction of salary during the Covid period and the difference was not to be refunded.

20. CW2 testified that; his claim was for salary arrears for eleven days he worked in June 2021. He confirmed that on termination, he received a cheque of Kshs. 52,140/-. He claimed that as for his claim for gratuity, the same was not in his contract. He testified that the amount he received was for arrears of March, April May, and June 2021, but stated that for June he was paid a salary less 11 Days.

21. CW2 confirmed that he was aware of the change in management from 1st April 2017 as the Board informed him that they had new partners and they were to continue working without signing new contracts and their jobs were secure.

22. CW2 complained that the employees were at one point asked to sign new contracts, but he declined and was dismissed. He was not aware some employees signed the new contracts and were still working.

23. CW2 testified that he paid his union dues directly and he started paying in early 2017.

24. CW2 stated that he was entitled to gratuity as he was a union member, and the union had a CBA with the respondent.

Fred Liseno Andanje (CW3)

25. CW3 testified that he was a cleaner cum gardener and was employed at a salary of Kshs. 6,000 and before he was terminated he was earning Kshs. 10,000/-. He was a union member since 1st April 2017 and was paying his dues(App-7-Pg.30). CW2 testified that he was forced to sign the salary reduction consent agreement, as it was indicated all employees had to sign.

26. CW3 testified that after his termination he was paid Kshs. 27,720 which was for arrears of months before his termination and the arrears for the months before 'just disappeared'.

27. CW3 testified that he claimed unpaid salary from 2019 to 2021, and his salary was often paid via cash before it was changed to via bank when Port Victoria came in 2017. He confirmed that he was aware there was a new management and his services were terminated for his failure to sign the new contracts. He testified that he was aware that those who signed new contracts were retained and are working. He confirmed that he did not have proof in court that he received his salary via bank as he did not avail his bank statements. He testified that he paid his union dues directly to the union personally, and the hospital was not aware that he was a member of the union.

28. CW3 stated he received the exclusion from working for Port Florence on 30th June 2021, and on 6th July 2021, received the termination letter from the respondent.

Respondent's Case

29. DW testified that he was an accountant by profession and a Board member of the respondent and he knew the grievants. He testified that a memorandum of agreement was signed by the former chairman of the Board, who served the board for many years.

30. DW testified that KIMA Hospital is a faculty under the Church of God, which is not a party to the Agreement. He was aware that there were arrears in the period of September 2009 to December 2013 and the Board had called all the employees and agreed to make payments.

31. DW testified that the grievants were not paid since they were no longer employed by KIMA Hospital.

32. DW testified that the Memorandum of Understanding (MOU) between Port Florence and the Church of God was signed to take over the management of the Hospital and as per the said MOU, all the assets and liabilities were handed over to Port Florence.

33. DW testified that, at one point the requirement for new contracts to be signed arose, and the grievants herein refused to sign new contracts.

34. DW testified that Evans (CW1) was a long-time employee of the hospital, and had an appointment letter (pg.15). He testified that although CW1's contract on page 15 stated that the contract had been negotiated with the Union (KUDHEIHA), *the constitution* of the Church, which is the owner of the Hospital, does not allow unionization, and if the employee joins a union they pay individually.

35. DW testified that, although on the second employment letter commencing on 1st October 2002, on Page 18, it was stated that the terms were negotiated with the union, he was not aware there was a CBA between the union and the Hospital.

36. DW testified that the Church of God is the owner of the Respondent, and they partnered with the Christian Health Association of Kenya for service delivery.

37. DW testified that there was an MOU with Port Florence which was a partnership and not a takeover which was for 10 years, with a renewal in the first five years. He testified that the Board met with the representatives of the employees to sensitive them, and they handed over all liabilities.

38. DW testified that they did not initiate the separation process with the grievants as all employees of KIMA were asked to sign new contracts but the grievants herein refused and their services were terminated.

39. DW testified that the grievants were assets to the Hospital, and their services were only terminated due to their failure to sign the new contracts.

40. DW further testified that the parties went for conciliation and they received correspondence therefrom. He was referred to Page 46 of the conciliation report where he confirmed that the conciliator observed that the only payment exempted was the COVID arrears. He confirmed that the Board received the claimant's letter of 24th July 2022(App. 15) but the tabulation of arrears from the claimant was not received (pg.48).

41. DW testified that salary arrears for the three grievants and other employees were not paid, although some arrears for some employees who signed the new contracts were paid, the said arrears were for only the period of the tenure of Port Florence and not for before.

42. DW testified that employees had the discretion to be unionized and the Management was not mandated to make deductions to the union.

43. DW testified that the grievants were terminated from employment under Port Florence and pursuant to the consent signed the dues for the Covid period were not payable.

44. DW testified that the grievants' employment was terminated by Port Florence.

Determination

Issues for determination

45. The claimant identified the following issues for determination in the claim: -

    a. Whether the termination of Evans Chibinda, Fred Andaje and Ruphers Lumumba was unfair.

    b. Whether KIMA Mission Hospital has a CBA with the Claimant and entitlement to be paid per calculations forwarded by the Claimant.

    c. Whether the respondent should pay costs of the suit.

    d. Any other reliefs the court deems fit.

46. The Respondent identified the following issues for determination in the claim: -

    a. Whether there is a Collective Bargaining Agreement between the Claimant and the Respondent.

    b. Whether the Claimant's termination was unlawful

    c. Whether the Claimants' are entitled to the reliefs sought.

47. The court having considered the Claimant's submissions will address the following issues: -

    a. Whether the termination of employment of the grievants by the respondents was lawful and fair.

    b. Whether the Respondent is bound by the Collective Bargaining Agreement between the Christian Health Association of Kenya (CHAK) and the Claimant

    c. Whether the Claimant is entitled to the orders sought.

Issue a.) Whether the termination of employment of the grievants by the respondents was lawful and fair.

The standard of proof

48. The employment claims are civil and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent the termination is unfair if '(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee'.

49. Section 43 of the *Employment Act*, 2007 provides that:-

> "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
>
> (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

50. Section 45 (2) of the Act provides that:

> (2) A termination of employment by an employer is unfair if the employer fails to prove:-
>
> C. That the reason for the termination is valid;
>
> (b) That the reason for the termination is a fair reason -
>
> 1. Related to the employee's conduct, capacity, or compatibility; or
>
> 2. Based on the operational requirements of the employer; and
>
> (c) That the employment was terminated in accordance with fair procedure."

51. As rightly held in Josephine M. Ndungu & others v Plan International Inc (2019) eKLR observed: '68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements...."

Substantive fairness- the validity of the reason

52. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the *Employment Act* which reads: - '43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

53. What the court needs to determine is whether the dismissal decision met the reasonable test where Lord Denning in British Leyland UK Limited v Swift (1981) I.R.L.R 91 held that: -

> 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view..."

Claimant's case

54. On the validity of the reasons for the termination of the employment, all the grievants were terminated on the basis that they refused to sign employment contracts with Port Florence Community Hospital since 2017 when the Church of God through the Memorandum of Understanding handed over the KIMA Hospital to Port Florence Community hospital.

55. DW testified that there was an MOU with Port Florence which was a partnership for 10 years, the first term was of five years renewable. He testified that the same was not a take-over, and the employees were sensitised through the Board, as they had representatives on the Board.

56. CW1-Evans, testified that they were informed that there was a new management in the hospital, but they were not told about the existence of an MOU. He testified that they were never involved in any MOU. He stated that he could not sign the new contracts as they were not given an explanation on the fate of their existing contracts with the Respondent before they could sign the new contracts with Port Florence.

57. CW-2-Ruphers testified that he was aware that there was a new management from 1st April 2017, and they had been informed that they were partners hence they continued to work. He testified that the Board informed them that Port Florence was their New Partners and their jobs were secure.

58. CW-3- Fred – testified that he was aware that there was a new management and that they had been asked to sign a new contract, which he did not sign.

The Respondent's case

59. DW testified that they did not initiate the separation process as the employer, but the same was done by Port Florence.

60. DW testified that they handed over all liabilities in the partnership and they did not initiate the separation process, as all employees of KIMA were asked to sign new contracts and only the grievants refused to sign.

61. DW testified that the grievants were assets to the hospital and they were only terminated for failing to sign the new contracts.

Determination

62. The letters stopping the grievants CW1, CW2, and CW3 from working were written by Port Florence Community Hospital (App. 5(pg. 22); pg.28, App.8(pg. 34)) all on 30th June 2021 all stating as follows: -

> "Re: ExclusionfromPort Florence Operations at Kima Mission Hospital
>
> The above subject refers.

This is to inform you that your services are no longer required by Port Florence Community Hospital. You are therefore to stop interacting with any aspects of management at the said facility in terms of service provision, whether for pay or pro bono.

The reasons of this separation is contained in the MOU that Port Florence signed with the Church of God East Africa, which required those willing to continue with the new management to sign new employment contracts. Your choice not to continue with our management is respected and it is now confirmed that we are separated. Proceed to obtain your payment from our accounts as a matter of last transaction with Port Florence Hospital Management.

....."

63. CW2 and CW3 further produced the individual Termination of Service letters (PG. 29 & pg. 35) dated 6th July 2021, in which the Respondent addressed the letters as follows: -

" Dear Ruphers,

Termination of Service

The above subject refers.

Following a joint meeting between the General Assembly of the Church of God (E.A) (K) and the management of Port Florence Community Hospital of 21st June 2021 and the subsequent adoption of the resolutions thereof by the joint meeting of the Board of Management of Kima Mission Hospital and the Management of Port Florence Community Hospital held on 28th June 2021, I have been directed to inform you that your services at KIMA Mission Hospital have been terminated with effect from 6th July 2021.

This has been necessitated by your refusal to sign an employment contract with Port Florence Community Hospital Since 2017 when Church of God through the Memorandum of Understanding handed over the Hospital to Port Florence Community Hospital.

Thanks for the services you rendered at KIMA Mission Hospital and kindly organize to hand over any Hospital property to the Administrator. we request that you vacate the premises within three (3) days to enable us allocate the house to the incoming staff.

Signed By.

Moses E. E. Abulwa

Board Chairman

".....

Dear Fred,

Termination of Service

The above subject refers.

Following a joint meeting between the General Assembly of the Church of God (E.A) (K) and the management of Port Florence Community Hospital of 21st June 2021 and subsequent adoption of the resolutions thereof by the joint meeting of the Board of Management of Kima Mission Hospital and the Management of Port Florence Community

Hospital held on 28th June 2021, I have been directed to inform you that your services at KIMA Mission Hospital have been terminated with effect from 6th July 2021.

This has been necessitated by your refusal to sign employment contract with Port Florence Community Hospital Since 2017 when Church of God through the Memorandum of Understanding handed over the Hospital to Port Florence Community Hospital.

Thanks for the services you rendered at KIMA Mission Hospital and kindly organize to hand over any Hospital property to the Administrator.

Signed By.

Moses E.E. Abulwa

Board Chairman ‘’

64. The letters from Port Florence Hospital to the Grievants and the letters from the Respondent to CW2 and CW3, referred to a Memorandum of Understanding (MOU)(D-Exh-2) produced by the respondent, executed by Port Florence Community Hospital and the Church of God in EA(K). The agreement indicated that it was a partnership agreement. The agreement indicates that it was signed on 17th March 2017. DW testified that the employees had representatives on the Board, and by that virtue, the employees were sensitized to the change in management.

65. There was no evidence produced by DW who is a member of the Board, that employees were aware of the terms in the MOU entered into by the Respondent through the church of God in EA(K). The mere presence of the representatives of the employees on the Board was not a clear representation of how the employees were made aware that they were to be issued new contracts. There was no evidence by the respondent in the form of minutes to indicate that the employees' representatives on the Board were present when the MOU had been executed and that the terms in the MOU were read out to the representatives of the MOU.

66. Additionally, the respondent who was the employer did not take steps in the form of posting the MOU or the effects of the alleged partnership on a notice board that could have been read by the employees. There were no steps taken by the employer, the respondent to provide proper information to its employees. The grievants testified that they were aware that there was a change in management, but they were not aware of the consequences of the said change in management.

67. It is important to note that on a reading of the MOU, at Clauses 5.6 and 6.4 below:

> “ 5.6. The Church of God in EA(K) through KIMA Mission Hospital Board of Management shall while Handing over the premises described in this agreement, provide the Port Florence Community Hospital with a List of the Staff handed over, their respective grades, salary scales, staff benefits and terminal dues if any provided thatwhere Port Florence Community Hospital hires new staff, such shall remain the employees of the facility and will be passed over to the Church of God in EZ(K)through KIMA Mission Hospital Board of Management at the end of this Agreement. Conversely, all staff taken over by the Port Florence Community Hospital from the Church of God in EA(K) through KIMA Mission Hospital Board of Management will at the end of this agreement revert before the commencement period herein above. The Church of God in EA(K) through KIMA Mission Hospital Board of Management will give letters of termination to staff that they would not want

to continue with the Port Florence Community Hospital and deal with their terminal dues if any at that time.

.....

6.4. To retain the existing staff where such need shall arise and hire additional qualified staff to meet the service delivery standards of Port Florence Community Hospital in synch with the Medical Services Standards providedthat the staff retained from Church of God in EA(K) through KIMA Mission Hospital Board of Management shall be placed on probation by the Port Florence Community Hospital as at the Commencement period of this agreement for a period of three months during which period the Port Florence Community Hospital shall be at Liberty to re-evaluate each individual staff and where necessary any staff found that does not meet the competency standards set by the Port Florence Community Hospital shall be dealt with in accordance with employment guidelines of the Port Florence Community Hospital."

68. The Grievants testified that the new management by Port Florence commenced on 1st April 2017, which is the date indicated in the MOU. Clause 5.6 above indicated that... The Church of God in EA(K) through KIMA Mission Hospital Board of Management will give letters of termination to staff that they would not want to continue with the Port Florence Community Hospital and deal with their terminal dues if any at that time." (Emphasis) The contemplated "that time" was at the time of handing over the list of employees when the Respondent was required to issue termination letters to the employees who did not want to work with Port Florence. At the commencement of the MOU, there is no evidence by the Respondent that the grievants herein refused to work with Port Florence. The effective word was working with... there was no mention that the employees were required to sign new contracts to signify they wanted to work with Port Florence.

69. Further, Clause 6.5 above "..... providedthat the staff retained from Church of God in EA(K) through KIMA Mission Hospital Board of Management shall be placed on probation by the Port Florence Community Hospital as at the Commencement period of this agreement for a period of three months during which period the Port Florence Community Hospital shall be at Liberty to re-evaluate each individual staff and where necessary any staff found that does not meet the competency standards set by the Port Florence Community Hospital shall be dealt with in accordance with employment guidelines of the Port Florence Community Hospital."

70. The Commencement was on 1st April 2017, and the MOU indicated that all staff from the Respondent would be on probation for the first three months from the commencement. The time when Port Florence sent letters of exclusion from Port Florence Operations, was 30th June 2021, about 4 years after the commencement of the MOU. At that time, the grievants had been working with Port Florence. The requirement for the execution of new contracts was allegedly in the middle of 2019 as indicated in the Claimant's letter of 8th September 2021 to the Respondent (Pg. 38) The need for the execution of new contracts was information that needed to be communicated to the grievants properly, bearing in mind that the grievants had existing salary arrears with the Respondent an issue they raised with the Respondent seeking clarification on the new appointment letters (pg. 38). There was no evidence that the Respondent informed the Grievants the consequences of signing new contracts and the fate of their agreements with the Respondent.

71. DW confirmed during hearing that, the MOU was not a Takeover but a partnership. This was also clear in reading the partnership agreement, which clearly showed that the MOU was a management

partnership but the facility and employees of the Respondent were to revert to the Respondent at the lapse of the 10-year partnership.

72. There was no evidence that the employees and other grievants were informed of the consequences of the partnership. Nor was there a mention of the requirement to sign new contracts. The grievants and other employees were not privy to the contents of the MOU. What they were aware of was that their employer had a new partner, who was to manage the hospital.

73. The Respondent in the witness statement of Charles Omutoko alleged that under the MOU transferring the management of the Respondent to Port Florence Community Hospital, the Respondent made verbal and written communications to its employees and staff through meetings held by the Board of Management on the same. The respondent did not produce evidence of the written statements issued to the employees evidencing that the employees were signing new contracts.

74. Port Florence as per the MOU was to place all employees of the Respondent on probation within the first three months of the commencement of the MOU, there was no evidence by the Respondent that the Respondent's employees were placed on probation, as that time lapse. In excluding the grievants from their operation in the hospital Port Florence allege that.....The reasons for this separation is contained in the MOU that Port Florence signed with the Church of God East Africa, which required those willing to continue with the new management to sign new employment contracts. Your choice not to continue with our management is respected and it is now confirmed that we are separated."

75. There was no clause in the MOU, even when the same was not privy to the employees, that required the signing of new contracts. The Respondent in issuing the termination of Service letters of 6th July 2021 also indicated that the grievants had refused to sign new employment contracts since 2017 when the Church of God handed over the Hospital to Port Florence Community Hospital.

76. The Respondent was obligated to ensure that the employees were told the consequence of their signing new contracts, and the fate of their existing contracts with the Respondent. There was no evidence produced by the Respondent that there was any sensitisation of the grievants on the consequences of their signing new contracts when they raised concerns.

77. The reason for the grievants' termination was failing to sign new contracts without being given an explanation, there was no evidence that the Respondent gave the grievants an explanation of why new contracts were to be signed and the fate of the existing contracts.

Section 45 (2) of the *Employment Act* provides that:-

> "(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."

78. The reason for termination did not relate to the grievants' capacity but on their conduct of failing to sign a new contract with a new entity, Port Florence Community Hospital. The Grievants were engaged by the Respondent who was their employer, in different capacities (Evans -CW1)App. 1(pg. 10-13, App 2. (pg. 14-16) was at first an AIDS prevention Assistant and later a Pharmaceutical

technician; Ruphers-(App. 6 (pg. 23-24) was an Accounting Clerk and Fred Liseno was a Cleaner and also used to tend to flowers, and trim hedges.

79. The Respondent alleged that the grievants refused to follow a lawful command by the employer which under Section 44(4)e of the *Employment Act*, is a ground for summary dismissal, and never signed new contracts. The Respondent referred to an MOU which had been signed by the Respondent's sponsor the Church of God and the Port Florence Community Hospital. The Employer did not provide evidence that the employees were informed of the need to have new contracts with Port Florence and its consequences on the grievants' contract with the Respondent, which contract still had existing liabilities as the grievants testified they had salary arrears with the Respondent.

80. The decision to have new contracts was a decision of Port Florence Community Hospital and not the Respondent, who was obliged to first terminate the Grievants' contracts or issue them with transfer letters to Port Florence Community Hospital for them to accept or decline such transfer. The Grievants were not given an opportunity to either accept or decline to be transferred, but rather the new management required that they sign new contracts and abandon their old contracts without an explanation.

81. In fact, the Witness statement of DW which he adopted as his evidence, states that, "Pursuant to the Terms of the Memorandum of Understanding the new management which took over the management of KIMA Mission Hospital with all its employees continued to run the operations of the hospitals until 2021 when the new management resolved to have new contracts with the employees whereas they were required to sign new contracts of employment with Port Florence Community Hospital which the three claimants declined"

82. The MOU did not indicate how the existing salary arrears owing from the Respondent were to be dealt with, or this information was not availed to the grievants. The Respondent was obligated to ensure that the grievants' contracts could not be changed without their consent and they were to be consulted before any changes.

83. The requirement of signing new contracts with a new entity was an action conducted without any evidence that the grievants were consulted before the MOU to require them to be subjected to a probation exercise or to even execute new contracts. The decision to require execution of new contracts was done unilaterally in disregard of section 10(5) of the *Employment Act*.

84. Section 10 (5) of the *Employment Act*, 2007 provides as follows:-

> " Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

85. Subsection 1 referred to above states:-"(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection(3) be given in installments and shall be given not later than two months after the beginning of the employment"

86. One of the particulars of contract contemplated under Subsection 3 is ...(d) either the place of work or, where the employee is required or permitted to work at various places, an indication of that place of work and of the address of the employer";

87. The requirement to sign the new contracts was in effect changing the identity of the employer; the address of the employer of the grievants, and the terms of employment, the grievants had with the Respondent.

88. The Respondent handed the grievants to a new entity that was to set aside the grievants' contracts with the Respondent and introduce new contracts without an explanation of why the contracts which were in place were being done away with.

89. There was no indication whether the Contracts with the Respondent were being terminated and the new contracts would supersede the Respondent's contract as the said new contracts were not availed in court by the Respondent for the court to verify if the same was provided. Needless to say, the process adopted by the Respondent in allowing the change of employment contracts of its employees by a third party and the issuance of new contracts without providing information to the employees on the fate of their initial contract was unilateral.

90. Furthermore, on reading the MOU which the employees were not privy to, the partnership was for a period of ten years, and employees were to revert to the Respondent after the 10-year Partnership. There was no provision for the issuance of new contracts.

91. The requirement of issuing new contracts by a different entity to the grievants without consultation with the individual employees and failure to provide them with the reasons for the change of contracts was unfair.

92. This is further amplified in the authority of Elizabeth Kwamboka Khaemba versus BOG Cardinal Otunga High School Mosocho & 2 Others [2014] eKLR where Wasilwa, J. observed as follows;

> " The key position is that the employer cannot alter employee's employment contract without consulting the employee. The working of the section is couched in mandatory terms, an indication that the employer cannot unilaterally revise the contract unless there is consultation. In the current case there was no consultation and the decision to change the duties and position of the claimant was made is shrouded, in malice as an extension of the "disciplinary" process instigated against the claimant.
>
> The end result of changing the Claimant's contract without consultation with her is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination;"

93. In the instant case, there was no evidence that the grievants were required to sign new contracts, and the insistence on them signing new contracts amounted to terminating their existing contracts with the Respondent unilaterally violating the mandatory requirement of consulting employees before changing their employment terms under Section 10(5) of the employments.

94. In the upshot, the reason for terminating the grievant's employment was unfair and unjustified.

Procedural fairness

95. Procedural fairness is mandatory even in the event that the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:- '41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

96. The Claimant stated that the termination of the grievants went against natural justice. The Claimant in the letter dated 8th September 2021(pg. 38) addressed to the Respondent and copied to Port Florence

Community Hospital, the Claimant informed the two that the process leading to the grievants' dismissal violated the *Employment Act* and advised the two to adhere to the proper procedure. No response was received and the claimant through the letters of 13th October 2021(App. 40-41) and of 27th October 2021(App.11-Pg. 42) sought for amicable settlement of the dispute from the respondent and Port Florence Community Hospital of the Claimant's mandate, only on 28th October 2021, Port Florence through its letter of even date (App.12-Pg.43-44) to state that the grievants were not its employees as they never entered into an agreement with them and that they had been excluded from the operations of Port Florence operations at KIMA Mission Hospital and their services had not been terminated by Port Florence. Port Florence stated that they had not violated any procedural fairness.

97. There was no response from the Respondent. The Respondent did not address the issue of procedural fairness.

98. The respondent was the employer of the grievants, as the Grievants had not entered into any other contracts, and their contract had not been terminated until when the Respondent issued the Termination of Service letters to two of the grievants. CW 1 was excluded from the operations of the hospital where he had been employed by the Respondent as his place of work.

Decision on procedural fairness

99. The court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR observed on procedural fairness:-'13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ..."(emphasis mine)

100. Section 41 of the *Employment Act* provides for the procedure for fair termination as follows:- '41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance, or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

101. It is not in dispute that there were no disciplinary proceedings before the termination of employment of CW1, CW2, and CW3. The Termination of Service letters of 6th July 2021 only stated that....."Following a joint meeting between the General Assembly of the Church of God (E.A)(K) and the management of Port Florence Community Hospital on 21st June 2021 and subsequent adoption of the resolutions thereof by the joint meeting of the Board of Management of Kima Mission Hospital and the Management of Port Florence Community Hospital held on 28th June 2021, I have been directed to inform you that your services at KIMA Mission Hospital have been terminated with effect from 6th July 2021."

102. The decision to terminate the grievants was reached after a joint meeting held by the Respondent's sponsor and the management of Port Florence Community Hospital, and the grievants were never called to appear before the Respondent or before the said joint meeting to defend themselves. There were no show-cause letters either issued to any of the grievants.

103. The Court upholds the court of Appeal decision in Pius Machafu Isindu case (supra) and holds that there was no procedural fairness in the termination process of the grievants (CW1, CW2, and CW3).

Whether the Respondent is bound by the Collective Bargaining Agreement between the Christian Health Association of Kenya (CHAK) and the Claimant.

104. DW testified that the CBA (App.15 pg.55-79) produced by the Claimant between the Claimant and the Christian Hospitals Association of Kenya (CHAK) was not executed on behalf of the Respondent and the only relationship between CHAK and the Respondent was for partnership.

105. The Claimant submitted that the CBA was signed by the General Secretary of CHAK (pg.63) on behalf of the Health Institutions run by churches and affiliated with CHAK. The Claimant submitted a membership directory of CHAK showing that the Respondent under the Church of God (EA)Kenya is a Member of the Association.

106. The Respondent argued that the Church of God (EA) Kenya did not appear among the institutions in the CBA appendix for it to be bound by the CBA, but the preamble of the CBA provides that any change in Appendix One of the CBA would be circulated among the members of the Church groups and the union and the CBA would apply to all unionasable employees employed by the said institutions.

107. The letters of appointment of CW1-Evans Chibanda (App1-pg.13), App-2-Pg. 15) all indicated that "it is drawn to the employees' attention. That the terms of agreement covering conditions and wages in positions that may permit union membership have been negotiated by the KUDHEIHA workers on behalf of its members." The Respondent did not provide a CBA that evidenced the negotiated terms with the Claimant union, and the only CBA availed was that produced by the Claimant.

108. The Respondent was the maker of the appointment letter to CW1 and as per the Contra proferentem rule therefore estopped from denouncing that it stated that the claimant had negotiated conditions of service and wages for unionisable positions. The Grievants were all union members of the Claimant and paid their union dues directly. DW testified that he could not confirm whether there was a CBA between the claimant and the Respondent, although he confirmed that they partnered with CHAK for service delivery.

109. The Conciliator's Certificate of Unresolved Issues of 24th March 2023(App 14 pg.47) observed that the CBA was binding on the Respondent.

110. The court finds that the contents of the letters of appointments of the grievants entitled them to benefit from the CBA.

Issue Whether the claimant is entitled to reliefs sought

111. The Claimant seeks various prayers for each grievant. The common prayers are:-

    a. Payment of terminal dues as indicated to the respondent by the Claimant in his letter to dated 24th July 2022 and supported by the Collective Bargaining Agreement.

    b. Four-month salary in lieu of notice.

    c. 15 months' salary reduction due to Covid 19

    d. Salaries arrears between September 2009 and December 2012

    e. Service gratuity for period worked.

f. Maximum compensation for loss of employment pursuant to the law.

g. The costs of this suit to be paid by the Respondent.

a. Terminal Dues as indicated to the respondent by the Claimant in his letter to dated 24th July 2022 and supported by the Collective Bargaining Agreement.

112. The terminal benefits computation of 24th July 2022 relating to the Grievants included their salary in lieu of notice, salary reduction for the covid period for 15 months, salary arrears and payment of service gratuity which were also claimed separately by the grievants in the statement of claim and which can be dealt with separately below.

b. Four Month Salary In lieu of Notice

113. The Claimant relied on the CBA to justify the claim as tabulated in letter to respondent dated 24th July 2022 and relied on to support payable terminable dues in the prayers. The court held the CBA was applicable. Thus award of notice pay is as follows:-

> CW1 had worked for 26 years. Under the CBA clause 16 he was entitled to 4 months notice pay. His last salary was Ksh,. 26500 hence notice pay is awarded for Kshs. 106,000/=
>
> CW2 had served for 5 years and his notice under the CBA clause 16 was 2 months. His last salary was Kshs.18500 hence notice pay awarded for Kshs. 37000
>
> CW3 was in service for 13 years . His last salary was Kshs. 10000. Under the CBA clause 16 he was entitled to 4 months notice pay. He is awarded notice pay of Kshs 40,000.

c) 15 months' salary reduction during Covid 19

114. All the grievants testified that they signed the consent to temporary reduction of salary (D-Exh- 3a, 3b & 3c) which was a 15% reduction of their salary from 1st April 2020 due to COVID. They testified that they did not expect a refund of the salary forfeited. This claim fails.

d) Salary arrears for September 2009 to December 2012

115. CW1 testified that he was given a tabulation of arrears due from September 2009 to December 2012. The Tabulation of Staff Salary Arrears (Pg. 51), was produced during Conciliation between the Parties and it set out the arrears of CW-1 -Evans Chibinda as Kshs. 244,080/- and CW-3- Fred Andanje as Kshs. 57,600/- CW1 testified that the amount paid to him by the respondent was for recent arrears and not the arrears of the period of 2009 and 2012.

116. CW-2-Ruphers Lumumba did not claim arrears in the period of September 2009 to December 2012 but claimed for 11 days' salary for days worked in June 2021. The Respondent submits that CW2 is only entitled to that amount unpaid, if at all. As he was paid Kshs. 52,140/ on termination. A look at the copy of the cheque produced by the respondent, there is a note as follows: -

> " Bal. of Kes.6,945/- to be paid by Port Florence by 16th July 2021 being error in Calculation.
>
> By
>
> Allan Ouma
>
> Hospital Administrator 9th July 202
>
> Ruphers Lumumba

9/7/2021"

117. Under the conciliator's report (App-14. Pg.46), the Respondent refused to pay the Salary arrears.

118. DW testified that indeed the grievants had arrears from September 2009 to December 2013 and they were not paid because they were no longer employees of the respondent.

119. The respondent submits that CW1 -Evans was paid a salary of Kshs. 184,504/ on termination and thus the difference of the claim of Kshs. 244,080 is payable of Kshs. 59,576/-

120. DW did not produce evidence that the grievants were paid the arrears for the period of September 2009 and December 2012. The tabulation by the Respondent when paying the Cheque of Kshs. 184,504/- indicates that the arrears paid were for 2021-2015 arrears.

121. There was no indication of what period the salary paid to CW3 was for by the Respondent. CW3 testified that the salary of Kshs. 27, 720/-was only for the previous period but his arrears were never paid.

122. The court then finds that at page 25 of the claimant's documents was personal statement of Ruphers Lumumba CW2 to effect that he was employed in 2016 hence could not have salary arrears for the period September 2009 to December 2012. DW admitted CW1 and CW3 were not paid.

123. I award the salary arears as tabulated by the Respondent in document filed by the Claimant at page 51 as follows:

CW1 Evans Chibinda Kshs. 244,080/-

CW3 Fred Indanje Kshs. 57,600/-

Service gratuity for the period worked

124. The claimant sought for the award of the service pay on the basis of the CBA.

125. The Respondents submitted that the grievants having been registered under the NSSF were not eligible to claim for service pay and relied on the provisions of section 35of the *Employment Act* to wit:- '(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."

126. The Respondent to buttress their position relied on the decision of Justice Nduma in Athman Imbwana Adenya v Kenya Bus Service Management (2016)e KLR where at Paragraph *21* it was held:-" the contract of employment of the claimant did not provide for payment of any gratuity as claimed at all. The claimant was also registered with NSSF and contribution were duly made by the employer and therefore the claimant is not entitled to payment of gratuity in terms of section 35(5) and 6(d) of the *Employment Act*."

127. In the instant case there was a CBA providing for payment of service gratuity or pension provident fund. The NSSF is not equivalent of a pension provident fund which is regulated by the *Retirement Benefits Act*. It is the opinion of the court that the grievants being beneficiaries of the CBA were entitled to gratuity as per the CBA clause 17(b) being at rate of 28 days for each year worked. The court

examined the tabulation at page 49 by the Claimant was satisfied it was correct and awards accordingly as follows:

> CW1. Service gratuity is Awarded for 26 years of service 28/30 x 26500 being Kshs. 24733 x26 years total award kshs. 643, 058/-
>
> CW2. Service gratuity is warded for 5 years of service 28/30 x 18500 being Kshs. 17267 x5 years total award Kshs. 86,335/
>
> CW3 Service gratuity is awarded for 13 years of service 28/30 x 10000 being Kshs. 9,333 x13years total award Kshs. 121,329/-

Maximum compensation for loss of employment pursuant to the law.

128. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. (See Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR) where the court held: " In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others."

129. The court on finding unfair and unlawful termination of employment is obliged to award compensation under section 49 of the *Employment Act*. There are several remedies among them the notice pay already awarded. There is also compensation capped at 12 months of gross salary of the complainant .

130. CW1 testified that he was earning a salary of Kshs. 26,500/-, CW2 testified that he was earning Kshs. 18,500/=; and CW3 testified that he was earning a Monthly Salary of Kshs. 10,000 respectively before their dismissal. The Respondent only denied the assertions by the grievants but never produced evidence to the contrary that the grievants were not paid the said sums.

131. Section 74 of the *Employment Act* confers responsibility on the employer to keep employee records. Failure by the respondent to keep and produce the pay records of the grievants worked to its disadvantage.

132. The court has awarded the grievants notice pay and service pay as terminal benefits. The court taking into consideration the foregoing and the circumstances under which the employees contracts were terminated , periods of service and expectation of continued service opines that they deserve compensation but not for equal periods.

133. CW1 served for 26 years and hence was unlikely to get a suitable employment as the last and is awarded 10 months this 26500x10 compensation thus Kshs. 265000/-

134. CW2- had served for 5 years and hence likely to return to a similar job. He did not tell the court he was unable to secure a job. He is awarded 6 months salary compensation for the unfair and unlawful termination thus Kshs. 18,500 x 6 compensation thus Kshs. 111,000/-

135. CW3- had served for 13 years. He may or may not be able to secure a similar job. He did not tell the court he was unable to secure a job. He is awarded 8 months salary compensation for the unfair and unlawful termination thus Kshs. 10,000 x 8 award of Kshs. 80,000/-

Conclusion and Disposition

136. The claim dated 11th May 2023 is allowed as follows:-

Award to CW1 -Evans Chibinda

a. Notice pay CW1 had worked for 26 years. Under the CBA clause 16 he was entitled to 4 months notice pay. His last salary was Ksh,. 26500 hence notice pay is awarded for Kshs. 106,000/=

b. Salary arrears for the period September 2009 to December 2012 award of Kshs. 244,080/-

c. Service gratuity is Awarded for 26 years of service 28/30 x 26500 being Kshs. 24733 x26 years total award kshs. 643, 058/-

d. Compensation for unfair termination awarded 10 months (26, 500x10) thus award of Kshs. 265,000/-

Total award to CW3 Kshs. 1,258,138/-

Award to CW2- Ruphers Lumumba

a. Notice pay -CW2 had served for 5 years and his notice under the CBA clause 16 was 2 months. His last salary was Kshs.18500 hence notice pay awarded for Kshs. 37,000/-

b. Service gratuity is awarded for 5 years of service 28/30 x 18500 being Kshs. 17267 x5 years total award Kshs. 86,335/

c. Compensation for unfair termination awarded for equivalent of 6 months gross salary (Kshs. 18,500 x 6) thus Kshs. 111,000/-

Total award to CW2 Kshs. 234,335/-

Award to CW3 -Fred Indanje

a. Notice pay -CW3 was in service for 13 years . His last salary was Kshs. 10000. Under the CBA clause 16 he was entitled to 4 months notice pay. He is awarded notice pay of Kshs 40,000.

b. Salary arrears for the period September 2009 to December 2012 award of Kshs. 57,600/-

c. Service gratuity is awarded for 13 years of service 28/30 x 10000 being Kshs. 9,333 x13years total award Kshs. 121,329

d. Compensation for unfair termination awarded for 8 months (Kshs. 10,000 x 8) total award of Kshs. 80,000/-

Total award to CW3 -Kshs. 218,929/-

Costs

137. The court is empowered under the Procedural rules to award costs and determine the same in suitable cases. The claimant succeeded in its claim hence entitled to costs pursuant to the principle of costs follow the event. Bearing in mind the relationship between the parties under the CBA I award Kshs. 50,000/- as reasonable costs to cater for transport and disbursements incurred by the claimant and payable by the respondent.

138. The awarded amounts are payable in 90 days failing which the awarded amounts will attract interest at court rates from date of judgment until payment in full.

139. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF JUNE 2024

J.W. KELI

JUDGE

In the presence of

C/A Macheso

For Claimant: Kamuye and the grievants

For Respondent: Ms. Omondi