



Sirere & 6 others v Nesco Services Ltd (Employment and Labour Relations Cause 75 of 2016) [2024] KEELRC 2323 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 75 OF 2016**

**K OCHARO, J
SEPTEMBER 24, 2024**

BETWEEN

**GEORGE ODUOR SIRERE 1ST CLAIMANT
JACKONIA OMONDI OGEKO 2ND CLAIMANT
CHRISTINE NYAMORAMAMBO MAANGI 3RD CLAIMANT
GLADYS LUKENDO AMBUCHI 4TH CLAIMANT
JAMES SANGANI MONAYO 5TH CLAIMANT
PAMELA NANGUNI NAIBENI 6TH CLAIMANT
WINFRED MWIVA 7TH CLAIMANT**

AND

NESCO SERVICES LTD RESPONDENT

JUDGMENT

Introduction

1. The claim before me is for unfair summary dismissal. Contending that at all material times, they were employees of the Respondent whose employment contracts the latter terminated unfairly and unlawfully, the Claimants sued it seeking various reliefs; a declaration to the effect that the termination was unlawful and unfair; payment of terminal dues; compensatory damages; issuance of a certificate of service; costs and interest.
2. The Respondent resisted the claim through its memorandum of response herein filed. In it, it denied that the Claimants' employment was unfairly terminated, asserting that their employment contracts were terminated fairly with a valid and fair reason, and in conformity with fair procedure. Further, their entitlement to the reliefs sought was denied.



3. At the hearing, the 1st Claimant testified on his behalf and that of the other Claimants. The Respondent presented one witness to testify for and on its behalf. After hearing the parties on their respective cases, this Court directed that they file written submissions, the submissions are on record.

Claimant's case

4. It was the Claimant's case that they came into the employment of the Respondent on various dates. They served the Respondent diligently throughout their tenure of service, until 2nd February 2014 when the Respondent terminated their employment under similar circumstances. They contend that the termination was unfair and unlawful, as they were not given any reason for the same, and the Respondent did not conform with the statutory provisions on procedural fairness such as issuing them with notices to show cause.
5. The 1st Claimant testified that according to their letters of appointment, they were supposed to work for eight hours. However, contrary to the term, they could work from 5.00 am to 5.00 pm. Through a letter dated 13th October 2005, they reminded the Respondent that they were being made to work overtime, and not compensated for the same. The Respondent didn't act on the letter. Resultantly they were forced to write another one dated 10th November 2011 as a reminder.
6. Throughout their tenure of service, they were not paid a house allowance. Their letters of appointment didn't indicate that the salary that they were earning was consolidated.
7. Their employment contracts were terminated through letters dated 30th January 2014. The Respondent indicated therein that the termination was for the reason that there was no more work for them, at their station of work. The Respondent had other stations to which he ought to have redeployed them.
8. The Respondents also failed to pay their terminal benefits after the termination, including leave pay for their untaken leave days. As such, they claim: -



No.	Name	Claim	Total Amount Claimed
1.	George Oduor Sirere	a) One month's salary in lieu of notice - Kshs. 10,925/- b) Untaken leave days @ 26 days per year for 14 years – Kshs.152,950/- c) House Allowance @ 15% being 15/100 x 10,925 x 12 x 14 – Kshs. 275,310/- d) 12 months' gross salary compensation for unfair termination – Kshs. 131,000/- e) Overtime: - Saturdays (10,925/26 x 4 hours x 30 x14 years) – Kshs. 1,058,884.62 f) Gratuity @ 15 days per year served being 15/26 x 10,925 x 14 – Kshs. 88,240.38	Kshs. 1,517,398.46
2.	Jackonia Omondi Ogego	a) One month's salary in lieu of notice - Kshs. 9,873/- b) Untaken leave days @ 26 days per year for 14 years – Kshs.138,222/- c) House Allowance @ 15% being 15/100 x 9,873 x 12 x 14 – Kshs. 248,799.60 d) 12 months' gross salary compensation for unfair termination – Kshs. 118,476/- e) Overtime:- Saturdays (9,873/26 x 4 hours x 30 x14 years) – Kshs. 637,947.70 f) Gratuity @ 15 days per year served being 15/26 x 9,873 x 14	Kshs. 1,384,255.76



		<p>– Kshs. 79,743.46 g) Underpayment 2014 (10,954-9873=1,081x12) – Kshs. 12,972/-</p>	
3.	Christine Nyamorambo Maangi	<p>a) One month's salary in lieu of notice - Kshs. 8,723.90 b) Untaken leave days @ 26 days per year for 14years – Kshs.122,134.60 c) House Allowance @ 15% being 15/100 x 8,723.90 x 12 x 14 – Kshs. 219,842.28 d) 12 months' gross salary compensation for unfair termination – Kshs. 104,686.80 e) Overtime:- Saturdays (8,723/26 x 4 hours x 30 x14 years) – Kshs. 563,640/- f) Gratuity @ 15 days per year served being 15/26 x 8,723.90 x 14 – Kshs. 70,455/- g) Underpayment 2014 (10,954-8723.90=2230.10x12) – Kshs. 26,761.20</p>	Kshs. 1,238,378.38
4.	Gladys Lukendo Ambuchi	<p>a) One month's salary in lieu of notice - Kshs. 9,873/- b) Untaken leave days @ 26 days per year for 14 years – Kshs.138,222/- c) House Allowance @ 15% being 15/100 x 9,873 x 12 x 14 – Kshs. 248,799.60 d) 12 months' gross salary compensation for unfair termination – Kshs. 118,476/- e) Overtime:- Saturdays (9,873/26 x 4 hours x 30 x14 years) – Kshs. 637,947.70 f)</p>	Kshs. 1,259,855.76



			<p>Gratuity @ 15 days per year served being $15/26 \times 9,873 \times 14$ – Kshs. 79,743.46 g) Underpayment 2014 $(10,954-9873=1,081 \times 12)$ – Kshs. 12,972/-</p>	
5.	James Monayo	Sangani	<p>a) One month's salary in lieu of notice - Kshs. 10,143/- b) Untaken leave days @ 26 days per year for 14 years – Kshs.142,002/- c) House Allowance @ 15% being $15/100 \times 10,143 \times 12 \times 14$ – Kshs. 255,603.60 d) 12 months' gross salary compensation for unfair termination – Kshs. 121,716/- e) Overtime:- Saturdays $(10,143/26 \times 4 \text{ hours} \times 30 \times 14 \text{ years})$ – Kshs. 655,393.85 f) Gratuity @ 15 days per year served being $15/26 \times 10,143 \times 14$ – Kshs. 65,539.38 g) Underpayment 2014 $(10,954-10,143=811 \times 12)$ – Kshs. 9,732/-</p>	Kshs. 1,402,131.83
6.	Pamela Naibeni	Nanguni	<p>a) One month's salary in lieu of notice - Kshs. 8,723 b) Untaken leave days @ 26 days per year for 14 years – Kshs.122,122/- c) House Allowance @ 15% being $15/100 \times 8,723 \times 12 \times 14$ – Kshs. 219,819.60 d) 12 months' gross salary compensation for unfair termination – Kshs. 104,676/- e) Overtime:- Saturdays</p>	Kshs. 1,260,025.60



		(8,723/26 x 4 hours x 30 x14 years) – Kshs. 563,640/- f) Gratuity @ 15 days per year served being 15/26 x 8,723.90 x 14 – Kshs. 70,455/- g) Underpayment 2010 (6,723-6200=543x12) – Kshs. 6,516/- 2012 (8,579-7,586=993x12) – Kshs. 11,916/- 2013 (8,995-8723=272x12) – Kshs. 3,264/- 2014 (10,954-8723=223x12) – Kshs. 26,772/-	
7.	Winfred Mwiva	a) One month's salary in lieu of notice - Kshs. 14,500/- b) Untaken leave days @ 26 days per year for 14 years – Kshs.203,000/- c) House Allowance @ 15% being 15/100 x 14,500 x 12 x 14 – Kshs. 365,400/- d) 12 months' gross salary compensation for unfair termination – Kshs. 174,000/- e) Overtime:- Saturdays (14,500/26 x 4 hours x 30 x14 years) – Kshs. 936,923.08 f) Gratuity @ 15 days per year served being 15/26 x 14,500 x 14 – Kshs. 117,15.40	Kshs. 2,013,938.48

9. Cross-examined by Counsel for the Respondents, the 1st Claimant testified that in his verifying affidavit that was contemporaneously filed with the statement of claim, he deposed that he had the authority to speak on behalf of the other Claimants. The affidavit was sworn on the 18th of January 2018. However, the authority to act on behalf of the others was embodied in the document dated 16th April 2016.
10. Though his letter of appointment specified his station as the World Bank office, sometimes he could be sent to other stations like Kencom house and NSSF building.



11. The Respondent only paid them a basic salary, therefore exclusive of house allowance and salary. Further, the Respondent wasn't adjusting their salaries to reflect the minimum wages relevant to the periods when they were in the service of the Respondent. However, referred to various letters were written to them [the Claimants] on various dates regarding salary increments, the 1st Claimant admitted that the letters expressed that the salary reviews were a result of Government directives.
12. On the termination letters, the 1st Claimant testified that they did set forth dates when the termination was to take effect. The termination was not to take effect immediately. The Respondent gave the reason for the termination as the termination of the contract between it and the World Bank.
13. The Respondent used to remit NSSF dues to the Authority.
14. In his evidence under re-examination, the 1st Claimant testified that the World Bank workstation was not a permanent workplace for them. They sometimes could be transferred to work elsewhere.

The Respondent's Case

15. Mr. Harun Osoro, the Respondent's director, testified on its behalf. He adopted his witness statement dated 8th April 2019, as his evidence in chief.
16. It was the Respondent's case that it engaged the Claimants as cleaners on diverse dates between December 1999 to January 2014. Their contractual salaries were in accordance with the relevant Wage Orders at all material times. Further, they were entitled to annual leave and were often allowed to proceed with the same whenever they applied for the same.
17. It was further stated that the Claimants' salaries were reviewed upwards from time to time.
18. According to their employment contracts, the Claimants were engaged to render cleaning services at the Respondent's client's (The World Bank – Kenya) premises. For a long time, the Respondent was able to secure contracts with the stated client, until July 2013, when its bid to have a fresh contract didn't succeed. As such, a situation was created where there was no longer work for the Claimants. Their contracts had to be terminated. The Claimants were aware that the Respondent's bid for the renewal of the contract with the client was unsuccessful.
19. They were duly paid dues according to their respective agreements. The claim for terminal is therefore unfounded.
20. Throughout the Claimant's tenure of service, the Respondent remitted their NSSF contributions to the relevant Authority dutifully.
21. The Respondent asserted that the Claimants and some of its former employees were retained by the owner of the same premises for which it had been contracted to offer cleaning services. As a result, the Claimants didn't suffer any loss and or damages at all.
22. It was further asserted that in terminating the Claimants' employment, the Respondent duly adhered to the statutory procedure by serving them termination notices and paid their terminal dues.
23. The Respondent contends that the Claimants are not entitled to house allowance as their salaries included the allowance. On overtime, the Respondent states that it never engaged the Claimants beyond the authorized hours.
24. The Respondent asserts that the Claimants' claim herein is defective as it was initiated without authority yet it is a representative suit.



Analysis and Determination

25. I have reviewed the Claimant's pleadings, oral and documentary evidence, and written submissions, and return that the issues for determination are as follows: -
- a. Whether the Claimants' employment contracts were unfairly terminated.
 - b. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants' employment contracts were unfairly terminated.

26. Before I delve into the crux of the dispute before me, it becomes imperative to determine this preliminary issue, the contention by the Respondent that the suit herein is fatally defective, as the 1st Claimant had no authority to plead on behalf of the other Claimants. The Respondent characterized the suit as a representative suit. The suit herein is not representative. It is one where we have co-claimants. The fact that the 1st Claimant swore a verifying affidavit that was contemporaneously filed with the statement of claim, did not make it a representative suit.
27. Further, all that the 1st Claimant deposed to in the verifying affidavit was that he had the authority to swear the affidavit in verification of the correctness of the contents of the statement of claim. In my view, no law required him to have written authority to swear the affidavit on his behalf and that of the other claimants for the purpose forestated. Too, there is no requirement in law that a statement of claim be accompanied by verifying affidavits sworn by all the Claimants in a matter.
28. As such, I with great respect find that the Respondent's contention stands on quicksand. Further, the Claimant's submissions against the contention are non-meritorious. They are anchored on provisions of the Civil Procedure Rules that are not relevant to the instant matter. Consequently, I hereby reject the Respondent's position that the claim should be struck out.
29. The law on unfair termination is well settled in Kenya. Unfair termination is defined under Section 45 of the [Employment Act](#) 2007 as follows:
- “(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 fair—
 - (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.”

30. The above-stated provision reinforces the fact that there cannot be a fair termination of employment without cause. A fair termination can only be on account of the matters set out under Section 45 [2] [b] [i] and [ii] of the Act, or where there is a mutual separation by the employer and employee.
31. I have carefully considered the Respondent's explanation regarding how the separation occurred, and I hear them stating that the termination of the employment contracts of the Claimants was a result of its



operational requirements. The Employment Act does not define “operational requirements” however, meaning can be gathered from judicial decisions and legal literature. Darly Dil Toit in his book *Labour Relations, a Comprehensive Guide*, commenting on section 213 of the Labour Relations Act of South Africa, on page 473, states;

“Section 213 defines the term “operational requirements” to mean requirements based on economic, technological, structural or similar needs of an employer. The Code of Good Practice [item 1] elaborates as follows;

“In general, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships by making existing jobs redundant or requiring employees to adapt to the new technology or consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.”

32. The Respondent’s position was that the termination of the Claimants’ employment was due to an economic reason, losing the contract with its client. As a result, the Claimant’s work became superfluous. A redundancy situation occurred.

33. Whether termination of an employee’s employment is stated to be under any of or all the grounds set out in Section 45[2][b][i], or the ground set out under sub-section [b][ii], a declaration that the same was fair can only be if the presence of procedural and substantive fairness is demonstrated of the termination. On this, the Court in the case of *Walter Ogal Anuro –v- Teachers Service Commission* (2013) eKLR the Court aptly held:

“... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

34. Section 41 of the Employment Act provides for a mandatory procedure to be followed by any employer contemplating terminating an employee’s employment on any of those grounds set out in Section [45][2][b][i]. However, it must be stated that the procedure contemplated in this provision doesn’t apply to situations where the employer intends to terminate an employee’s employment on account of their operational requirements. Section 40 of the Employment Act, provides the procedure that must be adhered to if an employee’s employment has to be procedurally terminated on the ground of redundancy.

35. The procedure is elaborate and strict, providing safeguards for employees. In my view, the procedure is so designed as termination of an employee’s employment on account of redundancy falls under the category of a no-fault termination.

36. The Court in *Hasbon Ngaruya Waigi vs. Equatorial Commercial Bank* [2013], referring to the Conditions outlined under Section 40 held;

“These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers’ livelihoods and where it must be done an employer must put into consideration the provisions of the law.”



37. There is now firm jurisprudence that an employer who intends to terminate an employee's employment on the ground must issue redundancy notices pursuant to section 40[1][b] [where an employee is not a member of a trade union].
38. No doubt, the notices envisaged in the stated provision were not issued. Where an employer fails, neglects and or ignores to strictly comply with the laid down conditions in the section in declaring an employee redundant, such termination becomes unfair within the meaning of Section 45 of the *Employment Act*.
39. On matters of redundancy, consultations must be undertaken between the employer and the employee to discuss a way out of the intended redundancy and, if possible explore alternatives to the termination or best way to implement it. Maraga JA [as he then was] in *Kenya Airways Limited vs Aviation*;

“The purpose of the notice under section 40 [1] [a] and [b] of the *Employment Act*, is also provided for in the ILO Convention No. 158 – Termination of Employment Convention, 1982 is to give the parties an opportunity to consider measures to be taken to avert or to minimize the termination and measures to mitigate, the adverse effects of any termination of workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is possible. This means that if the parties put their heads together, chances are that they could a very or at least minimize the terminations relating from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees.”

Not difficult to conclude that in this matter there were no consultations at all.

40. In conclusion, the termination of the Claimants' contracts of employment was procedurally unfair.
41. I now turn to consider the aspect of substantive justification. Section 43 of the *Employment Act*, 2007, places a duty upon the employer, to whenever there is a dispute regarding termination of an employee's employment, prove the reason[s] for the termination. The termination shall be deemed unfair in terms of section 45 if the employer fails to discharge the burden under section 43. The Act places a further burden on the employer under section 45 [2] to prove that the reason[s] for the termination was fair and valid. Therefore, it cannot be sufficient for the employer to just state that it terminated an employee's employment for this or that reason, without going further to discharge the burden under section 45 [2].
42. The two provisions of the law above are among those pillar provisions that the statutory regime that came into place in 2007, in the realm of Employment and Labour Relations came in with to stymie the common law principles that to a larger extent didn't accord employees adequate protection in the workplace. Principles that were not cognizant of the huge bargaining power imbalance between the employer and the employee.
43. It has not lost sight of this Court that in terminating an employee's employment an employer is obliged to act with justification. Section 47 [5] of the Act dictates so.
44. In *Isidor Rachuonyo vs. Brava Food Industries Limited, Nairobi ELRC No. 907 of 2017*, this Court expressed itself thus:

“To this Court, the provisions of the *Employment Act*, 2007, on unfair dismissal dispelled the ability of employers at common law to dismiss employees without cause. At common law,



an employee would be dismissed without reasons if he or she was given reasonable notice or pay in lieu of notice.

52. One can confidently assert that the unfair dismissal outfit consists of expansive protection to employees.”

45. The Supreme Court of Canada, and I echo, aptly stated in *Wilson vs. Atomic Energy of Canada Limited* 2016 SCC 29,

“..... The foundational premise of the common law scheme – that there is a right to dismiss on reasonable notice without cause of reason – has been completely replaced under the code by a regime requiring reasons for dismissal. In addition, the galaxy for discretionary remedies, including most notably, reinstatement, as well as the open-ended equitable reliefs available, is utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the code without, there is virtually no role for the plurality of remedies available to the adjudicator under the unjust dismissal scheme.”

46. The tone of the Respondent’s pleadings, evidence and submissions, is that the termination was fair, as the contractual notice was issued. This position runs in conflict with the new scheme under the 2007 regime mentioned hereinabove.

47. The foregoing premise notwithstanding, having held that the termination of the Claimants’ employment was on the alleged ground of operation requirement on the part of the Respondent, economic in nature, I now turn to interrogate whether this reason was fair and valid, justified and equitable.

48. How a Court determines the fairness of an operational reason is a question that this Court must answer before delving into interrogating whether the reason by the Respondent herein was fair. The answer to this was aptly captured by the Labour Appeal Court of South Africa in *BMD Knitting Mills [Pty] Limited vs. SACTWU* [2001] 73 LLR 705 [LAC] and I am impelled to adopt it, thus:

“The word “fair” introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But rather than take such justification at face value, a Court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employee to be retrenched. To this extent the Court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirement is predicated. Viewed accordingly, the test becomes less differential and the Court is entitled to examine the context of the reasons given by the employer, albeit that the inquiry is not directed to whether the reason offered is the one which would have been chosen by the Court. Fairness not correctness is the mandated test.”

49. This approach is broader, and in my view one that ensures a balanced dispensation of justice a far contrast from the “reasonable employer test” that equates rational conduct by the employer with fairness, which in essence takes not into consideration the employee’s perspective.

50. I have carefully considered the material placed before this Court by the Respondent and note that despite alleging that there was a contract between it and its client that lapsed and was not extended, hence rendering the Claimants without work, the contract was not tendered in evidence. Further, the



Respondent didn't present any evidence to show that there was bidding for the contract for service [cleaning services] which bid was rejected.

51. I note that the Respondent has in its submissions relied on the holding in the case of *Bandi vs- Mason Services Limited [cause No. 166 of 2018]* [2023] KEELRC 1054 [KLR] [28th April 2023]. In my view, this matter is distinguishable from the instant matter. In the instant matter, the Claimants' contracts' life was not expressed as a term of contract, to be dependent on the life of the contract between the Respondent and its alleged client.
52. In the premises, I am not persuaded that there was a valid and fair reason for the termination of the Claimants' employment.

c. Whether the Court should grant the prayers sought by the Claimant.

53. The Claimants contended that they worked overtime without compensation thereof. The Court notes that the Claimant in his evidence under cross-examination gave this court an impression that the issue of working overtime without compensation was last raised by them in 2005. Further, the issue was settled.
54. Assuming I am wrong on the foregoing conclusion, I must state that for the Claimants to succeed in their claim under this head, they needed to approach the same with specificity and clarity. In the case of *James Orwaru Nyaundi vs Kilgoris Klassic Sacco Limited* [2022] eKLR I held as follows: -

“78. The Claim for overtime and public holidays worked compensation has just been thrown to Court. This Court has incessantly urged that this practice must come to a stop. It is not enough for a Claimant to just give figures to court, asserting that he or she is entitled to them, cross her or his fingers hoping that the Respondent does not place before Court documents, and as a consequence of the failure say “behold the claim is proved, the employer has not tendered in evidence any documents.” The Claimant must if she or he has to succeed in the Claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn't paid for.

79. Parties often place reliance on Section 74 of Act, and wrong reliance I must say, to assert that whenever an employer does not produce documents in Court where overtime, public holiday worked, untaken unpaid for leave days are alleged, there is an automatic pass to a judgment in favour of the employee. My reading of the provision does not suggest that such an implication is one that follows it. The provision only provides for the record that must be kept by an employer, nothing to do with production of the records in Court.

80. If one wanted to rely on the record[s] which is in the possession and control of the employer to prove and or fortify certain aspects of his or her case, there is a legal avenue available for attainment of that, issuance of as notice to produce under the *Evidence Act*, Cap 80, laws of Kenya. It will be only after the notice has been properly issued, and the employer fails to produce the record, that the default consequence will set in.

81. The Claimant did not tender any specific in the nature mentioned herein above, the Claim for overtime, and public holidays worked compensation are declined.”



55. The Claimants did not specify, in their Memorandum of Claim dated 18th January 2016, the particular Saturdays that each worked overtime, or the specific hours that constituted overtime. I have carefully considered the Claimants' computation of what they hold is due to each of them as compensation for overtime worked. Even though they were not employed in the same year and date, puzzlingly, they base their calculations on their alleged entitled compensation of 14 years of service. This disentitles the claim of the character of being genuine and portrays the Claimants as parties who attempted to pray a lottery with the court process. As a result, I decline the Claimants' claim under this head.
56. The Claimants claimed salary underpayments. I have carefully considered the material placed before me starting with their pleadings, and then the evidence by the 1st Claimant, and find that though reasonably they were expected to place forth unambiguously, the relevant and specific Regulation of Wages Orders that applied to their case, at various material times, they didn't. It is not the Court's duty to fill gaps left by a litigant in their pleadings and evidence. The claim for underpayment was not proved. It has to fail.
57. This Court has not lost sight of the contents of the various letters that at different times informed the Claimants of salary reviews, and more specifically that they spoke to their house allowance. For instance, the letter dated 23rd May 2013, addressed to the 1st Claimant indicated that his salary had been increased to Kshs. 10,925/- including house allowance. The same position was reflected in those that were issued to the other Claimants. This prompts me to be persuaded by the Respondent's position and conclude that the Claimants' salaries, were at all material times consolidated. Consequently, their claim for house allowance fails.
58. On unpaid leave allowance, I note that the Claimants had a leave entitlement of 21 days as per their respective employment contracts. Their entitlement to 21 days of annual leave was consistent with Section 28 of the Act. The Claimants asserted that they were never permitted to take annual leave throughout their period of employment. This evidence was not controverted by the Respondent who is the keeper of employment records under Section 74 of the Act. As a result, I hereby allow the claim for compensation for earned but untaken leave days.
59. The claim for gratuity lacks merit. The benefit shouldn't be confused with service pay. Gratuity is a contractual benefit. It can only flow from an employment contract. Undeniably, the Claimants do not seem to assert that their employment contracts provided for this benefit in their favour. They didn't tender any evidence to establish this. Their Claim under this head fails as a result.
60. The Court of Appeal in the case of *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR held that:
- “Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer.”
61. In *Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 others* [2021] eKLR, the Court held that: -
- “28. In the view of this Court, gratuity becomes due provided any applicable conditions are present. In other words, where a contract provides for gratuity, it is payable as a general rule.”
62. I have carefully considered the termination letters that were issued to the Claimant, and it is clear that each of them was given one month's notice. Therefore, I hold that there was compliance with Section 35 (1) of the Act. The Claim for one month's salary in lieu of notice, therefore fails.



63. Section 49 (1) (c) of the *Employment Act* 2007, bestows upon the Court the power to grant a compensatory relief for an employee who successfully challenges his or her employer's decision to terminate his or her employment. The power is discretionarily exercised depending on the circumstances of each case. I have carefully considered the length of the time each of the Claimants spent in the employment; how their employment was terminated without adherence to the requirements of the law; and that they didn't contribute to the termination and hold that they are entitled to the compensatory award contemplated in the above-stated provision and to the extents brought out in the schedule hereunder.
64. In the upshot, Judgment is hereby entered for the Claimants against the Respondent as follows: -
- a)



No	Name	Award
1.	George Oduor Sirere	a) Considering he was employed on 1 st January 2000, Compensation for unfair termination equivalent to 10 months gross salary (Kshs. 10,925/- x 10) - Kshs.109,250/- b) Compensation for earned unutilized leave days for 3 years (Kshs. 10,925/30 x 21 x 3) – Kshs. 22,942.50 Total – Kshs. 132,192.50
2.	Jackonia Omondi Ogego	a) Considering he was employed on 1 st January 2000, Compensation for unfair termination equivalent to 10 months gross salary (Kshs. 9,873.90 x 10) - Kshs.98,739 b) Compensation for earned unutilized leave days for 3 years (Kshs. 9,873.90/30 x 21 x 3) – Kshs. 20,735.19 Total – Kshs. 119,474
3.	Christine Nyamorambo Maangi	a) Considering she was employed on 1 st July 2009, Compensation for unfair termination equivalent to 6 months gross salary (Kshs. 8,723.90 x 6) - Kshs.52,343.40 b) Compensation for earned unutilized leave days for 3 years (Kshs. 8,723.90/30 x 21 x 3) – Kshs. 18,320.19 Total – Kshs. 70,663.59
4.	Gladys Lukendo Ambuchi	a) Considering she was employed on 1 st January 2000, Compensation for unfair termination equivalent to 10 months gross salary (Kshs. 9,873.90



		x 12) - Kshs.98,379 b) Compensation for earned unutilized leave days for 3 years (Kshs. 9,873.90/30 x 21 x 3) – Kshs. 20,735.19 Total – Kshs. 119,474
5.	James Sangani Monayo	a) Considering he was employed on 7 th January 1997, Compensation for unfair termination equivalent to 12 months gross salary (Kshs. 10,143/- x 12) - Kshs.121,716/- b) Compensation for earned unutilized leave days for 3 years (Kshs. 10,143/30 x 21 x 3) – Kshs. 21,300.30 Total – Kshs. 143,016.30
6.	Pamela Nanguni Naibeni	a) Considering she was employed on 5 th August 2011, Compensation for unfair termination equivalent to 3 months gross salary (Kshs. 8,723.90/- x 12) - Kshs.26,171.70 b) Compensation for earned unutilized leave days for 3 years (Kshs. 8,723.90/30 x 21 x 3) – Kshs. 18,320.19 Total – Kshs. 44,491.89
7.	Winfred Mwiva	a) Considering she was employed on 1 st January 2000, Compensation for unfair termination equivalent to 10 months gross salary (Kshs. 14,950/- x 10 - Kshs.149,500/- b) Compensation for earned unutilized leave days for 3 years (Kshs. 14,950/30 x 21 x 3) – Kshs. 31,395/-. Total – Kshs. 180,895/-



- b. Interest on the sum awarded in (a) above at court rates from the date of Judgment until payment in full.
- c. Costs of the suit. [Instruction fee to be computed on the basis of the total amount awarded to the Claimants.]

65. It is so ordered.

READ, DELIVERED AND SIGNED THIS 24TH DAY OF SEPTEMBER, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Wangila for Claimant

Mr. Manyara for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

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OCHARO KEBIRA

JUDGE

