Mikis & 55 others v Frodak Services (Frodak Kenya Limited & another (Employment and Labour Relations Cause 10 of 2023) [2024] KEELRC 2765 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2765 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS CAUSE 10 OF 2023

JW KELI, J

NOVEMBER 7, 2024

BETWEEN

MULAMBULA IMBOGO MIKIS & 55 OTHERS & 55 OTHERS & 55 OTHERS ..... CLAIMANT

AND

FRODAK SERVICES (FRODAK KENYA LIMITED ..... 1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. This suit was instituted by the Claimants vide a Statement of Claim filed on 4th March 2020 seeking the following orders:-

    i. A declaration that the Claimants' services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimants are entitled to compensation of their terminal dues.

    ii. Award as set out herein in paragraph 11 for each Claimant.

    iii. Certificate of Service.

    iv. Costs of this suit and interests at Court rates.

    v. Any other further and better relief the Honourable Court may deem just and fit to grant.

2. Paragraph 11 of the Claim sought the following reliefs for each of the Claimants: -

    a. Sum of Kshs. 85,463.40 being prorated leave due for 72 months at 26 days per year.

    b. Sum of Kshs. 57,960 being sum of Kshs. 9,660 payment for work done during 10 public holidays for 72 months.

c. Sum of Kshs. 98,758.00 being claim for overtime accrued for 20 hours per week at one and half times the normal hourly rate.

d. Sum of Kshs 133,768 as unpaid housing allowance at 15% of the statutory minimum wage of Kshs. 12,386 for 72 months.

e. Sum of Kshs. 85463 being severance pay at rate of 15 days for every completed year of service.

f. Sum of Kshs. 800,000 being coalesced exemplary and aggravated damages for unfair and /or wrongful dismissal under section 49(c).

g. Sum of Kshs. 731,808 being underpayment for period. Lawful wage of Kshs. 12386 paid 4080 for 72 months.

h. Sum of Kshs. 14,244 being one-month notice.

i. Sum of Kshs. 39,503 being Rest days at double rate.

j. Sum of Kshs. 7122 being Paternity leave with respect to two children.

k. Sum of Kshs. 170,928 being compensation at 12 months' gross salary.

l. Sum of Kshs. 800 being leave travelling allowance

m. Interest on all the above.

3. The Claimants further filed the Verifying Affidavits sworn by the Claimants on 4th March 2020; the Claimants's List of Witnesses dated 4th March 2020; the Claimants' List of Documents dated 4th March 2020; and the Claimants' Witness Statements dated 4th March 2020.

4. The 1st Respondent entered appearance through the law firm of Okong'o Wandago & Company Advocates and filed a Response dated 23rd March 2023 to Memorandum of Claim. They also filed the 1st Respondent's List of Witnesses dated 23rd March 2023; and the 1st Respondent's List of Documents dated 23rd March 2023.

5. The 2nd Respondent entered appearance in the matter through the law firm of L.G. Menezes & Company Advocates and filed a Defence dated 20th May 2020 to Memorandum of Claim. They also filed a List of Witnesses dated 20th May 2020; 2nd Respondent's Witness Statement of one Daniel Kiyondi filed on 2nd July 2020; and 2nd Respondent's List of Documents dated 20th May 2020. In relation to the 21st Claimant, the 2nd Respondent filed a separate Witness Statement and List of Documents.

6. Following the directions of the Court issued on 3rd June 2024 that parties file their respective submissions, the Claimant filed submissions dated 10th July 2024; the 1st Respondent filed submissions dated 13th September 2024; and the 2nd Respondent filed submissions dated 25th August 2024.

Hearing

The Claimant's case

7. The Claimants' case was heard on the 2nd May 2024, when the 2nd Claimant, Benjamin Shingohi Iyadi (CW1) testified under oath on behalf of the other Claimants on the strength of the Authority to Plead dated 2nd February 2024. He adopted his written witness statement dated 4th March 2020, and produced the documents listed in the Claimants' List of Documents dated 4th March 2020 as the

Claimants' exhibits. CW1 was cross-examined by the 1st Respondent's Counsel, Ms. Twena and the 2nd Respondent's counsel, Mr. Fundi .

8. CW1 testified that he and the other Claimants reported to work at the 2nd Respondent's premises as usual but were turned away at the gate after being informed that there was no work available for them. The Claimants were later accused by the Respondents of striking, but CW1 was emphatic that this was not true. He stated that none of the Claimants were prosecuted for striking and no evidence had been provided by the Respondents that they were on strike. The Claimants had never been recalled to work. He therefore concluded that the termination of their employment was unfair as the Claimants were given no notice of termination, and neither were they subjected to disciplinary proceedings.

9. On why the Claimants sued both the 1st and 2nd Respondent, CW1 testified that 2nd Respondent provided their tools of trade including tractors and they physically worked at the 2nd Respondent's premises, Butali Sugar Factory. On its part, the 1st Respondent paid their wages and was the entity under which the Claimants' NHIF and NSSF registrations were done. The 1st Respondent was also the Claimants' supervisor. The Claimants' gate passes were in the names of both the 1st and 2nd Respondents. CW1 complained that although the Claimants were subjected to NHIF and NSSF deductions, the 1st Respondent failed to remit these deductions to the relevant authorities.

10. CW1 objected to the Respondents averment that the Claimants were employed as piece rate workers for the reason that they were employed continuously. For instance, he testified that he worked for the Respondents from 2011 to 2017. CW1 testified that he was paid a monthly salary of Kshs. 4,000/- which he considered an underpayment. He and the other Claimants were also not allowed to proceed for their annual leave throughout their period of employment, and were forced to work during public holidays and overtime, but were not paid. CW1 clarified that the work that the Claimants performed involved bringing in sugarcane from the farms to the factory. He stated that their work day routinely began at 3am with an unknown ending time.

11. On the issue of being paid their terminal dues, it was CW1's testimony that he had not received any payment. On cross-examination by counsel for the 1st Respondent, Ms. Twena, CW1 denied that the Claimants were employed on the basis of contracts. He, however, admitted that he was employed by the Respondents in the year 2014, rather than 2011. CW1 also stated that he worked exclusively for the 2nd Respondent. On cross-examination by counsel for the 2nd Respondent, Mr. Fundi, CW1 reiterated that he was employed by both Respondents, not only the 1st Respondent.

12. The Claimants contended that the consolidated minimum wage for a loader for the year 2017 (basic pay of Ksh. 12, 386.35 plus 15% house allowance) which was applicable to the Claimants at the time of their dismissal was Ksh14,244.00. Their claim was for payment of terminal dues as follows: leave allowance for the year 2011-2017 at 26 days per year (Kshs. 85,463.40); wages for work done during the public holidays in a year for 6 years (10 public holidays per year x 1.5 times daily pay); overtime dues for 20 hours per week earned and accrued over the 52 weeks at 1.5 times the normal hourly rate; unpaid housing allowance for 6 years tabulated at 15% of monthly salary; severance pay at the rate of 15 days for every competed year of service; underpayment (Lawful wage of Ksh. 12,386 -Ksh. 4,080 being the amount the Claimant was underpaid X 72 = Ksh. 731,808.00); one month's pay in lieu of notice (Kshs.14,244.00); rest days at double the hourly rate (14,244/225 X12X 52 =Ksh. 39,503.00); paternity leave at 15 days per year); compensation at 12 months' gross salary (14,244 X 12=Ksh. 170,928.00); and leave travelling allowance at Ksh. 800 X 1 (Paragraph 11 of the Memorandum of Claim) .

The 1st Respondent's case

13. The 1st Respondent's case was heard on the same day 2nd May 2024, when its witness George Onyango Ager (RW1) testified under oath, and was cross-examined by the Claimant's counsel, Mr. Kagunza. He adopted his Witness Statement filed on 21st August 2023 as his evidence in chief and produced the documents attached to the 1st Respondent's list of documents as 1st Respondent's exhibits 1-18.

14. RW1 's testimony was that the payment for the workers was different in that they were paid per tonnage, that is, Kshs. 13 per tonne of sugarcane from 2013 to December 2015; then the mount was increased to Kshs. 17 per tonne from 2015 to 2017. He stated that the Claimants' employment was premised on 3-month contracts of employment which were renewable at the employees' behest. RW1 confirmed that prior to 2017, there were no complaints received by the 1st Respondent relating to underpayment or paternity leave.

15. On the circumstances of the separation between the Claimants and 1st Respondent, RW1 testified that on 2nd May 2017 at 5.00 am in the morning, the Claimants went on strike. All the employees who had reported to work at 3.00 am on that day, including CW1, were involved in the strike. The strike continued until the afternoon of same day. In response to the strike, the 1st Respondent engaged the Kakamega County Labour Office to arbitrate between it and the employees who raised various complaints, including that they wanted to be employed directly by the 2nd Respondent. The Labour officer informed the employees that there was a procedure to ensure that this was done, but the employees walked out of the session, and the arbitration process was defeated. Following the failed arbitration, the Labour officer recommended that the employees be paid their terminal dues. RW1 stated that the 1st Respondent raised cheques for the terminal dues and handed them over to the employees, who acknowledged receipt by signing on the payroll report of April 2017. RW1 concluded that the claim before Court is an afterthought and ought to be dismissed.

16. During cross-examination by counsel for the 2nd Respondent, Mr. Fundi, RW1 confirmed that the Claimants were employed by the 1st Respondent, not the 2nd Respondent. In fact, one of their demands during the strike was that they desired to be employed by the 2nd Respondent. RW1 insisted that the 1st Respondent did indeed remit the Claimants' NHIF and NSSF deductions to the said authorities, and reiterated that the Claimants were paid their terminal dues at the point of separation.

17. During cross-examination by counsel for the Claimant, Mr. Kagunza, RW1 denied that the Claimants were ever employed by both the 1st and 2nd Respondents. When asked who the equipment used by the Claimants belonged to, RW1 answered that it belonged to the 2nd Respondent, and so did the sugarcane that was ferried by the workers. RW1 explained that the role of the 1st Respondent in relation to the Claimants included employing the workers, assignment of work, supervising the workers, welfare and payment.

18. On the alleged unprotected strike, RW1 conceded during cross-examination that the Respondents had not produced any evidence of photography or videos before Court of the Claimants' participation in the strike. He also conceded that the Claimants were not issued with any warning letters prior to termination. While RW1 insisted that the Claimants were given notice to show cause letters, and termination letters which were posted to their personal addresses, RW1 admitted that no certificate of postage/proof of postage of the said letters had been produced before the Court.

19. When asked by Counsel for Claimants about their reporting time and leaving time, and their pay, RW1 maintained that these times varied and so did the pay which was based on tonnage of sugarcane. RW1 stated that the 1st Respondent had made provision for payment of overtime, but admitted that they

had not produced employment records to show whether overtime was ever paid. He admitted that there was no provision for annual leave for the Claimants. RW1 confirmed that he had only seen the report with regard to proceedings before the Labour Officer but had not seen minutes taken during the said proceedings.

20. On re-examination, RW1 testified that the 1st Respondent was not contesting having employed the Claimants, but reiterated that the Claimants were piece rate workers whose wages depended on loaded tonnage of sugarcane. RW1's testimony was that the payment for the workers was different in that they were paid per tonnage, that is, Kshs. 13 per tonne of sugarcane from 2013 to December 2015; then the amount was increased to Kshs. 17 per tonne from 2015 to 2017. He stated that the Claimants' employment was premised on 3-month contracts of employment which were renewable at the employees' behest. RW1 confirmed that prior to 2017, there were no complaints received by the 1st Respondent relating to underpayment or paternity leave.

21. The 1st Respondent further challenged the Claimants' case on the premise that the same is sub-judice since there are other suits and proceedings pending before Courts of competent jurisdiction between the same parties and on the same subject matter, namely, Butali PMCC NO.23/2019 Levy Jeremiah Juma vs Frodak Kenya & Butali; Kakamega ELRC NO.9/2020 Felix Ashwivasa Bulinda vs Frodak Kenya Ltd; NO.109/2020 Gilbert Shirandula Charles vs Frodak Kenya Ltd; NO.111/2020 Nickson Ben Kulopa vs Frodak Kenya; NO.160/ 2020 Doctor Lichisoi vs Frodak Kenya Ltd (Claimant passed on before cause of action); NO.31 /2020 Philip Mbakayi -Vs- Frodak Kenya Ltd; NO.90/2020 Enock Wambasi vs Frodak Kenya Ltd; NO.209/2019 Abraham Fuma Munyasa vs Frodak & Another; NO.82/2020 Patrick Wekesa vs Frodak Kenya Ltd; NO. 208/2019 Mark Juma vs Frodak & Another; and NO.123/2020 Peter Andika Saulo vs Frodak Kenya Ltd.

The 2nd Respondent's case

22. The 2nd Respondent's case was heard on 3rd June 2024, when its witness Daniel Kiyondi Nyarunda (RW2) testified under oath, and was cross-examined by the Claimant's counsel, Mr. Kagunza and Ms Twena for the 1st Respondent. He adopted his Witness Statement filed on 20th May 2020 as his evidence in chief and produced the documents attached to the 2ndRespondent's list of documents as 2nd Respondent's exhibits 1-14.

23. RW2 was categorical that all the Claimants who failed to present themselves to the Court as ordered should have their claims dismissed.

24. During cross-examination by Ms. Twena, counsel for the 1st Respondent, RW2 confirmed that none of the employees demanded for payment of overtime or complained about underpayment prior to the present suit. He, nonetheless confirmed that they worked during public holidays, although he stated that they had rest days.

25. During cross-examination by Mr. Kagunza, counsel for the Claimants, RW2 could not confirm whether the 2nd Respondent had filed a written resolution of the Company authorizing him to testify or adduce evidence on its behalf. He, however, insisted that he had the authority of the 2nd Respondent's directors to appear in Court. RW2 explained that the 2nd Respondent's factory is operational seven days a week, including on public holidays, and conceded that the Claimants were entitled to wages for working during public holidays. RW2 stated that the Claimants were piece rate workers and their wages depended on work done. He stated that piece rate workers were not entitled to overtime payments, but a typical work day began at 6.00 am and ended at 3.00 pm or later.

26. With regard to the 2nd Respondent's relationship with the 1st Respondent, RW2 explained that the 1st Respondent was engaged by the 2nd Respondent to provide outsourced labour to the 2nd Respondent. The 1st Respondent received the workers payment for onward transmission to them, and was tasked with making NHIF and NSSF remittances on behalf of the workers. RW2 admitted that the work done was for the 2nd Respondent and that the tractors that the workers used belonged to the 2nd Respondent. On the nature of the work performed by the Claimant, RW2 stated that the sugarcane was loaded onto the tractors in the farms, and transported to the 2nd Respondent's factory where it was off-loaded.

27. On the strike, RW2's testimony was that the strike was reported to Malaba Police Station, but he stated that the 2nd Respondent had not produced an OB number before the Court . He also confirmed that the 2nd Respondent had not produced videos of the strike or minutes of the meeting with the Labour Officer Kakamega confirming that the Claimants were in attendance. Finally, he was not aware of any warnings issued to the Claimants.

Determination

Issues for determination

28. The Claimants in written submissions identified the following issues for determination: -

    a. Whether the evidence by RW-1 & 2 should be disregarded for want of authority to testify on behalf of a limited company.

    b. Whether there was an employer-employee relationship between the claimants and respondents

    c. Whether the claimants were piece rate employees

    d. Whether the claimants were unfairly and unlawfully terminated from employment.

    e. Whether the reliefs sought by the claimant were available to him.

29. The 1st Respondent opined that the authority of RW 1 as a witness was raised in submissions after the witness had been admitted. That it was not an issue for determination and stated the following as the issues:-

    a. Whether the claimants were unlawfully/ unfairly terminated

    b. Whether the claimants are entitled to reliefs sought.

30. The 2nd respondent identified the following issues for determination: -

    a. Whether the claimants were employees of the 2nd Respondent

    b. Whether the claimants are entitled to reliefs sought.

31. The Court having considered the parties' pleadings, oral and documentary evidence, and submissions, was of the considered opinion that the issues placed by the parties before it for determination were as follows: -

    a. Preliminary issue- The valid claimants

    b. Whether RW1 and RW2 were competent witnesses?

    c. Who was the employer of the claimants?

    d. What was the nature of employment of the claimants?

e. Whether the Claimants' termination from employment was unfair; and

f. Whether the Claimants are entitled to the reliefs sought in their Statement of Claim filed on 4th March 2020.

Preliminary issue

a. The valid claimants

1. The 1st Respondent raised the issue of some of the claims being subjudice in the witness statement of RW1 George Onyango and produced evidence of claims filed at Butali and Kakamega Magistrates Court concerning the following claimants:-

1. Levy Jeremiah Juma
2. Felix Ashwivasa Bulinda
3. Gilbert Shirandula Charles
4. Nickson Ben Kulopa
5. Doctor Lichisoi (deceased)
6. Philip Mbakayi
7. Enock Wambasi
8. Abraham Fuma Manyasa
9. Patrick Wekesa
10. Mark Juma
11. Peter Andika Saulo.

33. In reply to the 1st Respondent's response paragraph *9*, which pleaded the cases pending before the Magistracy Courts of Butali and Kakamega, vide reply dated 14th September 2023, the claimants gave a general denial. The Court returns that the evidence of existing claims was not controverted. There was no judgment as at time of hearing the claim placed before the Court. During the hearing, on the 18th March 2024, two of the said persons said to have suits pending before the lower Court appeared and identified themselves. The instant claim as it is was previously filed in Butali MELRC.ELRC 81 OF 2020 and vide ruling dated 11th March 20221, Hon ZJ Nyakundi, held the claim to be above the Court 's pecuniary jurisdiction leading to the instant suit.

34. At the hearing, Counsel for the claimants informed the Court that claimants nos. 21,22,30 and 44 were deceased and for failure of substitution with the representatives of the respective estates, the claims were marked as abated being No. 21 Philip Bernard Nyongesa, No. 22 Paul Mutsami Francis, No. 30 Doctor Luchisoi and No. 44 Wekesa Patrick Munjali.

35. CW1 told the Court he had authority to plead on behalf of all the claimants vide authority to plead and testify which was filed in Court on the 27th of February 2023.

36. The Court returns that the 1st Respondent, who issued contracts of employment to the claimants did not contest all the claimants were its employees. The suit as it is, was previously filed in Butali MELRC .ELRC 81 OF 2020 and vide ruling dated 11th March 20221 Hon. ZJ Nyakundi held the claim to be above the Court 's pecuniary jurisdiction leading to the instant suit. There was no

evidence of the said claims having been heard and determined. The Court has original jurisdiction in all employment claims. Taking into account the right to access justice and the circumstances of the case and especially the ruling by Hon. ZJ Nyakundi on pecuniary jurisdiction leading to the instant suit, the Court allows the suit to proceed for all claims save for the 4 deceased claimants. The decision to abide any other case in the magistrates Courts filed by any of the claimants.

37. The Court marked as abated the claims by claimants no. 21. Philip Bernard Nyongesa, No. 22. Paul Mutsami Francis, No. 30 Doctor Luchisoi and No. 44 Wekesa Patrick Munjali accordingly. All other claims are held as validly before the Court for determination.

Whether RW1 and RW2 were competent witnesses?

38. The claimants submitted that RW1 and RW2 had no document filed in the Court granting them authority to testify on behalf of the respondents' companies which are limited liability companies relying on the provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2020, to wit:- ''(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so''. The claimants submit that it was incompetent and fatally defective for any person to produce evidence for a corporation without the necessary authority. The claimants contended that the evidence of the RW1 and RW 2 was of no value and ought to be disregarded and to buttress the foregoing submissions relied on the decision in Microsoft Corporation v Mitsubishi Computer Garage Limited (2001) 2 EA 460 where Justice Ringera stated: '' Order III , rule 2 of the Civil Procedure Rules (now Order 4 Rule 1) requires an affidavit sworn on behalf of a corporation to be made by an officer thereof..'' The Judge further noted definition of an officer under section 2 of the *Companies Act* was not exhaustive and could include director, manager or secretary of the company and any employee holding position of trust in the company.

39. The 1st Respondent submitted that it filed a response whose contents were based on documents under custody of RW1. They relied on the Employment and Labour Relations Court (procedure) Rules 2016 rule 14(8) to wit-'' (8) A party shall notify the Court when submitting a statement of claim or a response to a statement of claim of any witnesses it proposes to call in support of its submissions, file witness statements and shall, at the same time, notify the other party.''

40. The 1st Respondent further relied on the decision of the Court of Appeal on the requirements of Order 4 Rule 1 Civil Procedure Rules in *Wines & Spirits Kenya Limited & Waiganjo Investments Limited v George Mwachiru Mwango (Civil Appeal 33 of 2018*) [2018] where the Court considered the application of the rule as follows:-

> ''Closely related to this, the respondent has taken issue with the oral testimony of the appellants' sole witness, Mr. John Waiganjo; whom the respondent claims lacked authority to testify. This being a preliminary point, it is perhaps pertinent to dispose of it immediately, before delving into the merits of the case.[15] Looking at the record, no objection appears to have been raised regarding Mr. Waiganjo's competence to testify. The issue was however mentioned, albeit peripherally, in the course of his cross examination. Asked whether he had been authorized by his co-director to testify on the 2nd appellant's behalf, he stated that though he was duly authorized, he had not brought the resolution with him to Court . The respondent now asserts that on account of Mr. Waiganjo's failure to produce a written resolution detailing his authority to testify, his testimony ought to have been disregarded. However, save for the decision the Bugurere Coffee Growers case, no law has been cited to support the contention that a witness, who is a director of a company must evince a written authority from the company in order to testify on behalf of the company. In addition, the decision in the Bugerere case is vastly distinguishable from the circumstances herein because in that case, the question for determination was whether an unauthorized firm of advocates could institute legal proceedings on behalf of a company. In

this case however, the question is whether a witness needs similar authority in order for him to testify on the company's behalf.

16. Under the law of evidence, the Court is allowed to make certain presumptions of fact. One such presumption is with regard to persons acting in a certain capacity or under documents. According to Phipson on Evidence; 17th Edn at p.1264-65; where a public official purports to act in a certain capacity, the Court may readily presume the veracity of his capacity to so act. However, a higher premium is placed upon a private individual. The authors had this to say on the subject:

> "Generally however, private relationships cannot, except as against the parties acting or acquiescing, be so established.....
>
> As against the parties themselves, however, acting in a capacity is, in civil cases, generally, and even in criminal cases sometimes, sufficient proof; though, where the appointment is by written contract, and not mere resolution, and its terms are material, parol evidence will be inadmissible if the document itself can be produced." (Emphasis added). The Court of Appeal then held: ''In our view therefore, the production of written authorization is only mandatory where contractual issues have been raised not in cases of authorization by mere resolution..."

41. Justice Aburili in ICEA Lion General Insurance Company Limited v Chris Ndolo Mutuku t/s Charlotte Beach Resort (2021)e KLR upheld the decision of Court of Appeal in *Wines & Spirits Kenya Limited & Waiganjo Investments Limited v George Mwachiru Mwango (Civil Appeal 33 of 2018*) [2018] (supra)to hold there was no merit in objection based on lack of authority holding that the competence of the witness was not challenged at trial and that none of the documents produced by the said witness prejudiced the respondent.

42. Similarly, the Court returns that there was no challenge of RW1 witness capacity in pleadings by the Claimants or at cross-examination. There was no contractual issues raised but mere lack of written authority for the witnesses to give evidence on behalf of the companies. It is trite that submissions are not pleadings hence the RW1 witness capacity stands unchallenged. On RW2 this issue was raised at cross-examination. The witness produced documents to prove its relations with RW1. The Rules of the Court relied on by the 1st Respondent Employment and Labour Relations Court (Procedure) Rules 2016 rule 14(8) provide: – ''(8) A party shall notify the Court when submitting a statement of claim or a response to a statement of claim of any witnesses it proposes to call in support of its submissions, file witness statements and shall, at the same time, notify the other party." (now Rule 35 of 2024 rules) The Court holds that the 2nd Respondent complied with the said Rule. RW2 filed his witness statement and there was no objection in reply to the defence. The Court returns that issue on lack of authority was an afterthought objection. Nevertheless, the Court holds that no prejudice was caused by the production of the documents on behalf of the 2nd Respondent by RW2 nor the 1st Respondent by RW1. The Court thought that the authority to testify for a corporation would only become an issue, to be raised by defence, where the corporation is a claimant, as costs for the defence are at stake. The Court under Article 159(2)(c) of *the Constitution* is obliged to pursue substantive justice. It reads: -'' justice shall be administered without undue regard to procedural technicalities; '' The Court holds that the objection to the Respondents' witnesses in the instance case qualifies as a procedural technicality as there were no contractual issues raised beyond the lack of authority as held in Wines & Spirits of Kenya Limited decision (supra) that:- ''In our view therefore, the production of written authorization is only mandatory where contractual issues have been raised not in cases of authorization by mere resolution..." . The Court did not find any prejudice the claimants would suffer

by the testimony of the respondent's witnesses without authority under seal of the company, in the instant case. The objection is dismissed.

Who was the employer of the claimants?

43. The claimants contended that they had employer-employee relationship with the respondents relying on their job cards and gate passes. The Court discerned that the claimants took the position that both respondents were their employer.

44. The 1st Respondent submitted that it was not in dispute that it had contracts with the 2nd respondent to supply loaders with the last contract ending in May 2017 which was terminated following unprotected strike by the claimants leading to damage of property of both respondents.

45. The 2nd respondent's defence was that it was not the employer of the claimants save for claimant No. 21, Philip Bernard Nyongesa(deceased), whose claim had abated on account of death having not been substituted by a representative of the estate. RW2 testified that the 2nd respondent had a contract with the 1st Respondent for supply of outsourced labour. RW2 produced the 2nd Respondent's documents as exhibits 1-10 being contracts between it and the 1st Respondent for outsourcing labour of the claimants. The production of the said contracts was not challenged nor was the content.

46. The 2nd Respondent relying on the contracts (its exhibits 1-10) submitted that the claimants were not its employees.

47. The 2nd Respondent relied on the provisions of section 2 of the *Employment Act* on definition of employee and employer to wit:- "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;" "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body,firm, corporation or company;' 'Further on Section 9 of the *Employment Act* to emphasise on the prerequisites of employment relationship to wit:- ''(1) A contract of service—

    a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

    b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

        2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)."

48. The 2nd Respondent further relied on the pronouncement of the employment relationship under the International Labour Organisation Treaty through its 95th Session 2006 paragraph *26* to wit:- "26. The determination of the existence of an employment relationship should be guided by the facts, and not by the name or form given to it by the parties. That is why the existence of an employment relationship depends on certain objective conditions being met and not on how either or both of the parties describe the relationship. This is known in law as the principle of the primacy of fact, which is explicitly enshrined in some national legal systems. This principle is also frequently applied by judges in the absence of an express rule." The 2nd Respondent further relied on paragraph 40 of the aforesaid Treaty which addresses the difficulties faced by outsourced employees under agency and which clarified on such employment relationships as follows:- ''40. The problems faced by workers involved in triangular

employment relationships pose different legal questions. These are workers employed by an enterprise (the provider) who perform work for a third party (the user) to whom their employer provides labour or services. For these employees, their employment status is not in doubt, but they frequently face difficulties in establishing who their employer is, what their rights are and who is responsible for them.''

49. The 2nd respondent further relied on the contracts between it and the 1st Respondent (its exhibits 1-10) and paragraphs 26 and 40 of the International Labour Organisation Traety of the 95th Session 2006 Treaty (supra) to submit that the 1st Respondent was the claimants' employer in the triangular relationship. The 2nd Respondent further relied on the decision of the Court of Appeal in Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union & Jokali Handling Services Limited [2016] KECA 510 (KLR) where it was observed: ''In the instant case, the outsourced employees entered into express contractual relationships with Jokali, which in turn contracted with Abyssinia to provide employees to perform various duties. The employees, though working in Abyssinia's premises, remained under Jokali's management and control. Faced with these facts, we find that, bar the fulfillment of the mandatory legal requirements, it was Jokali, and not Abyssinia, that was obliged to recognise the Union in respect of Jokali's employees. We therefore disagree with the learned judge that the employees outsourced to Jokali remained employees of Abyssinia.''

50. The Court relying on the contracts between the 1st and 2nd Respondents (2nd Respondent's exhibits 1-10), the samples of NSSF remittances by the 1st Respondent (2nd Respondent's Exhibit 12), the claimants gate passes and their NSSF statements indicating the 1st Respondent as employer and applying the International Labour Organisation Treaty through its 95th session 2006 paragraph *26* and *40* (supra) as well as the decision of the Court of Appeal in Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union & Jokali Handling Services Limited [2016] KECA 510 (KLR) finds and holds that the claimants were employees of the 1st Respondents (provider of labour) providing labour to the 2nd Respondent(third party). The Court holds that the obligations to the Claimants under the employment relationship were on the 1st Respondent who admitted as much. The Court holds that the employment arrangement by the Respondents was legal.

51. In the upshot the Court holds the claimants were employees of the 1st Respondent.

What was the nature of employment of the claimants?

52. The claimants submit that they worked for the respondents from 2nd September 2011 until 2nd May 2017 continuously operating machines , were supervised and paid by the respondents without freedom to do any other work outside the 2nd respondent's factory and were also subject of disciplinary action by the respondents for reporting late or absenteeism and as such their employment converted to contract of service in which wages are paid monthly thus not piece rate employees as alleged by the 1st respondent and that their terms did not reflect anywhere they were piece rate employees. The claimants relied on the Court of Appeal decision in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR where the Court relying on the definition of piece rate work under section 2 of the *Employment Act* observed that :-

> ''We have already reproduced section 2 in which "piece work" is defined with emphasis being on the amount of work done and not time taken to do it" . Section 2 of the *Employment Act* defines piece rate as," "piece work" means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance" The claimants contended that their employment converted from casual to term contract

under section 37 of the *Employment Act* and were entitled to notice under section 35 before termination.

53. Section 37 states:-"(1) Notwithstanding any provisions of this Act, where a casual employee—

    a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

    b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service."

53. The 1st Respondent contended that the claimants had contracts of piece rate work and that during cross examination, CW1 admitted they were paid for work done each fortnight.

54. The 2nd Respondent having been held as not the employer, the Court need not delve on their submissions on the issue.

55. The 1st Respondent contended that the claimants were piece rated workers and relied on contracts produced in Court which indicated payment of Ksh. 17 per day/tonnage. The claimants denied have signed the contracts. They were signed. Piece rate work is as defined under section 2 of the *employment act* to wit:- "piece work" means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance" The Court upholds the decision of the Court of Appeal cited by the claimants in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR where the Court relying on the definition of piece rate work under section 2 of the Employmnet act observed that ;-''We have already reproduced section 2 in which "piece work" is defined with emphasis being on the amount of work done and not time taken to do it."

56. The 1st Respondent produced contracts of employment for year 2017 which indicated Kshs. 17 per day/tonne paid in arrears every fortnight and in 2016 and 2015 paid 14 per day/tonne(1st Respondent exhibit 2 pages 810-1055). The payroll was produced and indicated days worked. The 1st Respondent produced documents to show it paid NSSF and NHIF. During cross-examination CW1 Benjamin Iyadi denied they had contracts. He admitted having been shown that one of the claimants' Clement Khawere Salamba signed contract in 2014 (at page 788 of the 1st Respondent's documents). CW1 admitted the said Clement was paid different wages in April 2016 and October 2015. CW1 could not substantiate the payment of the amount of salary stated in his witness statement.

57. RW1 George Onyango Ager stated he was the operations manager of the 1st Respondent. He told the Court that the payment was per tonnage and different. He told the Court that they paid NSSF and NHIF for all employees. During cross-examination RW1 denied that the gate pass was by the both respondents. The gate pass was written ''Frodak Services Butali Sugar Mill Office.. Gate Pass Casual" RW1 told the Court that payment varied depending on tonnage and employee could earn upto Kshs. 24,000 depending on the season of harvest. He stated that reporting to work varied just like the tonnage. He told the Court the Kshs. 17 per tonnage covered everything.

58. The Claimants swore witness statements to effect of payment of gross salary of Kshs. 4080 per month. CW1 could not confirm that position during cross-examination. On the other hand, the 1st Respondent produced evidence of contracts for payment per day and payroll indicating varied payment to the claimant as individuals and also varied wages from month to month. There was also indication of payment of NSSF. The Court finds the variance of wages was on days worked and not tonnage. The Court returns that the claimants were not piece rated as they were paid for days worked

and upholds the Court of Appeal decision in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR where the Court relying on the definition of piece rate work under section 2 of the *Employment Act* observed that ;''We have already reproduced section 2 in which "piece work" is defined with emphasis being on the amount of work done and not time taken to do it.' Consequently, the Court holds that the claimants were on contractual employment arrangement with the 1st Respondent and paid for days worked.

Whether the Claimants' termination from employment was unfair;

59. The claimants contended they were all on the 2nd May 2017 dismissed from work without any cause and without being accorded a chance to defend themselves contrary to the provisions of sections 35, 41, 43, and 45 of the *Employment Act*. For the termination of employment to pass the fairness test it must be based on valid reasons and procedurally fair.

60. The termination of employment must be based on valid reasons as stated in 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."

61. Procedural fairness is as stated in section 41 of the *Employment Act* to wit-'' 41. Notification and hearing before termination on grounds of misconduct

    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.

    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."

62. Section 45 of the *Employment Act* further elaborates on the components of the fair termination as follows:- '' (1) No employer shall terminate the employment of an employee unfairly.

    2. A termination of employment by an employer is unfair if the employer fails to prove—

        a. that the reason for the termination is valid;

        b. that the reason for the termination is a fair reason—

            i. related to the employees 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.

3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

4. A termination of employment shall be unfair for the purposes of this Part where—

   a. the termination is for one of the reasons specified in section 46; or

   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.

5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider—(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

   b. the conduct and capability of the employee up to the date of termination;

   c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

   d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

   e. the existence of any previous warning letters issued to the employee.''

63. The burden of proof in employment claims by the claimant is on the employer to justify the termination through prove of valid reasons as per section 43 of the *Employment Act*(supra). The burden of proof is as stated in section 47(5) of the *Employment Act* to wit:- '' (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''

64. The 1st Respondent, the employer, led evidence on the termination of the claimants' employment. On the circumstances of the separation between the Claimants and 1st Respondent, RW1 testified that on the 2nd May 2017 at 5.00 am in the morning, the Claimants went on strike. All the employees who had reported to work at 3.00 am on that day, including CW1, were involved in the strike. The strike continued until the afternoon same day. In response to the strike, the 1st Respondent engaged the Kakamega County Labour Office to arbitrate between it and the employees who raised various complaints, including that they wanted to be employed directly by the 2nd Respondent. The Labour officer informed the employees that there was a procedure to ensure that this was done, but the employees walked out of the session, and the arbitration process was defeated. Following the failed arbitration, the Labour officer recommended that the employees be paid their terminal dues. (The Strike Report by Kakamega County Labour Office was produced at pages 1057-1059 of the 1st Respondent's bundle of documents). RW1 stated that the 1st Respondent raised cheques for the terminal dues and handed them over to the employees, who acknowledged receipt by signing on the payroll report of April 2017. RW1 concluded that the claim before Court was an afterthought and ought to be dismissed.

65. During cross-examination by counsel for the 2nd Respondent, Mr. Fundi, RW1 confirmed that the Claimants were employed by the 1st Respondent, not the 2nd Respondent. RW1 told the Court that one of the claimants' demands during the strike was that they desired to be employed by the 2nd Respondent. RW1 insisted that the 1st Respondent did indeed remit the Claimants' NHIF and NSSF deductions to the said authorities, and reiterated that the Claimants were paid their terminal dues at the point of separation.

66. During cross-examination by counsel for the Claimant, Mr. Kagunza, RW1 vehemently denied that the Claimants were ever employed by both the 1st and 2nd Respondents. When asked who the equipment belonged to, he answered that it belonged to the 2nd Respondent, and so did the sugarcane that was ferried by the workers. RW1 explained that the role of the 1st Respondent in relation to the Claimants included employing the workers, assignment of work, supervising the workers, welfare and payment. On the strike, RW1 conceded that the Respondents had not produced any evidence of photography or videos before Court of the Claimants' participation in the strike. He also conceded that the Claimants were not issued with any warning letters prior to termination. While he insisted that the Claimants were given notice to show cause letters, and termination letters which were posted to their personal addresses, RW1 admitted that no certificate of postage/proof of postage of the said letters had been produced before the Court.

67. The 1st Respondent submitted that the strike was unprotected under the *Labour Relations Act*. That they produced a report of the Ministry of Labour on the strike (pages 1057-1059 of the 1st Respondent's bundle of documents) to confirm the loaders' representatives including Clement Salamba (4th Claimant) attended and represented loaders at the conciliatory meeting held at Kakamega Labour office where they laid their grievances and castigated walkout of the meeting. The 1st Respondent submitted that the only option was dismissal of the non-compliant claimants. They relied on the provisions of section 47 (5) of the *Employment Act* which provides for the burden of proof in employment claims to wit:- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''

68. The Court having considered the evidence before it, being the testimony of CW1, RW1 and RW2 and the report of the Ministry of labour on the strike, finds that indeed the claimants participated in an unprotected strike paralysing the operations of the respondents. A protected strike is as defined under section 76 of the *Labour Relations Act* to wit:- ''76. Protected strikes and lock-outs

A person may participate in a strike or lock-out if—

a. the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

b. the trade dispute is unresolved after conciliation—

i. under this Act; or

ii. as specified in a registered collective agreement that provides for the private conciliation of disputes; and seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative

of—

i. the trade union, in the case of a strike;

ii. the employer, group of employers of employers' organisation, in the case of a lock-out." There was no evidence before the Court that the said strike complied with these conditions of a protected strike.

69. The report of the Kakameg County Labour office was admitted without any protest or demand to be produced by author. It was authored by a Ministry of Labour Officer based at Kakamega County and addressed to Chief Industrial Relations Officer, Ministry of East African Community, Labour and Social Protection, Nairobi. In essence the strike report was an official document. It is a common law principle that acts of public officers are presumed to be regular and valid unless sufficiently shown to be otherwise. No evidence was laid before the Court by the Claimants to sufficiently prove the strike report was not valid. The report gave vivid account of the strike and also stated the strike was illegal and led to losses for the respondents. The court returns that the claimants participated in unprotected strike. The Court holds that the reasons for the termination were valid and lawful.

70. On procedural fairness, the contracts were coming to an end same day of strike hence the termination was by effluxion of contract. This was the same position held by the Court in the same cause of action in a decision delivered 18th September 2024 in Employment and Labour Relations Court at Kakamega Appeal No. E005 of 2023 Frodak Kenya Limited Versus Philip Lumanyasi Makunda. The Court did not find a reason to divert from the said decision and the same is upheld to apply in the instant case.

71. In the upshot the termination of the claimants' employment is held to have been lawful and fair.

Whether the claimants were entitles to reliefs sought.

72. The Court held that the nature of employment of the claimants was contractual and that the termination was lawful and fair. The details of the reliefs sought were stated in paragraph 11 of the claim as follows:-

a. Sum of Kshs. 85,463.40 being prorated leave due for 72 months at 26 days per year.

b. Sum of Kshs. 57,960 being sum of Kshs. 9,660 payment for work done during 10 public holidays for 72 months.

c. Sum of Kshs. 98,758.00 being claim for overtime accrued for 20 hours per week at one and half times the normal hourly rate.

d. Sum of Kshs 133,768 as unpaid housing allowance at 15% of the statutory minimum wage of Kshs. 12,386 for 72 months.

e. Sum of Kshs. 85463 being severance pay at rate of 15 days for every completed year of service.

f. Sum of Kshs. 800,000 being coalesced exemplary and aggravated damages for unfair and /or wrongful dismissal under section 49(c).

g. Sum of Kshs. 731,808 being underpayment for period. Lawful wage of Kshs. 12386-paid 4080 for 72 months.

h. Sum of Kshs. 14,244 being one-month notice.

i. Sum of Kshs. 39,503 being Rest days at double rate.

j. Sum of Kshs. 7122 being Paternity leave with respect to two children.

k. Sum of Kshs. 170,928 being compensation at 12 months' gross salary.

l. Sum of Kshs. 800 being leave travelling allowance

m. Interest on all the above.

73. As stated earlier the Court had pronounced itself on a similar cause of action based on same facts. Consequently, the Court upholds its decision delivered 18th September 2024 in Employment and Labour Relations Court at Kakamega Appeal No. E005 of 2023 Frodak Kenya Limited Versus Philip Lumanyasi Makunda to apply on the reliefs sought.

74. The remedies for termination of employment are as provided under section 49 of the *Employment Act*. Compensation is only due where the Court finds unfair termination. Under section 50 of the Act the Court is obliged to apply the remedies under section 49 of the *Employment Act* where it finds wrongful and or unfair termination of employment. Section 49 reads in part:-'' 49. Remedies for wrongful dismissal and unfair termination

1. Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

    a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

    b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

    c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

2. Any payments made by the employer under this section shall be subject to statutory deductions.

3. Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

    a. reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or

    b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage. '' Consequently, the reliefs sought by the claimants of exemplary and aggravated damages were not available for award by the Court even if the termination of employment had been held as unlawful/unfair. On other hand, compensation is only available where the termination was not based on valid reasons. That was not the case here. The notice pay is available for lack of procedural fairness which was also not the case here.

75. On the other reliefs sought, the Court upholds its decision delivered 18th September 2024 in Employment and Labour Relations Court at Kakamega Appeal No. E005 of 2023 Frodak Kenya Limited Versus Philip Lumanyasi Makunda. Makunda was a colleague of the claimants and raised the

same claim on similar grounds. Just like in the said decision, the Court in similar circumstances of lack of consistent wages or payslips, finds that the workers were entitled to statutory minimum wages to apply in the claim. The claimants submit that in the year 2017 when their services were terminated the statutory minimum wage was Ksh. 12, 386.35. There was no contrary evidence placed before the Court hence the applicable minimum wage was Kshs. 12, 386.35 also applied in the said decision. The Court having upheld its decision in Kakamega ELRC Appeal No. E005 of 2023(supra) the only awards available to the claimants are those under the said decision being on leave, service pay and underpayment.

On payment for leave in lieu

76. RW1 admitted the claimants were not granted leave. Payment in lieu is awarded consistent with the decision Kakamega ELRC Appeal No. E005 of 2023(supra). The Court orders payment of Kshs. 56,976 in lieu of leave.

Service pay

77. The Court upholds its decision in Kakamega ELRC APPEAL No. E005 of 2023 (supra) and holds that the claimants had no social security and hence was entitled to service pay as per section 35(5) of 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.'' The Court consequently substitutes the order for severance pay erroneously sought, with service pay for 15 days for every completed year. The Court holds that the completed years of service were 2014, 2015 and 2016 thus service pay ought to have been awarded for 15 days of every completed year thus 12386/30x15 x 3 total sum of Kshs. 18,579/- as service pay.

Claim for underpayment

78. The Claimants stated they were paid Kshs. 4080 but had no evidence to substantiate the alleged salary. The 1st Respondent produced a payroll cash listing indicating average amounts paid as wages of Kshs. 3000(pages 810-1055 of the 1st Respondent bundle of documents). The Court finds no basis to divert from its decision in Kakamega ELRC Appeal No. E005 OF 2023 (supra) and awards payment of underpayment for Kshs. 99,672/- based on statutory minimum wages.

79. Other claims namely overtime, rest days, public holidays, travelling allowance and paternity leave the Court finds they were not proved. The Court made a similar finding in Kakamega ELRC Appeal No. E005 OF 2023 (supra) and finds no reason to divert from the said decision.

Conclusion And Disposition

80. The Court in conclusion enters judgment for each of the Claimants against the 1st Respondent minus claimants no. 21. Philip Bernard Nyongesa, No. 22. Paul Mutsami Francis, No. 30 Doctor Luchisoi and No. 44 Wekesa Patrick Munjali whose claims abated on death and having not been substituted by the representative of their estates, as follows:-

    a. Award of accrued leave in lieu of Kshs. 56,976

    b. Payment of service pay of Kshs. 18579/-

    c. Payment of underpayment for Kshs. 99,672/-

    d. The Respondent to issue a certificate of service to the claimants pursuant to the provisions of section 51 of the *Employment Act*.

e. Costs to the claimants

f. The amounts (above a-c) to attract interest at Court rates if not paid in full to the claimants within 30 days of the judgment. All other claims are dismissed.

81. Stay of 30 days is granted.

82. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH OF NOVEMBER 2024

JEMIMAH KELI

JUDGE

In The Presence Of

C/A – Caleb

For Claimant: Kagunza

For 1st Respondent: Achieng

For 2nd Respondent: Fundi