



**Bakery Confectionery Food Manufacturing & Allied Workers Union v Manji Food Industries Ltd (Cause 125 of 2017) [2023] KEELRC 535 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 535 (KLR)

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

**CAUSE 125 OF 2017**

**JK GAKERI, J**

**MARCH 6, 2023**

**BETWEEN**

**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED  
WORKERS UNION ..... CLAIMANT**

**AND**

**MANJI FOOD INDUSTRIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a Memorandum of Claim filed on 25<sup>th</sup> January, 2017 alleging victimization and unlawful lock out of the grievants by the Respondent.
2. The Claimant avers that the grievants were employed by the Respondent on diverse days as follows; 1<sup>st</sup> grievant as a Chemical Mixer on 24/4/2012 at Kshs.18,449.00, 2<sup>nd</sup> grievant as a Machine Operator in May 2014 at Kshs.699/= for the day shift and Kshs.992/= for the night shift. The 3<sup>rd</sup> grievant was employed in April 2010 as a Machine Operator at Kshs.699.00 and 992/= for the day and evening shifts respectively.
3. That the grievants had no previous misconduct at the work place.
4. The Claimant avers that on 26<sup>th</sup> February, 2016, the grievants reported to work at 5.30 pm for the night shift and were producing Glucos 4's and worked well until 4.00 am when they noticed that the machine was producing an abnormal sound and the 1<sup>st</sup> grievant switched off the machine. The noise came from the moulding section which they proceeded to open, but called Peter Mutuku the Supervisor and one Bernard Kalendo.
5. The Claimant avers that the grievant could not establish where the bolt emanated from as they were machine operators only.



6. It is further averred that Mr. Peter Mutuku repaired the machine and production continued till morning and the incident was reported to the Production Manager, one Francis Einstein who sought an explanation as to where the bolt had come from.
7. It is the Claimant's that the grievants were issued with show cause letters on 27<sup>th</sup> February, 2016 and responded and worked for one (1) week. Subsequently, the grievants were suspended on 4<sup>th</sup> March, 2016 for a period of 14 days for purposes of investigations and reported to the Human Resource Manager on 21<sup>st</sup> March, 2016, one Christopher Nzioka.
8. The Claimant further avers the grievants reported on 22<sup>nd</sup> March, 2016 and although the Human Resource informed them that he had cleared them, the Production Manager's Secretary requested them to report back to the Human Resource Manager and the reporting continued until 1<sup>st</sup> April, 2016 when the union was looped in and wrote to the company on 4<sup>th</sup> April, 2016 and a meeting took place on 14<sup>th</sup> April, 2016 and the grievants were never recalled to resume duty.
9. It is the Claimant's case that the 2<sup>nd</sup> and 3<sup>rd</sup> grievants were engaged as casual employees and worked intermittently and continuously from the date of engagement.
10. The Claimant avers that save for the 1<sup>st</sup> grievant, the grievants were neither given a termination notice nor paid for the days worked until 29<sup>th</sup> February, 2016.
11. The Claimant prays for;
  1. A declaration order to issue that the purported lock out and/or redundancy visited upon the grievants herein by the Respondent is unlawful and illegal.
  2. An order for payment of the grievants redundancy benefits and other unpaid or accrued benefits in accordance with the CBA including compensation for loss of employment as follows;
    - a. Cliffe Onganga
      - One month's notice pay Kshs.18,449.00
      - Severance pay Kshs.76,635.00
      - 3 months pro rata leave Kshs.6,386.25
      - 3 months pro rata leave travelling allowance Kshs.1,250.00
      - 12 months compensation Kshs.265,668.00
      - Total Kshs.368,438.00
    - b. Malachi Ogere
      - One month's notice pay Kshs.18,488.00
      - Days worked for but not paid 29/2/2016 – 1/4/2016 Kshs.45,209.00
      - Severance pay Kshs.25,590.00
      - Leave entitlement for 1 year Kshs.5,000.00
      - Leave traveling allowance Kshs.5,000.00
      - 11 months pro rata leave Kshs.23,457.50
      - 11 months pro rata leave travelling allowance Kshs.4,583.00



12 months compensation Kshs.266,136.00

Total Kshs.404,053.50

c. Jacob Mbohe

One month's notice pay Kshs.18,488.00

Days worked and not paid for 29/2/2016 – 1/4/2016 Kshs.45,209.00

Severance pay Kshs.153,540.00

Leave entitlement for 6 year Kshs.153,540.00

Leave traveling allowance for 6 years Kshs.30,000.00

12 months compensation Kshs.266,136.00

Total Kshs.666,913.00

3. Costs and interest

4. Any other relief this Honourable Court may deem fit in the circumstances to grant.

### **Respondent's case**

12. The Respondent avers that other than the 1<sup>st</sup> grievant, the other two were employed on daily wage or as agreed and were not entitled to terminal dues.
13. That at no time were the grievants locked out of work place and left the Respondent's work place on their own volition after refusing to resume work and the contracts determined by effluxion of time.
14. The Respondents denies all other allegations made by the Claimants and prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

15. The Claimant availed evidence of two of the three grievants as Malachi Ogere was untraceable and the other witnesses had no authority to testify on his behalf.
16. On cross-examination, CWI Mr. Cliffe Onganga testified that he joined the Respondent in 2005 but became a permanent employee on 1<sup>st</sup> August, 2012 and was victimized by being locked out of the place of work on 23<sup>rd</sup> March, 2016.
17. That he and Mr. Alex Mogere and Jacob Mbohe were at work on 26<sup>th</sup> February, 2016 operating the moulding machine and at around 4 am, they heard unfamiliar noises from the machine and as a consequence switched it off and called the in-charge, Mr. Mutuku and after removal of the moulding, they realized that there was a bolt in the machine that had damaged the knife. That Mr. Mutuku repaired the machine and work continued after about 40 minutes till morning and were issued with a notice to show cause and responded on 29<sup>th</sup> February, 2016 and worked until 4<sup>th</sup> March when they were suspended.
18. The witness testified that they reported to work on 21<sup>st</sup> March, 2016 but Mr. Nzioka asked them to go home to report on the following day.
19. That the unions involvement since 1<sup>st</sup> April, 2016 bore no fruit.



20. CWI confirmed that the machine could not operate without the mould which was critical to the Respondent's business.
21. That they continued reporting to the work place until 30<sup>th</sup> April, 2016.
22. On re-examination, the witness stated that the grievants were not responsible for handling the dough and could not have noticed any foreign object.
23. That they were not informed the outcome of the investigation.
24. CWI, Mr. Jacob Mbohe testified that he joined the Respondent in April 2010 under 3 months contracts separated by a break of one month and his last contract was set to expire on 31<sup>st</sup> January, 2016 and he did not apply or sign another contract.
25. On cross-examination, the witness confirmed that he used to apply for renewal of the employment contract.
26. That the Head of Human Resource and the General Manager allowed them to return to work but the Production Manager declined.
27. It was his testimony that he did not express an interest to resume duty.
28. That he was not paid for the month of February though NHIF and NSSF contributions were paid.
29. On re-examination, the witness testified that he had not received a new contract.

#### **Respondent's evidence**

30. RWI, Mr. Christopher Muthusi Nzioka testified that the grievants were suspended to facilitate investigation effective 4<sup>th</sup> March, 2016.
31. That the three were taken back but they did not report to work.
32. The witness testified that he and the General Manager called the grievants and requested them to resume duty but they declined the offer.
33. That Jacob Mbohe and Malachi Ogere did not apply for renewal of their contracts of employment.
34. The witness testified that he had not issued a termination letter to Cliffe Onganga and his colleagues.
35. RWI further testified that during the grievants shift, a bolt was found in the dough, something they should have noticed and it was not the first.
36. On cross-examination, the witness confirmed that grievants were union members.
37. It was RWI's testimony that the standard letter of appointment applied to those employed on permanent and pensionable terms such as Mr. Cliffe Onganga.
38. That on the material day, work resumed after the dough was cleaned although the machine was not performing optimally.
39. The witness stated that communication with the grievants after the suspension was oral and no disciplinary hearing took place.
40. The witness confirmed that although he received a letter from the union, he did respond but met the union officials on 14<sup>th</sup> April, 2016 and management was suspecting that there was sabotage. The union demanded that the Respondent takes back the grievants.



41. It was his testimony that although Jacob Mbohe's contract lapsed on 31<sup>st</sup> January, 2016, he continued working pending renewal.
42. On re-examination, the witness testified that Mr. Jacob Mbohe would have gotten a contract in February 2016 but had not expressed interest.
43. That the replacement moulder arrived in 2015 as it was fabricated.
44. Malachi Ogere did not participate in the proceedings.

#### **Claimant's submissions**

45. According to Claimant's counsel, the issues for determination were; terms of engagement of the grievants, reason for termination and procedure, reliefs sought and costs.
46. As regards the terms of engagement, it was submitted that other than Mr. Cliffe Onganga, the rest were casual employees engaged under 3 months fixed term contracts.
47. That the contract for Jacob Mbohe portrayed him as a casual employee on contract term yet the parties had a Collective Bargaining Agreement (CBA) and the grievants were members of the union.
48. Reliance was made on various clauses of the CBA to urge that since the Respondent had not controverted Jacob Mbohe's evidence that he joined in 2010, the three months fixed term contract was an unfair labour practice since it violated the provisions of Section 37 of the *Employment Act*, 2007.
49. The decision in *Bakery Confectionary Food Manufacturing & Allied Workers Union (K) V Kenafri Industries Ltd* (2018) eKLR was relied upon in support of the submission that the Respondent could not engage Jacob Mbohe outside the provisions of the CBA.
50. Reliance was also made on the decision in *Kenyatta University V Esther Njeri Maina* (2020) eKLR.
51. As regards the reason for termination of the grievants employment, counsel relied on the provisions of Sections 43, 45 and 47(5) of the *Employment Act* to urge that it was the Respondent's burden to demonstrate that it had a valid reason to terminate the grievants employment. That the occurrence of the night of 26<sup>th</sup> February, 2016 was not attributable to the grievants as no evidence was adduced to demonstrate their culpability as RWI was not present when the machine was opened and his evidence was hearsay and those present, Mr. Mutuku and Mr. Kalendo did not testify.
52. That the statements by the Shift-In-Charge and Mixing Supervisor on record merely confirmed the incident and the grievants were not the dough mixtures.
53. It was urged that the grievants account of what transpired was credible.
54. Counsel, further submitted that the grievants were not informed of the outcome of the investigations as to whether they were implicated.
55. The decisions in *Philip Amwayi Wokinda V Rift Valley Railways Ltd* (2018) eKLR and *Peter Wangai V Egerton University* (2019) eKLR were relied upon to urge that the Respondent had failed to justify that it had a valid reason to terminate the grievants employment.
56. On procedure, counsel relied on Section 41 of the *Employment Act* to urge that though the Respondent issued show cause letters to the grievants, and they were suspended for 14 days and were turned away by the factory manager, and not allowed to access the work place, they were not taken through a disciplinary process.



57. Reliance was made on the decision in *Bakery Confectionary Food Manufacturing and Allied Workers Union (K) V Wrigley Company (EA) Ltd* to emphasize the essence of procedural fairness.
58. As regards the reliefs sought, it was urged that Cliffe Onganga and Jacob Mbohe were entitled to the reliefs sought.

### **Respondent's submissions**

59. Counsel for the Respondent identified four issues for determination, namely; whether the Claimant had jurisdiction to represent the grievants, nature of employment of the grievants, termination and the reliefs sought.
60. On jurisdiction of the Claimant to represent the grievants, counsel submitted that the Claimant had no jurisdiction to represent Mr. Jacob Mbohe as he was neither a casual nor permanent employee but a daily wage contracted person and the CBA did not cover him.
61. As to whether Mr. Jacob Mbohe and Malachi Ogere were daily wage workers, Counsel submitted that the two were daily wage labourers as they were being paid daily rates as confirmed by Jacob Mbohe and were not employed in 2010 and 2014 and were not at work for a continuous period.
62. That the court could not rewrite the contract on record and Section 37 of the *Employment Act* was inapplicable.
63. On termination of employment, it was submitted that the grievants employment was terminated by the Respondent because the moulding die unit and knife were damaged during their shift and it was a common occurrence causing losses to the Respondent and the grievants were issued with and responded to a notice to show cause and the requirement for procedural fairness was fulfilled.
64. Counsel further submitted that Jacob Mbohe's contract lapsed by effluxion of time.
65. That Cliffe Onganga abandoned the place of work.
66. Reliance was made on the decision in *Julius Kyalo Malonza V Ruth Osolo t/a Eraeva Catering Services* (2021) eKLR to reinforce the submission.
67. It was further submitted that RWI called the 1<sup>st</sup> grievant but he declined to resume duty.
68. Counsel submitted that the grievants assertion of unlawful termination was false and the grievants were not unfairly terminated from employment.
69. As regards the prayers sought, it was submitted that the grievants were not entitled to the prayers as the Respondent's evidence was more credible.
70. Finally, the Respondent's counsel submitted that the Claimant's case had no foundation in law as the 1<sup>st</sup> and 3<sup>rd</sup> grievants (Cliff Onganga and Jacob Mbohe) confirmed that they were paid the wages stated in their payslips and the 3<sup>rd</sup> Respondent had a daily payment and had no claim for pro rata leave.
71. That Cliff Onganga refused to resume duty when called.
72. That the contract of employment for Jacob Mbohe was discontinuous.

### **Determination**

73. The issues for determination are;
  - i. Whether Jacob Mbohe was a casual employee of the Respondent.



- ii. Whether the Claimant had the right to represent the grievants (Cliffe Onganga and Jacob Mbohe).
  - iii. Whether termination of the grievants employment was unfair.
  - iv. Whether the grievants were entitled to the reliefs sought.
74. As to whether Jacob Mbohe was a casual or term employee, parties adopted contrasting positions. While the Claimant submitted that under the CBA in force, Jacob Mbohe was not a casual employee by virtue of the provisions of Clause 45 of the CBA which reproduce to provisions of Section 37(1) of the Employment Act, 2007, the Respondent's counsel on the other hand urged that Jacob Mbohe was a casual employee as the contract on record provided for daily wage and were being paid daily.
75. The salient question is whether Jacob Mbohe was a casual employee in the first instance or had transitioned from casual to term as provided by Section 37 of the Employment Act.
76. Section 37 of the Act provides;
- 1. Notwithstanding any provisions of this Act where a casual employee –
    - a. Works for a period or a number of continuous working days which amounts 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.
77. In this case, Mr. Jacob Mbohe testified that he used to work on 3 months contract since 2010 followed by a one month break and the last contract lapsed on 31<sup>st</sup> January, 2016 but as confirmed by RWI he continued working awaiting the new contract and was on duty on the night of 26<sup>th</sup> February, 2016.
78. It is unclear why the Respondent had not issued a new contract 26 days after Mr. Jacob Mbohe's employment contract lapsed yet he was rendering services.
79. Instructively, the Respondent adduced no evidence to controvert Mbohe's evidence on commencement of employment in 2010 or demonstrate any discontinuation of employment from 2010 to 2016.
80. Relatedly, even though the contract on record indicates that Mbohe's daily wage was Kshs.645/=, the Respondent led no evidence that he was being paid on a daily basis to qualify as a casual employee within the meaning of Section 2 of the Employment Act which provides that;
- Casual employee means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”
81. Since Mr. Jacob Mbohe served the Respondent under renewable three months contract, he was not a casual employee within the meaning of Section 2 of the Employment Act. The court is satisfied and finds that Jacob Mbohe's employment was a term contract.



82. In *Rashid Mazuri Ramadhani & 10 others V Dosbi & Company (Hardware) Ltd & another* (2018) eKLR, the court stated as follows;

“The question we have to ask ourselves is whether the appellants were able to prove on a balance of probability that they were engaged by the employer for a period aggregating to more than one month so as to convert their casual daily contract to a term contract. This therefore takes us to the evidence adduced by one Rashid Mazrui Ramadhani.”

83. The court is guided by these sentiments where the court found the employee was not a casual employee.

84. As to whether the Claimant had the right to represent the grievants, counsel for the Respondent submitted that it was not in the case of Mr. Jacob Mbohe as he was a daily wage contracted employee. The Claimant’s counsel did not submit on this issue.

85. In determining this issue, the court is guided by the sentiments of the Court of Appeal in *Modern Soap Factory V Kenya Shoe and Leather Workers Union* (2020) eKLR where the court held as follows;

“In our judgement, we can see no reason why a registered union whose constitution so empowers should not have standing to institute a claim on behalf of its members and to present its members in court.

Article 41 of the *Constitution* of Kenya on labour relations protects the right of every person to fair labour practices and the right among others to join a trade union which in turn has the right to determine its activities.

Article 258 of the *Constitution* provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention. In the same spirit, Section 22 of the *Employment Act* provides that; . . .

We can see no reason therefore to fault the conclusion by the judge that the respondent has Locus standi to institute claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle the question. It is not a matter amenable for determination on the basis of a Preliminary Objection. See *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) E.A 696.”

86. In the instance case, the Respondent’s witness Mr. Christopher Nzioka confirmed on cross-examination that the three employees were members of the union, a fact he emphasized. This fact is also confirmed by the union’s letter to the Respondent dated 4<sup>th</sup> April, 2016 which the Respondent did not respond to as confirmed by RWI.

87. Having admitted in evidence that grievants were members of the Claimant union, the Respondent was estopped from alleging otherwise through submissions.

88. For the foregoing reasons, it is the finding of the court that the Claimant union had *Locus Standi* to represent Mr. Cliffe Onganga and Jacob Mbohe.

89. As to whether termination of the grievants employment was unfair, it is common ground that the grievants were suspended from employment on 4<sup>th</sup> March, 2016 for a period of 14 days and did not resume work thereafter.



90. RWI was categorical that the Respondent did not make any written communication to the grievants after the suspension. He testified that all communication was oral.
91. Although the witness testified that he and the General Manager called the grievants to report to work, a fact conceded by CWI and CWII, their evidence is that they actually reported but the Head of Production declined to take them back.
92. CWI confirmed on cross-examination that they reported to work place several times but were not given any work.
93. Instructively, the grievants were suspended by letter dated 4<sup>th</sup> March, 2016 to pave way for investigations. The letter stated that;
- “In order to get to the bottom of this and find out how such a big bolt ended up in the moulder taking cognizance of the previous damages, Management suspends your services for fourteen (14) days.”
94. That the suspension was intended to facilitate investigation was confirmed by RWI, on cross-examination.
95. Although RWI testified that three incidences had taken place when the grievances were working together, he adduced no evidence to demonstrate what the incidences were and when they took place and the action taken.
96. CWI, Mr. Cliffe Onganga confirmed on cross-examination that they were not informed of the outcome of the investigation and no written communication was given by the Respondent.
97. Relatedly, RWI confirmed that no disciplinary hearing took place.
98. Similarly, although RWI testified that Cliffe Onganga refused to resume duty, he adduced no evidence on the steps he took to bring the employment to closure.
99. In other words, the testimony that the grievants absconded duty was not supported by any evidence.
100. Needless to emphasize, an employer who alleges that an employee deserted the work place is obligated to adduce evidence to demonstrate the steps it took to contact the employee to resume duty and any further action including a notice to show cause as held in *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR. A similar holding was made in *Simon Mbitshi Mbane V Inter Security Services Ltd* (2018) eKLR.
101. In *Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd* (2020) eKLR, Onyango J. stated as follows;
- “From the evidence adduced in this matter, the Claimant maintains that the Respondent had suspended her from duty to pave way for investigations a fact that is not disputed by the Respondent. It therefore cannot now purport to claim that the Claimant is guilty of desertion.
- Further, even if she had absconded, she is by law entitled to a fair disciplinary process set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this court it did accord the Claimant a fair hearing prior to her termination.”



102. These sentiments apply on all fours to the facts of this case even though there was no termination letter.
103. In Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Ndolo J. stated as follows;
- “For a termination to pass the fairness test, it must be shown that there was not only substantively justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the Employer to effect the termination..”
104. Similarly, Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR, the Court of Appeal held;
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination to be done according to a fair procedure. . .”
105. The foregoing sentiments leave no doubt that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
106. Applying the foregoing propositions of law to the facts of this case, it is common ground that the moulding machine experienced a problem on the night of 26<sup>th</sup> February, 2016 and a bolt was found in the mould after the mould was cleared, which led to the suspension of the grievants for purposes of investigation. However, it is unclear if an investigation was carried out and what its findings were as the Respondent had no report to justify the lock out of the grievants from their place of work.
107. No investigation report or finding by the Respondent attributed culpability on the part of the grievants.
108. The Respondent provided no reason why it did not write to the grievants to resume duty if that was its desire as RWI appeared to suggest and as demanded by the union.
109. From the evidence on record, it is the finding of the court that the Respondent had neither a valid nor fair reason to terminate the grievants employment by way of lock out.
110. As regards the procedure employed by the Respondent, it requires no gainsaying that other than the notice to show cause which the grievants responded to and suspension, the grievants were not accorded any other opportunity to present their case and defend themselves.
111. The mandatory provisions of Section 41 of the Employment Act were not complied with. (See Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR).
112. From the foregoing, it is the finding of the court that termination of the grievants employment was both substantively and procedurally wanting.
113. As regards Jacob Mbohe whose contract lapsed on 31<sup>st</sup> January, 2016, he was still in employment on 26<sup>th</sup> February, 2016 when the incident occurred awaiting a new contract as RWI confirmed.
114. The Respondent cannot allege that his contract lapsed by effluxion of time yet he was in employment and was locked out with the rest.



115. The witness confirmed in evidence that he had given his Curriculum Vitae to one Margaret for purposes of renewal of contract and RWI did not deny that the Respondent had an employee by that name.

116. The two Claimants were consistent in their evidence that they were locked out, a fact evidenced by the letters from the union and Ministry of Labour and East African Community Affairs.

117. As to whether the grievants are entitled to the reliefs sought, the court proceeds as follows;

**i. A declaration that the purported lock out and/or redundancy was unlawful and illegal**

118. Having found that the lock out of the grievants by the Respondent was unlawful and unfair, a declaration to that effect is merited.

**ii. One (1) months' notice pay**

119. From the evidence on record, there is no indication that the Respondent gave the grievants any notice of the lock out or other notice.

The prayer for one (1) months' pay *in lieu* of notice is merited for both grievants.

**iii. Severance pay**

120. Granted that the grievants were not declared redundant by the Respondent, the prayer for severance pay is unmerited and is declined.

**iv. 3 months pro rata leave and 3 months pro rata leave travelling allowance**

121. Neither Cliffe Onganga nor Jacob Mbohe testified on the number of leave days outstanding and when they accrued.

The prayer is unsubstantiated and is declined.

**v. Days worked from February 29<sup>th</sup> to 1<sup>st</sup> April, 2016**

122. Jacob Mbohe adduced no evidence that he rendered any services to the Respondent from 29<sup>th</sup> February, 2016 to 1<sup>st</sup> April, 2016 and was not paid.

The prayer is declined.

**vi. 11 months pro rata leave and 11 months pro rata leave travelling allowance**

123. The witnesses adduced no evidence to demonstrate the number of leave days outstanding and when the days or the travelling allowance accrued.

In the absence of relevant particulars, the prayer is unsustainable and is declined.

**vii. 12 months compensation**

**1. Cliffe Onganga**

124. Having found that termination of the grievants employment was unfair, the grievants are entitled to the relief provided by Section 49(1)(c) of the [Employment Act](#).

125. In determining the quantum of compensation, the court has considered the following; The 1<sup>st</sup> grievant joined the Respondent in 2006 on fixed term 3 months contract with one month break until 24<sup>th</sup> April,



2012 when he was employed on permanent terms and thus served the Respondent for about 10 years in total. The grievant had no record of any previous misconduct or warning letter and did not contribute to the lock out. From the evidence on record, the grievant did not contribute to the termination of his employment and wished to continue.

In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.

## 2. Jacob Mbohe

The grievant joined the Respondent in 2010 on 3 months fixed term contracts with one month break till termination in February 2016, a duration of about 6 years and the last contract lapsed on 31<sup>st</sup> January, 2016 and wished to continue.

The grievant had no record of misconduct or warning and did not contribute to the lock out.

In the circumstances, the equivalent of 2 months' salary is fair.

126. In conclusion, Judgment is entered for the Claimant in the following terms;

- a. Declaration that the lock out of the grievants by the Respondent was unfair and unlawful.
- b. Cliffe Ongaga
  - i. One month's salary in lieu of notice.
  - ii. Equivalent of 3 months' salary.
- c. Jacob Mbohe
  - i. One month's salary in lieu of notice.
  - ii. Equivalent of 2 month's salary.
- d. Costs of this suit.
- e. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MARCH 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.**



**DR. JACOB GAKERI**  
**JUDGE**

