



Mayamba & 5 others & another v Feed the Children Kenya & another (Cause 152 of 2014 & 1227 of 2015 (Consolidated)) [2023] KEELRC 1103 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 152 OF 2014 & 1227 OF 2015 (CONSOLIDATED)**

**JK GAKERI, J
MAY 8, 2023**

BETWEEN

JECINTA IRENE MAYAMBA & 5 OTHERS CLAIMANT

AND

FEED THE CHILDREN KENYA 1ST RESPONDENT

SEINTJE VELDHUIS 2ND RESPONDENT

**AS CONSOLIDATED WITH
CAUSE 1227 OF 2015**

BETWEEN

**KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND
INSTITUTION WORKERS UNION CLAIMANT**

AND

FEED THE CHILDREN KENYA 1ST RESPONDENT

SEINTJE VELDHUIS 2ND RESPONDENT

JUDGMENT

1. Cause No. 152 of 2014 the claim was initiated by way of a memorandum of claim dated February 5, 2014 and a supplementary memorandum of claim dated 15th December 2015 alleging unfair and unlawful termination of the six (6) grievants who were working for the Respondents in the capacity of Community mobilizers. The Claimants are Jacinta Irene Mayamba, Lydia N. Mlamba, Pascalinah Ndinda Munguti, Simon Musyoki Mweu, Rose Mueni Makau and Florence A. Ayub.



2. The Claimants states that they worked for the 1st Respondent for 8 years from January 2006 until 18th December 2013 earning salaries of Kshs.6,000/= and Kshs.11,000/=.
3. The grievants seek the following prayers;
 - i. 12 months wages as compensation for loss of employment as provided for under Section 49(1) (c) of the Employment Act, 2007.
 - ii. One month pay in lieu of Notice 30 days
 - iii. Annual Leave for 8 years 168 days
 - iv. Severance pay for 8 years 120 days
 - v. December 2013 salary 30 days
 - vi. Salary Deduction of Kshs.2,500/=
 - vii. Salary underpayment from 2007- Dec 2013
 - viii. House Allowance 15% of the basic salary for 8years
 - ix. Public Holiday for 8 years 11 days per year
Totalling Kshs.3, 5411, 981/=
 - x. Any other award or benefit which this Honourable court may deem fit to grant in the circumstances of this case.
4. In Cause No. 1227 of 2015, the Claimant union initiated the suit by a Memorandum of Claim filed on 13th July, 2015 alleging unlawful termination of Thirty six (36) of its members without due regard to the provisions of the Employment Act, 2007 and their respective employment contracts with the Respondent.
5. The Claimant maintains that each of the Thirty six (36) grievants joined the Respondent on diverse dates as Community Mobilizers (CM) until December 2013 when they were unfairly terminated as indicated in Appendix 1A and 1B
6. The claimant avers that the grievants were on the December 18, 2013 verbally terminated by the Respondents after it received the Claimants letters dated 16th December 2013 seeking recognition of the union and deduction of union dues.
7. The claimant avers that the Respondents started victimizing, harassing and humiliating the grievants and eventually illegally and unlawfully terminated their employment after realizing they had joined a union.
8. The claimant further avers that the Respondents were unlawfully underpaying the grievants contrary to Section 48 of Labour Institutions Act, 2007 and the Regulation of Wages (General) Orders.
9. The Claimant avers that the Respondents ignored its demands forcing the union to report the dispute to the Cabinet Secretary, Ministry of Labour, Social Security and Services and after several conciliation meetings, a certificate of unresolved dispute was issued.
10. The claimant further avers that the grievants were terminated unfairly and unlawfully as they were not granted a hearing contrary to the principles of natural justice, they were terminated without any formal communication, no reason for termination was given and they were denied terminal benefits.



11. The claimant prays that the court finds that termination of the grievants employment by the Respondent was unfair and unlawful and seeks the following orders;
- i. 12 months wages as compensation for loss of employment as provided for under Section 49(1) (c) of the Employment Act, 2007.
 - ii. One month pay in lieu of Notice 30 days
 - iii. Annual Leave for 8 years 168 days
 - iv. Severance pay for 8 years 120 days
 - v. December 2013 salary 30 days
 - vi. Salary Deduction of Kshs.2,500/=
 - vii. Salary underpayment from 2007- Dec 2013
 - viii. House Allowance 15% of the basic salary for 8years
 - ix. Public Holiday for 8 years 11 days per year
Totalling Kshs.42,019,264/=
 - x. Any other award or benefit which this Honourable court may deem fit to grant in the circumstances of this case.

Respondent's case

12. In response to the Memorandum of Claim in Cause No. 152 of 2014, the Respondent filed Memorandum of Defence on 19th March, 2014.
13. In response to the Memorandum of Claim in Cause No. 1227 of 2015, the Respondent filed a Memorandum of Defence on 7th September, 2015.
14. The Respondent avers that the grievants were engaged by the 1st Respondent as volunteers providing voluntary services to their communities as Community Mobilizers (CM) for the HIV/AIDS program.
15. The Respondents aver that the voluntary services were on part time basis for which they would get Kshs.500/= per day as stipend for lunch and transport which was in line with the government strategy for NGO's working within communities.
16. The Respondents state that subsequently, the stipend increased to Kshs.1,500/= per week which was given at the end of the month. That the gratuitous amount of Kshs.6,000/= was provided to them on their request as they indicated they wanted to save the money.
17. The Respondent further state that the stipend rates were above the government prescribed rates.
18. It is the Respondent's case that the grievants did not provide the services on a daily basis but rather on part time basis half a day for 3 days a week.
19. The Respondents aver that the gratuitous amount given to the Community Mobilizers did not create an employment relationship as the mobilization skills were also utilised by other organizations within the respective communities.



20. The Respondent further states that the staff card given to the community mobilizers was intended to identify them to the target groups and to facilitate their movement within the community after incidents of imposters perpetrating fraud ostensibly as representatives of the 1st Respondent.
21. The Respondents state that when the community-based model was taken over by the government, the Community Mobilizers were informed of the same three months before the termination date of December 2013.
22. The Respondents aver that the union became involved after the grievants had been informed of the impending change therefore the allegations in the memorandum of claim are false and misleading.
23. The Respondents state that it engaged the claimants union representatives in meetings regarding lack of funding for the programme and that community mobilizers had been transferred to the government's structure and as such the union's position as pleaded is absurd and false.
24. The Respondents aver that any document signed by community mobilizers at the end of the project was voluntary and freely done with the said mobilizers expressed gratitude for the ex-gratia payment.
25. The Respondents deny the allegations on victimization and since the project came to an end before the union came into the picture, the union claim for employment dues is misguided and misadvised.
26. The Respondents state that there was no employment relationship between them and the grievants and no loss of employment, redundancy or termination took place and the grievants are not entitled to the reliefs sought in the claim and that gratuitous payment is not a right.
27. Further the Respondents state that any claim beyond 3 years is statute barred by virtue of the provisions of the [Employment Act](#), 2007.
28. The Respondents aver that the claim is made in bad faith and the grievants are not entitled to the prayers sought and urges the court to dismiss the same with costs.

Claimant's evidence 152/2015

29. Jacinta Irene Mayamba one of the Claimants testified on 17th January, 2019 and has since passed on and since she was the one who had authority to testify on behalf of the Claimants, counsel for the Claimants was permitted to substitute the witness and did so.
30. On 21st September, 2019 when the matter came up for hearing, the issue of administration of the Claimant's estate was brought up and counsel was requested to update the court on the issue and counsel informed the court the Claimants case should be deemed to have abated as he had no instructions from the administrators of her estate.
31. CWI, Florence Anupi Ayub testified on 26th October, 2021. In her written statement, the witness stated that they were employed by the Respondent as a Community Mobilisers (CM) from January 2006 until 18th December, 2013 at monthly salaries of Kshs.6,000/= and Kshs.11,000/= and served diligently. That their employment was terminated when the Kenya Scientific Research, International Technical and Institutions Workers Union (the union) came into the picture.
32. That the salaries paid by the Respondents was below the minimum wage.
33. The Claimant testified that despite being permanent employees, they were not issued with appointment letters.
34. That they were claiming Kshs.3,541,981/= from the Respondents.



35. In her oral testimony, the witness told the court that when they joined the union, the Respondents reduced their work days from 5 to 3. The witness furnished no evidence of the change and when it took place.
36. That they used to have a Christmas Party every year but she was late for the meeting on 18th December, 2013 and found out that other Community Mobilisers had signed a document she had not seen and only six did not sign namely; herself, Irene Mayamba, Rose Mueni, Simon Musyoki, Pascalinah and Lydiah Mulama, the Claimants in Cause No. 152/2015.
37. The witness denied that the Community Mobilisers were volunteers and her salary was Kshs.11,000/= per month as the team leader while her colleagues earned Kshs.6,000/=.
38. That the Respondent had not given them any notice of termination of employment.
39. It was her testimony that they did not proceed on leave.
40. On cross-examination, the witness confirmed that Jacinta Mayamba and Rose Mueni had since passed on.
41. That she was in-charge of Mathare, Huruma, Korogocho, Dandora, Maili Saba and Kayole where they would visit HIV Positive patients, provide food and report on each of them and her community was Dandora. It was her evidence that they had to build relationships with the people and were supported by the police for purposes of security and had no meeting with chiefs or politicians.
42. It was her testimony that she was a Community Mobiliser for 8 years. That in the HIV Programme, there were other donors other than the Respondents but she only knew the Respondents.
43. That all Community Mobilisers were terminated on the same day for having joined the union.
44. The witness confirmed that the letter dated 16th December, 2013 was the one by which the union forwarded the check off forms of 40 employees of the Respondent as members of the union and their names were on the list.
45. That the Respondents responded to the union's letter by letter dated 18th December, 2018.
46. The witness confirmed that she had no document on any union matters before 16th December, 2013.
47. As regards copies of minutes filed by the Claimants, the witness testified that the union had the originals but had copies for her use but had not filed minutes of the meeting held on 30th October, 2013 at Huruma which identified her as the 1st attendee.
48. The witness confirmed that the issue of Community Health Workers arose as the strategy of dealing with communities was about to change at the instigation of the government and this was about 1¹/₂ months earlier and union matters were not part of the meeting.
49. That although Mr. Onduto of the union attended the meeting held on 13th November, 2013, union membership was not discussed and the witness confirmed that indeed their separation with the Respondents was not actuated by union matters.
50. That the facilitator (Margaret MOH, Njiru District) emphasized that the work of a Community Health Worker was voluntary.
51. The witness maintained that they were employees as they had employment cards and Bank statements on record. For instance, her card was at page 17 of Appendix 1A identifying her as a Community



- Mobiliser and on its reserve, it stated that she was an employee of the 1st Respondent. The witness could not recall when the card was issued.
52. The witness confirmed that the minutes of the meeting held on 15th December, 2006 availed by the Claimants showed that cards were given to all those present for identification purposes as evidenced by minutes of 4th December, 2006 at the Chief's Office where the issue of identification came up under minute 2, "Own Meeting."
 53. The witness testified that the Mobilisers joined on the same day but had no evidence to prove the same and minutes for the meeting held on 11th December, 2006 revealed that new members were introduced at the meeting.
 54. The witness testified that not every member attended every meeting as it was not mandatory and apologies were accepted.
 55. That she had no evidence of payment from 2007 to 2009 and payment through the bank begun in 2009 – 2013.
 56. That although she alleged to earn Kshs.11,000/= per month, her statement had no deposit of the sum nor did the statement indicate that the amount deposited was a salary.
 57. It was her testimony that during the meeting held on 25th June, 2007, the Mobilisers were discussing bus fare as the transport money given by the 1st Respondent was not enough.
 58. The witness confirmed that the bank statements availed showed that while on 29th January, 2009 she received Kshs.11,000/=, on 27th February, 2009, she received Kshs.8,000/= and there was no pay for March and April 2009.
 59. The witness testified that the amount was fixed per month.
 60. That in March 2013, Lindah received Kshs.5,500/= and Jacinta Irene Mayamba received cash from another donor, (Pathfinder) in 2011.
 61. The witness confirmed that Lindah received Kshs.36,685.00 and Kshs.60,996/= from another donor, Heavenly Treasures at different times in 2010 and Kshs.39,425.00 in 2011.
 62. That Pascalinah Ndinda received Kshs.7,950.00 as KEMRI Salary on 15th July, 2011.
 63. The witness admitted that the Claimants were indeed receiving money from other organizations but could not explain the circumstances.
 64. That the mobilisers determined how best to treat their clients in the communities.
 65. It was her testimony that the Mobilisers attended a refresher course on 31st July, 2008 from 9.00 am – 1.00 pm and a one day course on 8th June, 2009.
 66. The witness confirmed that she attended the meeting held on 27th November, 2006 and had no minutes earlier than those and only 12 persons attended and the Chairperson was Dr. Maina. Only 4 of the Claimants attended the meeting.
 67. The witness testified that they were being informed of what to do by the Respondent.
 68. The witness confirmed that the meeting held on 15th December, 2006 at the ALL NATION CHURCH dealt inter alia with the issue of 'Resource and Use' and further confirmed that;
 - i. Each community leader would be provided with one packet of gloves.



- ii. Irene Mayamba offered to provide condoms for those who needed them.
 - iii. They would not meet the entire of the following week as it would be the Christmas week.
69. The witness testified that the alleged humiliation and harassment was not reflected anywhere on the record.
70. That they were unaware of the change of strategy but their union was involved and agreed on the ex gratia package.
71. The witness confirmed having attended the meeting held on 30th October, 2013.
72. That some of the Community Mobilisers signed the discharge voucher but for the 6 Claimants.
73. The witness insisted that she was a Community Mobiliser not a volunteer.
74. The witness confirmed that on 4th May, 2007, the Mobilisers were trained on support group, documentation and record keeping, Group work and Database review.
75. The witness confirmed that she could respond to questions on bank statements of other Claimants and could not tell who came to work and when.
76. The witness declined to respond to the question whether other donors working in the communities and paying some of the Claimant's money was stipend or salary.
77. On re-examination, the witness testified that they were employees of the 1st Respondent and the 2nd Respondent was its director.
78. That they joined in 2006 and had not been told they were volunteers as they were Community Mobilisers.
79. That at one point, the employer reduced their salary to Kshs.6,000/=.
80. The witness testified that she did not attend the meeting held on 13th November, 2013.
81. That the 1st Respondent had employees other than Community Mobilisers.
82. That a local chief identified the Claimants to the 1st Respondent's, June Koinange and then used to meet at the chief's camp but later had an office and were aware of Ministry of Health's requirements and had been briefed by one Dr. Muringo.
83. That volunteers are not paid for leave or severance.
84. That she was the senior team leader and had been briefed on the strategy. 1227/2015
85. CWI, Rebecca Wanyoike testified on behalf of 31 persons who had executed the letter of Authority dated 12th April, 2022.
86. It was her testimony that they were employed in January 2006 and served diligently until 18th December, 2013 when their employment was terminated on account of redundancy after they joined the union and the union demanded recognition.
87. That their salary was below the minimum wage from 2006 to 2013 and were claiming the sum of Kshs.42,019,264.00
88. In her oral testimony, the witness testified that they all signed the discharge voucher and received between Kshs.35,000/= and Kshs.40,000/= and were not paid service pay.



89. That they were given an option to resign from the union or employment but refused and were dismissed.
90. That the reverse side of the card stated that they were employees and worked every day 8.00 to 5 pm.
91. That she signed the discharge voucher and was not given time to read it.
92. On cross-examination, the witness confirmed that they were issued with certificates of appreciation not certificates of service, signed the discharge voucher and received cash before the suit was filed and did not return the cash and some of the colleagues such as Irene Mayamba, Rose Mueni and Mary Njeri had since passed on.
93. That she was unaware of the cards of the other Claimants in this case.
94. It was her testimony that they related to the Chief because the Chief was involved in community mobilization and his office was central to their work.
95. That the 1st Respondent did not dispense drugs.
96. That all joined the 1st Respondent on the same day and some joined in 2007, 2008 and 2006 and had no document on the alleged employment.
97. The witness testified that only the discharge vouchers had the correct date of engagement and that they were dismissed because of joining the union.
98. The witness testified that she could not read English to understand the union's letter to the 1st Respondent dated 16th December, 2013 on membership and union dues.
99. That the union was aware of the proposed shift of base from Nairobi.
100. That the meeting of 30th October, 2013 was held before the union wrote to the Respondents.
101. The witness confirmed that as per the minutes dated 30th October, 2013, the community strategy was explained by Margaret of Ministry of Health and Community Health work would be voluntary but in case of a sponsor, the members would benefit from trainings and a small allowance occasionally.
102. The witness confirmed she had no evidence to the contrary.
103. The witness further confirmed that the issue of transitioning had been discussed before the union joined the scene.
104. That they relied solely on the cards as evidence of employment and had only 24 identity cards of the Claimants and had no evidence to show that they served in the program.
105. The witness confirmed that in her case, whereas the memorandum of claim stated that she joined in January 2006, other documents indicated that she joined on 2nd September, 2009 and none of the grievants was a mobiliser for 8 years as alleged.
106. That they used the cards to identify themselves to the community and was a member when they were introduced but did not attend the meeting held on 15th December, 2006 when they were issued.
107. That the need for identification had been highlighted at the meeting held on 4th December, 2006.
108. The witness was emphatic that she could not tell when the others joined the 1st Respondent as they joined at different times.
109. That she had no evidence of payment from 2006 – 2009.



110. That only 13 statements were filed and 22 were not.
111. That payments from the 1st Respondent were not designated as salary and could not explain why some people received less pay.
112. The witness confirmed that the minutes dated 28th June, 2007 revealed that one member had raised the issue of transport in the evening and one Elvis would follow up.
113. The witness confirmed that Beatrice Njambi received Kshs.2,533/= from APHRC Research Centre and amounts from RENWA and had no pay for January 2013.
114. The witness further confirmed that mobilisers worked for other donors and were paid for services rendered.
115. That the 1st Respondent paid consistently.
116. The witness could not explain why in January 2013, Beatrice received Kshs.5,500/=.
117. The witness confirmed that Jane Njeri Chege was not paid in October 2013, Bernadine had no pay in May 2013 and had another source of income. Rebecca Wanyoike had no pay in January 2011 and Jane Wairimu received Kshs.17,000/= from Mothers to Mothers Kenya and twice from the 1st Respondent.
118. The witness admitted that in July 2013, she received Kshs.6,500/= from other places of work and confirmed they used to work elsewhere and could not explain how they doubled up as full time employees of the 1st Respondent as alleged.
119. That she could not tell what other groups were doing on a single day or engagement for the entire month.
120. That attendance or absence was not regulated by the 1st Respondent nor was approval needed.
121. It was her testimony that the amount paid by the 1st Respondent was motivational to render services.
122. That she was not aware that the union met the Respondents yet she had earlier testified that they brought in the union because of the salaries they were not being paid.
123. That only 32 of the 35 discharge vouchers were filed.
124. The witness stated that she had no evidence of harassment.
125. The witness confirmed that the union was on board and they had given it the mandate to negotiate on their behalf but had no evidence of when it did so.
126. That by letter dated 4th November, 2013, the union had indicated its intention to engage the Respondents on dues to the Claimants (grievants) and itemised the categories as notice, severance, leave and other benefits and proposed a meeting on 13th November, 2013.
127. The witness confirmed that no objection was raised by those present at the meeting of 18th December, 2013 and all signed except 4.
128. The witness testified that the 1st Respondent had employees other than Community Mobilisers and Mobilisers did not raise questions when Stephen disclosed that he would be proceeding on leave from 12th September, 2008.
129. That the witness had no employment contract with the Respondent and was neither paying tax nor making NSSF or NHIF contributions.



130. On re-examination, the witness testified that she joined the union on 5th November, 2013 and was designated as a Community Mobiliser.
131. About 6 or 9 identity cards were not on record.

Respondent's evidence

132. RWI, Agnes Mutisya testified that she was the Program Officer of the 1st Respondent having previously been a Social Worker. That the 2nd Respondent was the Regional Director of the 1st Respondent and the suit against her was misdirected.
133. It is her testimony that prior 2018 Lifespring Counselling and Training Centre offered counselling and other social support to communities in low income housing areas and the 1st Respondent engaged in feeding activities provided by Lifespring in its projects and in 2008, it became involved in the HIV/AIDS programs and other specialized organizations provided treatment and health support.
134. That under the National Health Sector Strategic Plan (2005/2010), Government approach on delivery of health care was the introduction of level I services to empower communities and households and the 1st Respondent's first contact was the local chief who introduced the Claimants to the 1st Respondent and its focus was feeding initiatives and the Claimants were identified as volunteers as Community Mobilizers in the HIV/AIDS program consistent with the Government Strategic Plan.
135. That the 1st Respondent was not responsible for the Claimants work conditions as they were not working but their welfare needs were catered for and they agreed to volunteer. The Respondent had no obligation to provide insurance cover to the Claimants and some of them were beneficiaries of the program. That the suit by the Claimants was an after thought.
136. The witness indicated that the Mobilizers were involved in the HIV/AIDS program from January 2008 when the 1st Respondent joined the program and were paid Kshs.500/= per day for transport and lunch consistent with the Operative Government Strategy, initially per activity and later weekly at Kshs.1,500/= and only those available for the period were paid the stipend and later on a monthly basis at their request so that they could save and had opened bank accounts, in addition to insecurity. That Florence Anupi and Josephine Njeri had their payment enhanced to Kshs.11,000/= as team leaders to enable them attend meetings at the field office and the same was reduced when the office was closed consistent with the Government Policy and the stipend was above prescribed Government rates and there were no complaints and the mobilisers offered services 3 days a week, payment was gratuitous and their mobilization skills were utilized by other organizations in their respective communities and no claims on employment were made.
137. That the card was intended to identify them to target groups for free movement to curb imposters and fraudsters and enhance security and they also had T-shirts.
138. That when the community based model was taken over by the Government after change in strategy and the Mobilizers were notified 3 months before the termination date.
139. The witness testified that subsequently, the union joined the scene, meetings took place, the Respondent computed the token of appreciation payable, for the services rendered, the mobilizers signed the discharge voucher were given certificates of appreciation and paid.
140. That Claimants in Cause 152 of 2014 rejected the amount payable to them but those who signed were bound by its terms.
141. That the 1st Respondent was still ready to provide the ex gratia sum it had offered the Claimants.



142. That the 1st Respondent acted in good faith, lacked funding for continuation of the program and the government had taken over the mobilization.
143. The witness maintained that the Claimants were not employees and the amount paid was a stipend and the program was approaching its conclusion when the union joined the scene.
144. That the grievants in Cause 1227/2015 agreed and confirmed that they had rendered voluntary services to their communities and received payment and the suit was not filed in good faith.
145. On cross-examination, the witness confirmed that she joined the Respondent on 1st April, 2009 and found the Claimants/grievants there. It was her testimony that unlike the Mobilisers, all permanent employees were notified of their terms of engagement. That Mobilizers were paid a stipend and did not work every day.
146. That the Ministry of Health changed the strategy and the grievants transitioned to the new program as ordained by the Ministry and membership of the union had no roles in the discontinuation of the program.
147. The witness confirmed that she prepared the attendance sheets for signature by the grievants/claimants.
148. That Florence and Josephine were paid more because they were required for 5 days a week and made tea for other staff until the office closed when they became ordinary Community Mobilizers.
149. That the monthly pay was at their instigation.
150. That the daily rate was Kshs.500/= accumulated to Kshs.6,000/= per month.
151. That the Claimants had volunteered their services to the communities they worked with and cards were issued to enhance security through identification and were issued on 15th December, 2006 to replace T-shirts.
152. It was her testimony that the meeting held on 20th April, 2009 was for Community Mobilisers but could not tell who took the minutes.
153. That she had no minute stating that the grievants/claimants were indeed volunteers.
154. The witness stated that she had no record that the Mobilisers worked for 3 days only.
155. The witness testified that she was unaware of the computation of benefits and did not attend the meeting held on 13th November, 2013 with the union representative.
156. The witness testified that she was unaware of what severance pay was.
157. That there was no minute that referred the Mobilizers as volunteers from 2006 to 2013 and after the change of strategy all were discharged.
158. The witness denied that it was a ploy to declare the claimants/grievants redundant.
159. The witness confirmed that awareness of the Ministry of Health Policy, June 2006 but had not read the entire document.
160. The witness testified that the new strategy had no provision for co-operation with Non-Government Organizations (NGO).
161. On re-examination, the witness testified that she was in-charge of Mobilizers in Eastlands and had psychologists and social workers to supplement government efforts.



162. That Mobilizers never claimed to be employees of the 1st Respondent but were doing so in court and bore the burden of proof.
163. The witness testified that during the meeting of the community mobilizers on 18th March, 2007, it was revealed that not all mobilizers attended all meetings as they were not required every day.
164. That one of the Mobilizers suggested that regulations be set to govern their activities. The issue of absenteeism was also raised and they were asked to have a duty roster.
165. That Mobilizers organized meetings and discussed how to carry on their activities and the mobilizers were doing the same for other bodies such as Pathfinder.
166. The witness testified that the grievants were not forced to sign the discharge voucher.

Claimants' submissions

167. The Claimants in their submissions distilled the following issues for determination;
 - i. Whether the claimants were employed by the Respondent under the terms outlined in paragraph 3 and 4 of the memorandum of claim
 - ii. Whether the claimant's termination was in accordance with the procedure provided under section 40, 41 and 45(5) of the [Employment Act](#) 2007;
 - iii. Whether there were genuine reasons to warrant the termination of the claimants per provisions of section 43,44 and 45(5) of the [Employment Act](#).
 - iv. Whether claimants were paid all their terminal dues
 - v. Whether the claimants are entitled to the prayers as outlined in the memorandum of claim.
168. On the first issue, the claimants submitted that their employment status was not voluntary as they were appointed in the year 2006 and issued with employment cards/badges affirming their appointment.
169. They submitted that the Respondent failed to produce any master roll preceding 2013 showing that the claimants only worked for 3 days a week as alleged and rely on the provisions in Section 74 of the [Employment Act](#) that obligates the respondents to keep employees records.
170. On the second issue, it was submitted that the grievants were terminated on account of engaging in union activities. The witness who testified on behalf of the Respondent admitted that no notice to show cause was issued to the grievants and she was not present at the time the claimants were allegedly paid their dues and had no idea how leave and severance pay were calculated.
171. The claimants submitted that no reason was tendered in regard to their termination and relied in the provision in Section 43 of the [Employment Act](#) that;

“Any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for termination, and where he fails to do so the termination shall be deemed to have been unfair within the meaning of Section 45 of the [employment Act](#)”.
172. It was further submitted that the grievants in Cause 1227 of 2015 were paid their salary in lieu of notice but those in Cause 152 of 2014 who were equally entitled were not paid.
173. It was submitted that having established that the grievants were unfairly terminated by the Respondent, they sought 12 months salary as compensation for unlawful and unfair termination.



174. The claimants submitted that the Respondent having paid severance pay to the grievants in Cause 1227 of 2015, the same should be paid to the Claimants in Cause No. 152 of 2014 at the rate of 15 day for each completed year of service.
175. The claimants submitted that payments remitted to the grievants was below the minimum wage and urge the court to award the claimants the amount underpaid.
176. The claimants further pray for payment of the December 2013 salary for those in Cause No. 152 of 2014.

Respondent's submissions

177. The respondents distilled two issues for determination;
 - i. Whether the community Mobilizers have proved that they were employees of the first respondent and whether the 1st respondent had proved its defence to their claims
 - ii. Whether the community mobilizers are entitled to the orders sought.
178. On the first issue, the Respondents submitted that an employee as defined in the *Employment Act, 2007* is a person employed for wages or a salary and an employer is defined as any person, public body, firm, corporation or company which has entered into a contract of service to employ an individual.
179. The respondents submitted that there was no employment relationship between themselves and the Community Mobilizers as no contract of service had been presented and that the ID cards issued were for identification purposes within the communities.
180. The Respondent relied on the holding in the case of *Wago Roba Molu V Personal Systems Computer Limited (2021)* where the court held that;

“While that may be the case, it’s also true that staff identity card produced by the claimant bearing the names of the Respondent is not conclusive evidence to prove the existence of an employment relationship...”
181. The respondent further relied on the holding in *Richard Stanely Githuku Kinuthia v Kenya Redcross Society (2015)* eKLR where Ongaya J. held that volunteerism arrangement could not be converted into an employment relationship.
182. The Respondent submitted that the Community Mobilizers were not entitled to the orders sought as they had not proved their case as there was no employment relationship between them and the respondents and the provisions of *Employment Act, 2007* could not apply.
183. Reliance was also made on the holding in *Benard ‘B’ Kones Ndiema v Twin Oaks Limited (2022)* eKLR where the court stated;

“Having established that there was no employee employer relationship between the claimant and the Respondent, it naturally follows that there was no unfair termination and that the claimant is not entitled to the reliefs sought. Accordingly, the claim is dismissed with costs.”
184. The respondents urged the court to dismiss the claim with costs

Findings and determination

185. The issues for determination are;



- a. Whether the Claimants in Cause No. 152 of 2014 and the grievants in Cause No. 1227 of 2015 were employees of the 1st Respondent.
 - b. Depending on the answer in (a) above,
 - i. Whether termination of their employment was unfair.
 - ii. Whether they are entitled to the reliefs sought.
186. Before delving into the issues distilled above, it is elemental to dispose of the peripheral but essential question of when the Claimants and grievants joined the 1st Respondent.
 187. Puzzlingly, none of the parties addressed the issue, which in the court's view required determination. While the Claimants and grievants insist that they joined the 1st Respondent in January 2006, neither of the witnesses had documentary evidence of any nature to establish the date when they joined the 1st Respondent. Indeed, some of the dates given by the parties were contradictory.
 188. In their supplementary memorandum of claim, the Claimants in Cause No. 152 of 2014 alleged that they joined in the year 2006. In the Memorandum of Claim, they alleged January 2006. In Cause No. 1227 of 2015, the grievants averred that they joined the 1st Respondent from January 2006.
 189. The Respondents averred that they joined in January 2008 in both cases.
 190. Strangely, documents prepared by the Claimant in Cause No. 1227 of 2015 show that all the 35 grievants identified therein joined the 1st Respondent from 1st September, 2006 to 2nd September, 2009 and all worked for between 6 years and 8 years.
 191. Discreditably, the witness in Cause No. 1227 of 2015, Rebecca Wanyoike testified in court that she and all the other grievants joined in January 2006 but had no evidence to prove the allegation and subsequently confirmed that she could not tell when the others joined.
 192. Similarly, the witness in Cause No. 152 of 2014, Florence Anupi had no evidence to demonstrate when she or any of the other Claimants joined the 1st Respondent.
 193. One of the witnesses testified that the Discharge Voucher had the correct dates of engagement yet the vouchers had no date of engagement.
 194. In sum, neither the Claimants nor the grievants adduced evidence to prove when they indeed joined the 1st Respondent, perhaps because of the nature of engagement and the services they were rendering and their appreciation of the relationship between the parties.
 195. Be that as it may, documents availed by the Claimants in the form of training schedule, certificates, workshops and minutes of meetings reveal that the parties started interaction sometime in Mid-November 2006.
 196. Evidence on record also reveal that the Claimants and grievants joined the Respondent at different times.
 197. The four sets of minutes on record dated 27th November, 2006, 4th December, 2006, 11th December, 2006 and 15th December, 2006 reveal that these were the initial meetings and dealt with housekeeping matters.
 198. The 1st meeting on 27th November, 2006 was chaired by one Dr. Maina, who was not an employee of the 1st Respondent, so was the second on 4th December, 2006.



199. Whereas the venue of the 1st meeting on 27th November, 2006 is not indicated, the other meetings were held as follows; 4th December, 2006 – Chief’s Office, 11th December, 2006 – Assistant Chief’s Office and 15th December, 2006 – All-nation Church.
200. From the foregoing, it is the finding of the court that Claimants and the grievants have failed to prove the dates on which they were allegedly employed by the 1st Respondent. The date of commencement of employment is an essential element of the employment contract.
201. For purposes of this judgement, the court will proceed on the assumption that the first Claimant(s) or grievant(s) joined the 1st Respondent in November 2006, the character of the relationship notwithstanding.
202. As to whether the Claimants and grievants were employees of the 1st Respondent, the parties adopted contrasting positions. While the Claimants/grievants submitted that they were employees of the 1st Respondent from January 2006 as Community Mobilizers, the Respondent submitted that they did not discharge the burden of proof as ordained by the provisions of Section 107 and 108 of the Evidence Act.
203. Intriguingly, none of the Claimants or grievants adduced evidence of how the alleged contract of employment was negotiated and concluded i.e who gave the commitments on behalf of the Respondent, when and where.
204. The Claimants/grievants case is founded on the following arguments;
- i. The 1st Respondent gave them identity cards which expressly stated that they were employees.
 - ii. They received monthly salaries.
 - iii. Those who signed the discharge voucher were paid one month’s salary in lieu of notice, severance and leave.
205. As regards the cards, evidence on record revealed that the Community Mobilizers came up with the idea of things the 1st Respondent was supposed to buy for them such gloves, caps, T-shirts and badges.
206. However, the minutes of the meeting held on 15th December, 2006 show that the badges were issued on that day and it was the first agenda item of the meeting.
207. The minutes had no record of the attendees. Those present are identified as Kawangware, Dandora, Huruma and Head Office.
208. During the meeting held on 4th December, 2006 at the Chief’s Office, the Community Mobilizers “own meeting” agreed that when taking the sick to the hospital, they ensure that they identified themselves as a community worker. The cards or badges were provided less than two weeks after the issue of identification had been raised in a meeting.
209. Needless to underscore, it is the duty of an employer to ensure that its employees are identifiable in a particular manner.
210. RWI testified that the cards were also issued as a security device in identifying the Community Mobilizers.



211. As regards the role of a staff identity card, the court is guided by the sentiments of Stella Ruto J. in *Wago Roba Molu V Personal Systems Computer Ltd (2021) eKLR* cited by the Respondents as follows;
- “While that may be the case, it is also true that the staff identity card produced by the Claimant and bearing the names of the Respondent, is not conclusive evidence to prove the existence of an employment relationship. There is more that needs to be established through oral and documentary evidence. It is therefore necessary to interrogate all the evidence presented before the court in order to arrive at a reasonable determination as regards the relationship of the two parties.”
212. The foregoing sentiments are consistent with the proposition that in the absence of a written contract of service, the relationship may be deciphered from the evidence adduced by the Claimants and any supportive documents, though none is conclusive evidence.
213. In the instant case, the minutes on record lay it bare that the staff identity cards or badges were issued for purposes of identifying the claimants/grievants as Community Mobilizers.
214. As regards the alleged monthly salary, the Claimants relied on the bank statements, though not all statements were filed.
215. Witnesses testified that team leaders were paid Kshs.11,000/= while other Community Mobilizers were paid Kshs.6,000/=, a fact the 1st Respondent admitted and bank statements on record confirm as much. However, the 1st Respondent’s evidence and submissions were unambiguous that the amount paid to Community Mobilizers was a stipend for transport.
216. Other than the Bank statements, the Claimants had no other evidence of the basis of the payment and none of the Claimants furnished evidence of payment before 2009. This is also confirmed by the union’s letter dated 25th November, 2013 on the claims made.
217. Strangely, none of the minutes on record appear to have addressed the issue of salary or stipend. It is unclear as to when the amount was agreed upon between the Claimants and grievants and the 1st Respondent.
218. During a meeting held on 25th June, 2007 at the Dandora Office, one of the Community Mobilizers by the name Elvis complained that Dagoretti was far and fare in the evenings was high and the transport money given by the 1st Respondent was not enough. One Jedidah had a similar complaint over fare to Dandora in the meeting. Both participants repeated the same during the A.O.B and the chair of the meeting, one Emily Wesonga indicated that the office would look into the issue.
219. The Claimants and grievants adduced no evidence to demonstrate how they could not afford bus fare of Kshs.70/= yet they allege to have been salaried employees of the 1st Respondent.
220. During the meeting held at Dandora on 2nd July, 2007, it was agreed that during food packing exercise, the Mobilizers be given bus fare to the office as follows; rainy season Kshs.100/= and regular season Kshs.70/=.
221. RW testified that the 1st Respondent initially paid the Community Mobilizers Kshs.500/= for three days a week, weekly at Kshs.1,500/= but the Claimants and grievants requested to be paid monthly for purposes of saving and the 1st Respondent agreed and the sum was computed at Kshs.6,000/= per month for 12 days.
222. The Claimants and grievants did not controvert this evidence.



223. Even assuming that the Claimants rendered services every day, no evidence was led that they had raised the issue with the 1st Respondent at any time.
224. It is common ground that the 1st Respondent generally paid the Community Mobilizers their respective amounts regularly as bank statements on record reveal albeit with variations for instance, on 29th July, 2009, Florence Anupi received Kshs.11,000/= but in February and May 2009 she was paid Kshs.8,000/=. In March 2013, Lindah was paid Kshs.5,500/=.
225. Surprisingly, the bank statements on record revealed that the Claimants and grievants were Mobilizers for other organizations and were receiving payments and RWI testified as much.
226. Both witnesses in Cause No. 152 of 2014 and Cause No. 1227 of 2015 admitted that Mobilizers worked for other organizations. For Instance, Jacinta Mayamba routinely received payments from Pathfinder. Similarly, Lindah Mlamba received substantial deposits from Heavenly Treasures. In addition, Ndinda Munguti received Kshs.7,950/= from KEMRI in July 2011.
227. Evidently, at no time was the issue of salary raised by the Claimants and grievants, though facilitation in relation to transport was.
228. On its part, the Respondent maintained that the amount given to the Community Mobilizers was a stipend to enable them reach the communities they were serving and there was no agreement on how much it would be.
229. Finally, the deposits into the Community Mobilizers bank account did not identify the nature of the payment.
230. On the amount paid to the Community Mobilizers in December 2013, the Claimants and grievants wondered how persons who were not employees were paid severance and leave.
231. The Respondent on the other hand maintained that it was token and the Mobilizers had been informed of the change of strategy as early as October 2013 and were thus aware that the 1st Respondent's engagement was coming to an end in December, 2013.
232. Counsel for the Claimants submitted that this was a ploy to declare the Mobilizes redundant but tendered no supportive evidence to rebut the Respondents allegation that there was a change of strategy by the Ministry of Health, a development that had been explained to the Mobilizers on 30th October, 2013.
233. Closely related to the foregoing is the allegation that Mobilizers' engagement was terminated when the union joined the scene, an allegation the Respondent denied.
234. In addition, the Claimants and grievants adduced no documentary evidence to demonstrate the nexus between the two.
235. In order to put this issue to rest, it is essential to examine the concatenation of events preceding the meeting on 18th December, 2013.
236. It is unclear as to when the Claimants and grievants became members of the union as none filed a subscription receipt or payment voucher. However, a union representative attended the meeting of 13th November, 2013 whose sole agenda was the transitioning of Mobilizers from the 1st Respondent's programs. The meeting agreed on payment of some monies to the Mobilizers.
237. During a subsequent meeting on 21st November, 2013, the union representative informed the meeting that he was not accompanied by any Mobilizer as earlier agreed. He reported that the Mobilizers had



- entrusted him fully with the matter and the members had no representative being new members of the union.
238. The union officials request for mobilizers payments was discussed, namely; notice pay, severance pay, annual leave and underpayment.
239. According to the minutes, the 1st Respondent agreed to look into the issue of a token of appreciation for the assistance the mobilisers had accorded the 1st Respondent.
240. The union was to appraise the mobilizers for their concurrence and a meeting was held on 3rd December, 2013. During the meeting, a mobilizer from Kawangware wondered whom the union represented as she was not a member.
241. Evidently, the union had not enlisted all the mobilizers by this date nor had it made a formal request for deduction of union dues, which it did by letter dated 16th December, 2013.
242. The foregoing reveals that the union joined the scene sometime in early November 2013 by recruiting members.
243. In the court's view, it is improbable that the 1st Respondent knew before hand that the mobilizers would be joining a union in early November 2013 and had convened the meeting of 30th October, 2013 to forestall the process by inter alia using a change of government policy as a pretext.
244. The evidence on record runs contra to the allegations by the Claimants and grievants.
245. Similarly, the averment that they were harassed after joining the union was not proven and Florence Anupi and Rebecca Wanyoike confirmed that they had no evidence of harassment.
246. Going back to the payments made to the Mobilizers who signed the discharge voucher, it is common ground that the 1st Respondent was ready and willing to give the Mobilizers a token of appreciation. The designations on the Discharge Voucher are traceable to the unions demand as evidenced by the minutes of the meeting held on 21st November, 2013 where the union representative, Mr. Onduto tabled his request i.e notice, severance, leave and underpayment. The 1st Respondent rejected notice pay as it had given the Mobilizers a 3 months notice.
247. The minutes revealed that the Mobilizers worked for half-day 3 days a week and the issue of leave could not arise according to the 1st Respondent and were being paid Kshs.500/= for half day thus underpayment could not arise.
248. Did the designation of the payments made to Mobilizers as leave pay and severance constitute the Claimants and grievants employees of the 1st Respondent?
249. Section 2 of the [Employment Act](#), 2007 defines an employee as
- “ a person employed for wages or a salary and includes an apprentice and indentured learner.”
250. The definition of an employer is sufficiently wide to include the 1st Respondent.
251. Finally, Section 2 defines a contract of service as
- “ an agreement whether oral or written and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership, but does not include a foreign contract of service to which part XI of this Act applies.”



252. Over the years, courts of law have developed tests for determining whether a contract of employment exists between parties. Among them is the control test which is premised on the element of control, tools provided, profit, risk of loss and integration.
- i. In employment, the employee agrees to use his skill to render services in return for a salary and would be under the control of the employer who determines what is to be done, how, where, when and by what means.’
253. While the Claimants and grievants urged that they were employees, the 1st Respondent urged that they were indeed volunteers and never became employees.
254. From the evidence on record, it is common ground that the Mobilizers joined the 1st Respondent at different times from late 2006 to 2009.
255. There is no evidence as to how the joining took place. What is clear is that no documentation was executed and no promises appear to have been made on payment other than facilitation.
256. Evidence suggests that an initial group was introduced to one June of the 1st Respondent by the local Chief. According to the minutes of the meeting of members held on 9th January, 2007, one Mama June joined the Mobilizers.
257. It is unclear how the Mobilizers were being paid before 2009 i.e whether cash or bank transfer.
258. There is credible evidence on the number of days they were to do the visitations but none on any supervision by the 1st Respondent.
259. It is evident that the 1st Respondent invested resources in training of the Mobilizers on various skills including reporting and left them to serve their communities.
260. The minutes of the meeting held on 15th December, 2006 leave no doubt that the Mobilizers managed their work schedules. The “Any Other Business” (A.O.B) states;
- “The following Monday we shall not meet because it’ll be the Christmas week. The whole week will be a relaxing week.”
261. The Christmas week was one (1) week away and the closing was later changed to 22nd December, 2006.
262. During the meeting held at Dandora on 4th February, 2008, the Mobilizers introduced a register to be signed by every Mobilizer while reporting on and off duty to be implemented with immediate effect.
263. Both witnesses admitted that attendance of meetings was not mandatory and members routinely gave apologies.
264. The 1st Respondent appear to have envisioned a situation where the mobilizers would serve their communities 3 days a week and report on their activities during the 3 half days but there was no one to ascertain that the visitations actually happened and absenteeism was common.
265. Evidence reveals that the mobilizers held their own meetings and strategized on how to perform their duties.
266. During the meeting held on 18th March, 2007, the attendees who included officers from the 1st Respondent, one Mobilizer suggested that regulations be set to govern their activities and they were advised to have a duty roster which would suit them.



267. Not a single copy of the duty roster or attendance registered was filed. The later had been agreed upon at the meeting held on 27th November, 2006.
268. Equally, during the meeting held on 15th February, 2007, it was decided that the team leader and one Wangoi to make arrangements on how the Mobilizers would be working on daily duties.
269. Similarly, at the meeting held on 4th February, 2008, all mobilizers agreed to buy a Thermometer and Surgical Spirit, a demonstration that they may not have been employees at all.
270. Finally, Rebecca Wanyoike testified that they had not raised the issue of leave before the 1st Respondent's programme came to a close nor the issue of pay as you earn (P.A.Y.E), NHIF or NSSF contributions.
271. As ordained by the provisions of Section 107 and 108 of the Evidence Act, he who alleges is duty bound to prove the allegations by adducing evidence.
272. Section 108 provides that;
The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. (See Ngere John Gilbertson V Impact Research and Development Organization (2020) eKLR).
273. It is the duty of the Claimants and grievants to demonstrate that they were salaried employees of the 1st Respondent.
274. From the documentary evidence on record, it is clear that the Claimants and grievants were neither appointed nor engaged as employees. They joined the predecessor of the 1st Respondent and subsequently joined the 1st Respondent as volunteers.
275. The minutes dating November 2006 and 2007 are clear that no contracts of employment were entered into between the parties.
276. There is no scintilla of evidence that the amount paid by the 1st Respondent was agreed upon. Indeed, those who joined in 2006 and 2007 sought a transport allowance only and the 1st Respondent acquiesced and was paying Kshs.500/= per day, 3 days a week from 2009. Although for some of them it was regular, for many it was not, nor was the amount the same for the entire duration.
277. Based on the evidence on record, the court is persuaded that the amount was a volunteer allowance as opposed to a salary which is a contractual term and at no time during the relationship did the parties have a dispute on the allowance. (See Richard Stanley Gathuku Kinuthia V The Kenya Red Cross Society (2016) eKLR).
278. The court is further guided by the sentiments of the Ndolo J. in Isaac Gakua Mwangi V Chief Executive Director Women Enterprise Fund (2022) as follows;
“In the persuasive decision in Universal Church of the Kingdom of God V Myeri Mxolisi Justice & 2 others (ZALAC) 2015/31) the Labour Appeal Court of South Africa declared that a volunteer Pastor earning a stipend allowance could not claim an employment relationship with the church. The South African Court went further to hold that an employment relationship must be evidenced by either an implied or express contract of employment.”
279. In the court's view, this is a case where the grievants and the claimants received regular payments for serving their communities at their convenience and attended meetings of the group once in a while, if



available and who were free to mobilize for other donors and received payment as well. Neither the 1st Respondent nor the Claimants and grievants herein envisioned an employment relationship.

280. In the circumstances of this case, the court is satisfied that the Claimants and the grievants have failed to prove on a balance of probabilities that indeed there was an employment relationship between them and the 1st Respondent.

281. The witnesses admitted in evidence that the Respondent had employees such as Stephen, the 2nd Respondent and others but relied on the Claimants and grievants to distribute food and visit members of the communities they worked with voluntarily.

282. Having found that the Claimants and grievants have failed to demonstrate that they had an employment relationship with the 1st Respondent, it follows that the questions of how the relationship was terminated and entitlement to reliefs do not merit determination in this instance.

283. In the circumstances, Cause No. 152 of 2014 and Cause No. 1227 of 2015 are unsustainable and are accordingly dismissed.

284. Parties to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF MAY 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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *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

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