



REPUBLIC OF KENYA



KENYA LAW

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**Odero & 226 others v Kenya Kazi Services Limited (Cause E497 of 2020)
[2023] KEELRC 1953 (KLR) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1953 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E497 OF 2020
J RIKA, J
AUGUST 16, 2023**

BETWEEN

MICHAEL OMONDI ODERO 1ST CLAIMANT
MICHAEL MUKWEKE MUTHUKU 2ND CLAIMANT
AMOS WASWA WANYAMA 3RD CLAIMANT
NYANGERESI MATONDO ENOCK 4TH CLAIMANT
GEORGE OMONDI SHEM 5TH CLAIMANT
BENJAMIN ASHIONO LUSICHI 6TH CLAIMANT
JARED OTIENO MUGA 7TH CLAIMANT
LAZARUS KATIKO MATHUVA 8TH CLAIMANT
FELIX PALAPALA 9TH CLAIMANT
JOHN KIMEU KISIO 10TH CLAIMANT
WALTER ODHIAMBO OBUDHO 11TH CLAIMANT
EDWARD LIAMBILA MAKOKHA 12TH CLAIMANT
DANIEL HARRISON MBINJI 13TH CLAIMANT
MISHAEL ODEK OSANO 14TH CLAIMANT
GEOFFREY MOMANYI MONAYO 15TH CLAIMANT
MUSA ANJERE SIMIYU 16TH CLAIMANT
ROBERT SIMIYU MUKASA 17TH CLAIMANT
PETER OUMA OPIYO 18TH CLAIMANT
ALFRED MASIKA WAFULA 19TH CLAIMANT



CHRISTOPHER MTUNGU NAMAYI	20 TH CLAIMANT
FREDRICK NYAGAKA NYACHUBA	21 ST CLAIMANT
GEOFFERY AURA OGALLO	22 ND CLAIMANT
LIVINGSTONE ANZANE ELAVADZA	23 RD CLAIMANT
MICHAEL MASAI CHEPKWESI	24 TH CLAIMANT
AMOS BARASA MASINDE	25 TH CLAIMANT
JARED MOGENI OMWERI	26 TH CLAIMANT
MOSES ANUMDA MOMANYI	27 TH CLAIMANT
ANTHONY MWANGI KINYUA	28 TH CLAIMANT
SAMWEL ISRAEL OMUNYIN	29 TH CLAIMANT
DOMINIC MWANZIA KIMANI	30 TH CLAIMANT
JAMES MUTWIRI NJAGI	31 ST CLAIMANT
MICHAEL WEKESA NAMINDA	32 ND CLAIMANT
JAMES MUNENE WANJOHI	33 RD CLAIMANT
PHILIP HAMISI WANJALA	34 TH CLAIMANT
GEORGE OGALO OPIYO	35 TH CLAIMANT
PATRICK KIPKOECH	36 TH CLAIMANT
MICHAEL ONYINKWA ASANGO	37 TH CLAIMANT
JOEL MWASYA KIMANZI	38 TH CLAIMANT
BENSON GICHUNUKU NABEA	39 TH CLAIMANT
RODGERS KWEYA	40 TH CLAIMANT
CHRISTINE MUSEMBI KISALI	41 ST CLAIMANT
DANIEL OCHIENG' OKUMU	42 ND CLAIMANT
HARON AGUYA VUGUSU	43 RD CLAIMANT
DAVID HONGO ALUKA	44 TH CLAIMANT
DENIS KYALO MULONZYA	45 TH CLAIMANT
NICHOLAS MURIITHI NJERU	46 TH CLAIMANT
ONWERE EVANS NYARIKI ONDARI	47 TH CLAIMANT
JULIA KENEI	48 TH CLAIMANT
MAURICE AKURE IRETA	49 TH CLAIMANT
WILLIAM NDUNGU NJUGUNA	50 TH CLAIMANT
BEN OBANDO OMBIMA	51 ST CLAIMANT



EVELYN KEMUNTO OMARI	52 ND CLAIMANT
LYDIA GAITI KITHINJI	53 RD CLAIMANT
LAWRENCE OKATWA MUKOLWE	54 TH CLAIMANT
PHILIP SOITA NDAYA	55 TH CLAIMANT
PAULINE NAKHUMICHA NABUTOLA	56 TH CLAIMANT
COLUMBUS KHANIRI AMUHAYA	57 TH CLAIMANT
EUGENIA NKUENE MARITHI	58 TH CLAIMANT
WILLIAM SAFARI LINGWA	59 TH CLAIMANT
RICHARD KIPKURUI CHIRCHIR	60 TH CLAIMANT
BRUNO SOLI MATINDU	61 ST CLAIMANT
TULULA RONALD KHAEMBA	62 ND CLAIMANT
HILLARY KIPKOSGEI KURGAT	63 RD CLAIMANT
FEDINAND WECHARE WANYAMA	64 TH CLAIMANT
CHRISPINUS JUMA KITUYI	65 TH CLAIMANT
ROBERT WASILWA TINGALA	66 TH CLAIMANT
NICHOLAS GITARI MRWARIA	67 TH CLAIMANT
CAROLINE AUDI	68 TH CLAIMANT
KENNETH KISALI MUDANYA	69 TH CLAIMANT
WYCLIFFE MWASAME WAFULA	70 TH CLAIMANT
MILTON WANYAMA NAMAKHELO	71 ST CLAIMANT
GEOFFREY MMBALA OFINDO	72 ND CLAIMANT
MESHACK SIKHAKHA KULOBA	73 RD CLAIMANT
GORDON NGAATU MUTUA	74 TH CLAIMANT
HYLINE MORAA NYACHIENGA	75 TH CLAIMANT
MCDONALD KWINGA NDAVI	76 TH CLAIMANT
NICHOLAS OGEMBO OYARO	77 TH CLAIMANT
HARUN AGGREY OMBEWA ONJIRA	78 TH CLAIMANT
JARED OKOTH GEMBO	79 TH CLAIMANT
NICHOLAS LUMALA LUMASIA	80 TH CLAIMANT
DAVID GIKUNDI	81 ST CLAIMANT
GODFREY MWAKALE	82 ND CLAIMANT
EVERLINE ACHIENG ONOKA	83 RD CLAIMANT



PATRICK KELE	84 TH CLAIMANT
TITUS MUTUA NZUNGO	85 TH CLAIMANT
PHILIP KIMOLI	86 TH CLAIMANT
JAMES MWANGI NGURE	87 TH CLAIMANT
JAIRUS WANDAYE OOI	88 TH CLAIMANT
PETER NAKITARE MUNANDA	89 TH CLAIMANT
SHELTON CHERIOT NDIWA	90 TH CLAIMANT
JOSHUA KIOGORA BARNABAS	91 ST CLAIMANT
JEREMIAH NYAKWARA ARANDA	92 ND CLAIMANT
HARUN KIBET KURUI	93 RD CLAIMANT
BRAMWEL WANGUSI	94 TH CLAIMANT
EVANS MBULA MUTUA	95 TH CLAIMANT
ANDREW OCHIENG JAKOYO	96 TH CLAIMANT
JULIUS KISANGAU NZALU	97 TH CLAIMANT
JAMES MAGE NGIGI	98 TH CLAIMANT
CHARLES OLUOCH OPONDO	99 TH CLAIMANT
MICHAEL NZIOKA SUVI	100 TH CLAIMANT
ANDREW WAMALWA MAUBE	101 ST CLAIMANT
DANIEL MOGAKA MOKAMBA	102 ND CLAIMANT
ANN NGULU MANYONGE	103 RD CLAIMANT
KIPKEMBOI CHERUYIOT	104 TH CLAIMANT
REUBEN RUTO CHEPSON	105 TH CLAIMANT
MUNGE CHRISTOPHER	106 TH CLAIMANT
ABEDNEGO KYALO MUTUA	107 TH CLAIMANT
BENARD MBWIKA MWENZWA	108 TH CLAIMANT
WASHINGTON ADEDE KIDEW	109 TH CLAIMANT
JOHN NJUGUNA THERU	110 TH CLAIMANT
CHRISTINE OKINDA	111 TH CLAIMANT
MAXIMILIA NASAMBU WANJALA	112 TH CLAIMANT
EMMANUEL LILECHI KANGAYIA	113 TH CLAIMANT
KENNEDY AROKO ODHIAMBO	114 TH CLAIMANT
SAMUEL NGURURU NJOROGE	115 TH CLAIMANT



ANDREW MAINA KAHIHU	116 TH CLAIMANT
SAMWEL GITHI KAGIRI	117 TH CLAIMANT
GEORGE MORARA OTISO MAKORI	118 TH CLAIMANT
SOLOMON WEMALI	119 TH CLAIMANT
EZEKIEL SIKUKU MUHUYI	120 TH CLAIMANT
MALACHI ONSARE NYANGAU	121 ST CLAIMANT
GEOFFREY WANYAMA	122 ND CLAIMANT
JANEROSE NANJALA MUTELE	123 RD CLAIMANT
MOSES MASIBO	124 TH CLAIMANT
GIDEON NYABUTO OGAO	125 TH CLAIMANT
ALFRED CHERUYIOT CHIRCHIR	126 TH CLAIMANT
COLLINS OCHIENG OKELLO	127 TH CLAIMANT
EMMA VUGUTSA MUDANYA	128 TH CLAIMANT
HUDSON AMUKOYA SHISERO	129 TH CLAIMANT
AMOS KUCHANJA KARISA	130 TH CLAIMANT
CHARLES WAWERU KIMANI	131 ST CLAIMANT
JOYCE BOSIBORI MAGETO	132 ND CLAIMANT
ELIJAH OKELLO AJOWI	133 RD CLAIMANT
MULUPI HANDA	134 TH CLAIMANT
HESBORN MUCHOKI	135 TH CLAIMANT
DAMARIS KWAMBOKA RATEMO	136 TH CLAIMANT
RHODA KHAVELE MWANGALE	137 TH CLAIMANT
JARED OKINDO MAGATA	138 TH CLAIMANT
FRANCIS MANGA WATINDI	139 TH CLAIMANT
TOBIAS OPIYO OGAL	140 TH CLAIMANT
ERICK MWANGI KARIUKI	141 ST CLAIMANT
HARON NYANGAU	142 ND CLAIMANT
JOSEPH KATILA WEKESA	143 RD CLAIMANT
PASCAL MUSYOKA MUTUTU	144 TH CLAIMANT
THOMAS KICHIA AJWERA	145 TH CLAIMANT
EMMANUEL WEKESA CHAKALI	146 TH CLAIMANT
JEREMIAH OGEMBO SARAMU	147 TH CLAIMANT



JOSEPH NAGANGA KURIA	148 TH CLAIMANT
STEPHEN MBAJA ADAGI	149 TH CLAIMANT
NORAH CHEMUTAI ROP	150 TH CLAIMANT
PAUL ATEMA ONYANCHA	151 ST CLAIMANT
KENNEDY MWAI ODALI	152 ND CLAIMANT
PAUL NJOROGE MAINA	153 RD CLAIMANT
WILSON RIOBA NYAKUNDI	154 TH CLAIMANT
LIVINGSTONE MAINA NDONGA	155 TH CLAIMANT
VIOLET OTANGA MAKOKHA	156 TH CLAIMANT
JARED ASAEL KOROSO	157 TH CLAIMANT
JACKSON ONYIEGO NYABOGA	158 TH CLAIMANT
PHILIP ODHIAMBO OCHIENG	159 TH CLAIMANT
JOSEPH NYAGA GACHANJA	160 TH CLAIMANT
DICKSON MATI MUTHEKI	161 ST CLAIMANT
FREDRICK WEKESA KITAI	162 ND CLAIMANT
EVANS NYASETI ORERO	163 RD CLAIMANT
GRACE NYAWIRA KIAMA	164 TH CLAIMANT
BEN KUTONDO MUSANYI	165 TH CLAIMANT
NICHOLAS AGEVI LUSENGELI	166 TH CLAIMANT
KENNETH LIMOZI IMBUGA	167 TH CLAIMANT
GEOFFREY SCHANGI	168 TH CLAIMANT
WILFRED AKUKU OGWA	169 TH CLAIMANT
BENJAMIN OBUOCHA ONDUSO	170 TH CLAIMANT
JUSTUS MOKONGU BABU	171 ST CLAIMANT
MACDONALD MAHOLI MUDENYA	172 ND CLAIMANT
ISSAC MWANGALE WAFULA WAMALWA	173 RD CLAIMANT
HENRY MOKAYA MATARA	174 TH CLAIMANT
NELSON TEKEREI RUTTO	175 TH CLAIMANT
GEOFFREY KIPLAGAT MAGUT	176 TH CLAIMANT
GILBERT BARASA WANYAMA	177 TH CLAIMANT
RONALD ORUCHO	178 TH CLAIMANT
CHRISPINUS MMBASU ISINDU	179 TH CLAIMANT



WILSON MULING PHILIP	180 TH CLAIMANT
HERBERT NGARE ARAKA	181 ST CLAIMANT
CHARLES KAMAU KINYANJUI	182 ND CLAIMANT
GEORGE ODERA OGADA	183 RD CLAIMANT
JACOB KIMELI	184 TH CLAIMANT
JOHN KEBASO SEME	185 TH CLAIMANT
MERCY KENDI	186 TH CLAIMANT
SIMON KAVASI	187 TH CLAIMANT
EVANS VISIA LIYENGWA	188 TH CLAIMANT
DICKSON KARAMA ANGASA	189 TH CLAIMANT
JOHN SHIYOKA MASERO	190 TH CLAIMANT
DAN KIPCHIRCHIR MUTAI	191 ST CLAIMANT
LAWRENCE KIRAITHE MUTAI	192 ND CLAIMANT
DON KINYANJUI KAMANDU	193 RD CLAIMANT
WYCLIFFE WANZALA GARD	194 TH CLAIMANT
DANIEL KIPYEGO TANUI	195 TH CLAIMANT
PAUL KIPCHIRCHIR KITUR	196 TH CLAIMANT
KENNETH MUCHANGI NJERU	197 TH CLAIMANT
FRANCIS KALOLI	198 TH CLAIMANT
JACKLINE NYABONYI OMBASA	199 TH CLAIMANT
JUSTIN GITONGA NJAGI	200 TH CLAIMANT
JOSEPH KARIUKI WAINAINA	201 ST CLAIMANT
ALFRED KIPKOSGEI KEMEI	202 ND CLAIMANT
KENNETH MALAIKA WASIKE	203 RD CLAIMANT
JOASH KIPLIMO PETER	204 TH CLAIMANT
SAMWEL OGANGO MAIKO	205 TH CLAIMANT
BENJAMIN OUMA OUKO	206 TH CLAIMANT
VINCENT KHAMALI WEKESA	207 TH CLAIMANT
WILFRED NGWANYI MBAYACHI	208 TH CLAIMANT
JULIUS ODHIAMBO OGOLA	209 TH CLAIMANT
SIMON GITAU KINUTHIA	210 TH CLAIMANT
SAMSON KIPLIMO BARGETUNY	211 TH CLAIMANT



ROGERS MUTUA MAKAU	212 TH CLAIMANT
AGNES NYAMBURA NJENGA	213 TH CLAIMANT
ANDERSON KABURU MICHENI	214 TH CLAIMANT
VINCENT SEKO IKOHA	215 TH CLAIMANT
JONATHAN KIPTOO MAIYO	216 TH CLAIMANT
SAMSON KIPKORIR KOSGEY	217 TH CLAIMANT
JACOB EKWEE EYAPAN	218 TH CLAIMANT
GERFAS OWUOR	219 TH CLAIMANT
AMBROSE NZUKI NGOLOI	220 TH CLAIMANT
ALPHONCE HAWEMBE NYANGWALA	221 ST CLAIMANT
SAMMY JOHN KALOKI	222 ND CLAIMANT
DANIEL WEKESA WAFULA	223 RD CLAIMANT
COSMAS KIPKOECH KEMEI	224 TH CLAIMANT
KENNEDY KASIJA SIMIYU	225 TH CLAIMANT
FRED BUYELA WASIKE	226 TH CLAIMANT
KENNEDY WAFULA KASILI	227 TH CLAIMANT

AND

THE KENYA KAZI SERVICES LIMITED RESPONDENT

JUDGMENT

Pleadings.

1. There were initially 192 Claimants in this Claim.
2. The Claim was amended, and further amended, naming 227 Claimants, listed above.
3. The Respondent filed an Application dated December, 15, 2020, seeking orders striking out of the claims by the 66th Claimant, Robert Wasilwa Tingala; 150th Claimant, Norah Chemutai Rop; 173rd Claimant, Issac Mwangale Wafula Wamalwa; and the 177th Claimant, Gilbert Barasa Wanyama.
4. A consent order was recorded on November 28 2020, allowing the Application.
5. The 4 Claimants had filed individual claims in other Courts, which were pending, at the time the consent order was recorded.
6. There are 223 remaining Claimants, to this Claim.
7. They are said to have given written authority to the 131st Claimant, Charles Waweru Kimani, to prosecute the Claim on their behalf.



8. They rely on their Memorandum of Claim, further amended at Nairobi on June 9 2021; bundle of documents on record; and witness statement of Charles Waweru Kimani.
9. Their Claim is that they were employed by the Respondent, a private security service company, as Security Guards. They provided security at the United States Embassy offices in Kenya, and also to the official residences of United States diplomats in Kenya.
10. They were members of Kenya National Private Security Workers Union [KNPSWU] as of the year 2013, when the Industrial Court granted them an award, in Cause Number 1499 of 2011, filed by KNPSWU against the Respondent. The award included commuter allowances and overtime pay.
11. They disagreed with their Union and recanted their membership, on the ground that the Union had failed to follow up on full implementation of the award.
12. They joined another Trade Union, Kenya Private University Workers Union [KPUWU] to advance their collective cause. This Union was later found by the Court, to have no relevance in the private security services industry, and could not be granted recognition by the Respondent. The Claimants were left in a limbo, without a Trade Union, to represent them.
13. The 131st Claimant, Charles Waweru Kimani stepped in to fill the void, engaging the Respondent on matters surrounding implementation of the award made on 2013, culminating in what the Respondent alleges was an industrial action, that took place on 28th January 2019. The action by the Claimants, resulted in dismissal by the Respondent, of 328 Guards, between 6th February 2019 and 12th February 2019.
14. They were at the time of summary dismissal on 5-year term contracts, commencing 1st March 2017, ending on 28th February 2022.
15. The Claimants state that summary dismissal decision taken by the Respondent, violates Sections 41, 43, 44, 45 and 46 of the [Employment Act](#).
16. They pray for Judgment against the Respondent for: -
 - a. Declaration that termination by the Respondent, of fixed-term contracts by way of summary dismissal, is irregular, unfair, unlawful, un-procedural and contrary to the [Employment Act](#).
 - b. 1-month salary in lieu of notice to each Claimant, based on their last salaries.
 - c. 12 months' salary for each Claimant, in compensation for unfair termination.
 - d. Gratuity/ service pay, for each Claimant.
 - e. Certificates of service to issue.
 - f. Costs.
 - g. All outstanding arrears, including overtime pay accrued under the employment contracts, as per annexure 2 of the Further Amended Statement of Claim.
 - h. Salary for each Claimant, for the remainder of the contractual period, as per annexure 1 of the Further Amended Statement of Claim.
 - i. Annual leave, both earned and anticipated, as per annexure 1 of the Further Amended Statement of Claim.



17. The Respondent filed a Statement of Response, further amended at Nairobi, on 13th July 2021; bundle of documents contained in 10 volumes; and witness statements of Ishmael MacMillan Murunga, Deputy Commander at the US Embassy Nairobi, Christopher William Manning, Respondent's CEO at the time of the dispute, and Respondent's then Head of Human Resources, Helga Kimanani.
18. It is admitted that the Claimants were former Employees of the Respondent, working as Security Guards at the US Embassy, Nairobi. The Embassy was a client of the Respondent.
19. The Respondent states that award in Industrial Court Cause Number 1449 of 2011, Kenya National Private Security Workers Union v. Kenya Kazi Services Limited, ought to be litigated in the relevant Cause, and not through this fresh Cause.
20. It is the position of the Respondent that award in that Cause was the subject of appeal proceedings in Civil Application No. NAI 108 of 2013, Kenya Kazi Services Limited v. Kenya National Private Security Workers Union. The Appeal was settled by consent of the Parties. Parties were engaged in negotiation of a fresh CBA signed between the Respondent and KNPSWU, in 2013.
21. The Parties also filed consent in Cause Number 1449 of 2011, recording the Cause as settled, upon registration of the fresh CBA in 2013.
22. The Respondent never had a recognition agreement with KPUWU, and KPUWU could not allege to negotiate with the Respondent on any issue, on behalf of the Claimants.
23. On 28th January 2019, the Respondent states, the Claimants were involved in an illegal strike.
24. The Respondent had a recognition agreement with KNPSWU, which granted KNPSWU the sole collective bargaining agency, with regard to all Unionisable Employees working for the Respondent.
25. It is admitted that the Claimants were on 5-year fixed-term contracts, ending on 28th February 2022.
26. The Claimants resigned from KNPSWU and joined KPUWU. They petitioned this Court in Petition Number 49 of 2018, Charles Waweru Kimani & Others v. Kenya Kazi Services Limited, seeking orders to compel the Respondent to grant recognition to KPUWU, as their Union of choice, for purposes of collective bargaining. The Petition was dismissed by the Court, in a Judgment delivered on 28th June 2019.
27. Throughout, Charles Waweru Kimani held himself out as the representative of all Employees. He led his colleagues in demanding for payment of commuter allowances and overtime. The Claimants persistently threatened to engage in illegal strike, which compelled the Respondent to seek protection from the Court.
28. Orders were obtained from the Court, in the presence of the Claimants' Advocates, barring the Claimants by themselves, or their agents, from demonstrating, calling strike action, or demanding to negotiate terms and conditions of service for the Employees of the Respondent.
29. On 26th January 2019, the Respondent's Managing Director Chris Manning received an e-mail from the Respondent's Project Manager at the US Embassy, containing messages from Charles Waweru Kimani, threatening to have the Security Guards withdraw their labour, on 28th January 2019. Strike action was aimed at compelling the Respondent to pay the arrears of benefits alleged to have accrued from the award of the Court in 2013.
30. The Country had just suffered a terrorist attack at the Dusit2 Hotel on 15th / 16th January 2019. The US Embassy is a sensitive installation, and Manning and the Respondent's Project Manager sought



out Charles Waweru Kimani and his colleagues, in an attempt to avert industrial action. Parties held a meeting to this end, on 27th January 2019.

31. Kimani and his team conceded at the meeting, that they indeed intended to have the Security Guards withdraw their labour on the following day. Kimani insisted that in order to avert the strike, Manning and the Project Manager had to attend to the Security Guards at their congregation, at a place near the US Embassy, known as the Bamboo.
32. Early in the morning on 28th January 2018, Manning and the Project Manager availed themselves at the Bamboo where the Claimants and other Security Guards were congregated. They explained to the Claimants that their grievances would take time to resolve. They asked the Claimants to report to work by 1.30 p.m. The Claimants declined to do so.
33. The US Embassy directed the Respondent to withdraw the Claimants from its premises, on account of abandonment of their duty. It withdrew their Embassy access badges.
34. The Claimants were issued notices to show cause why disciplinary action should not be taken against them. This was on the following day, 29th January 2019. They gave their respective responses. They were suspended for a week. They were invited for disciplinary hearings between 5th February 2019 and 8th February 2019. They were found to have engaged in an illegal strike and summarily dismissed. Charges against each Employee were specific. Kimani was charged with circulation of inciting messages; mobilizing US Embassy day shift Security Guards to boycott work on 28th January 2019; instigating disobedience of instructions to resume work, issued by the Managing Director-Kenya, the Regional Director East Africa, and the Project Manager; and disobeying orders issued by the Court on 11th October 2018. In answer to the notice to show cause, Kimani admitted that he called the strike.
35. The Claimants were dismissed fairly and on valid grounds. They were paid terminal benefits, comprising salary for days worked to the date of termination; accrued annual leave days; and other outstanding claims to the date of termination. There is no basis to grant the prayers for anticipated salary and benefits, over the remainder of the contractual period.
36. The Respondent prays that the Claim is dismissed with costs.

Hearing.

37. Kimani gave evidence on 23rd February 2022, and 28th June 2022, when the Claimants' case closed. The Respondents offered 3 witnesses, who were heard on 10th November 2022, and 17th February 2023, closing the hearing. The Claim was last mentioned in Court on 20th April 2023, when Parties confirmed filing / undertook to file and exchange their Closing Submissions.

Claimants' evidence.

38. As stated at the outset, all witness relied on their respective witness statements and adopted respective bundles of documents.
39. Kimani restated that the genesis of the dispute was in the award of the Court in Cause Number 1449 of 2011. Award of commuter allowances and overtime was not implemented. In December 2018, the Respondent agreed to pay commuter allowances in arrears, but did not pay overtime.
40. Kimani told the Court that he was the recognized representative of the Claimants. The Claimants were promised by the Respondent that by January 2019, there would be a mode of implementation of overtime pay in place. There was back and forth. The Claimants withdrew their membership of KNPSWU in 2016. They hence acted without a Union.



41. Manning called Kimani on 27th January 2019. It was agreed that Manning would meet all the day shift Security Guards the following day- 28th January 2019. US Embassy was notified. Kimani was authorized to announce the meeting over the radio.
42. The meeting took place, involving about 600 day- shift Guards. Manning and the Project Manager Steve Turner, attended. On the agenda was payment of arrears of overtime.
43. The objective was not met. Manning asked for time to consult the East African Regional Director, Arnold. He came back with the East African Regional Director. There was no concrete resolution. The East African Regional Director advised that the Respondent would provide buses for the Guards to be taken back to their workstations. The buses were never availed.
44. The Security Guards sat waiting at Bamboo, in the presence of the OCPD, until 6.00 p.m. Kimani advised his colleagues to go home and report for duty the following day, 29th January 2019. Most Guards wore uniforms at Bamboo, because they were on duty, while there.
45. The Claimants reported on duty the following day, only to be issued with notices to show cause. They were suspended for 7 days. They were invited for disciplinary hearings, held at various stations. They were heard and summarily dismissed. They appealed. Appeals were never heard. Summary dismissal decision was upheld.
46. Dismissal was disastrous. Families were broken. Some of the Guards died. The reason for dismissal was the same- insubordination. There was no disobedience from any of the Claimants. They did not refuse to report for duty. Kimani was dismissed on the additional ground of inciting his colleagues. He did not incite anyone. He did not disobey any orders from the Court, or disparage the image of the Respondent. He did not mobilize colleagues to boycott work.
47. The Claimants were not paid their terminal dues. They were in 5-year term contracts. They pray for terminal dues and compensation. They pray for overtime pay. It was easy to compute overtime, based on the award of the Court. The award remained in place, until there was a subsequent CBA. The Claimants' Union filed Cause Number 769 of 2015 seeking to enforce the award. The Cause was withdrawn by the Union. Commuter allowance was paid. Overtime was never paid. All the Claimants were beneficiaries of the award in Cause Number 1449 of 2011.
48. Cross-examined, Kimani told the Court that he joined the Respondent in the year 2008. He moved to the US Embassy in January 2012. He was a member of KPNSWU at the time. Cause Number 1449 of 2011 concerned CBA dispute. There were various awards from the Court. There was intention by the Respondent to challenge award in Cause Number 1449 of 2011, at the Court of Appeal. There was a consent dated 13th November 2013, signed by the Parties' Advocates, settling Court of Appeal Civil Application Number NAI 108 of 2013 [UR 71/ 2013. There was a consent of even date, filed at the Industrial Court in Cause Number 1449 of 2011, marking the Cause as settled, on the ground that the Parties had concluded and registered a fresh CBA dated 24th September 2013.
49. Kimani told the Court that the CBA dated 24th September 2013, contained terms and conditions of service, different from the award of the Court. Parties executed the CBA after negotiations.
50. He did not know when Claimant number 198, Francis Kaloli's contract was terminated. He did not know that Kaloli retired on 31st December 2018. Claimant number 227, Kennedy Wafula Kasili's contract was not terminated on the same date as Kimani's. Kimani would not insist that the prayers sought in the Claim, apply to these 2 Claimants.



51. The Claimants recanted membership of KPNSWU and joined KPUWU. KNUWU sought an order from the Court to be granted recognition by the Respondent. Recognition was declined.
52. The Court issued an order barring the Claimants from going on strike. The Claimants had not threatened to go on strike. They were served with the order. The order was still on force, in January 2019.
53. The Claimants gathered at Bamboo, along redhill road. It was 3 to 4 kilometres away from the US Embassy. Kimani did not ask the Guards to demonstrate at the US Embassy.
54. Kimani conceded that he circulated a telegram message to all Guards on the eve of 28th January 2019. He advised them, that they were to gather at Bamboo without fail. He advised that there would be no shift handover that day.
55. Kimani met Manning on 27th January 2019. Management was trying to stop the meeting of 28th January 2019. Kimani was accompanied by 3 colleagues who were all Parties in the Petition where an order against the strike action issued. He called off the meeting of 28th January 2019, but the Guards did not honour his instructions. Manning asked Kimani to call all the Guards to the meeting on 28th January 2019, which he did, through the control room.
56. Day Guards convened at the site by 5.30 a.m. Night Guards could not hand over. They stayed on duty.
57. Manning and the Regional Director both addressed the Guards. They did not give a proposal on payment of overtime. The Regional Director told the Guards to go back to work, and to wait for buses to ferry them to work. The buses never arrived.
58. Claimant number 197, Kenneth Njiru, stated on notice to show cause, that the buses came, but the Claimants did not board.
59. Kimani told the Court that access badges issued to the Guards by the US Embassy were withdrawn. They could no longer access the Embassy.
60. On 29th January 2019, the Claimants were issued with notices to show cause why they should not be disciplined. They all responded. They were all heard. Kimani did not have the company of a trade union representative at the hearing, because he considered himself to be a trade union representative. He was comfortable with the hearing.
61. He was charged with among other offences, the incitement of his colleagues. He conceded that he communicated to his colleagues via telegram. He conceded that there was an order of the Court, restraining the Guards from engaging in industrial action.
62. He did not see any money sent to his bank account by the Respondent, in terminal benefits. Other Claimants were paid. The Claimants had been provided 8 pairs of uniforms each, by the Respondent. Kimani did not return his, after dismissal. Some Guards returned theirs.
63. Kimani's pay slip shows he earned overtime, at a rate 1.5 and 2.0 on regular days and public holidays respectively. The item was always paid, but not in accordance with the award of the Court. Cause Number 245 of 2019 involved KPUWU and the Respondent. It related to the dismissal of Kimani, after the strike action, the same issue in dispute herein. Gratuity was paid at the end of every contract. The Claimants seek gratuity for the period 2017 -2019.
64. Redirected, Kimani told the Court that the meeting of 28th January 2019, was convened by Manning. The meeting called by Kimani did not take place. Manning called the meeting to appraise the Guards



about their arrears of overtime pay. Buses did not come to pick the Guards. The Guards did not disobey any order of the Court. There was no action taken by the Respondent, for disobedience of any order.

Respondent's evidence.

65. Deputy Commander, US Embassy, Ishmael MacMillan Murunga, reported to work on 28th January 2019. He found over 200 Guards had not reported to work.
66. He sought information from the Guard Commander. He was told that the Guards were away on industrial action. They had gathered at Bamboo, redhill road, about 1 km away from the US Embassy.
67. He was later told that the Procurement Office had secured buses, to ferry the Guards back to their workstations. 3 buses, 50 seaters, were procured. The buses gathered at Respondent's offices at westlands in Nairobi about 11.00 a.m. They proceeded to Bamboo. The Claimants jeered at them, and were aggressive. Murunga told the Court that the buses were compelled to speed off in the direction of Gachie, because they could not make a U-turn given the hostility they were met with, by the Claimants. Murunga personally recognized some of the Claimants at Bamboo. The buses returned after 30 minutes, expecting the situation would have calmed down. They found the Claimants more agitated.
68. Project Manager Steve Turner advised Murunga and his team to return to the Head Office. It was approaching midday. Murunga organized for relievers for the night shift Guards, who ought to have handed over to the day shift Guards that morning. The US Embassy wrote to the Respondent, advising that the strikers be removed from its facility forthwith.
69. Cross-examined, Murunga told the Court that the Respondent does not have a Transport Officer. Procurement Officer Langat, discharged this role. He procured 3 buses at 6.30 a.m. which assembled at the Head Office, westlands.
70. Murunga was not aware that top Management of the Respondent were meeting with the Guards at Bamboo. He did not have documents to show procurement of the buses. He arrived at Bamboo at around 11.00 a.m. He had instructions to ferry the Guards to their respective workstations, to relieve night shift Guards. There was an industrial action at Bamboo, not a meeting called by Management. He did not find Manning and Turner at the meeting. He was informed that they had been there.
71. Reliever Guards were assigned duty to relieve the night shift Guards. They were commercial Guards, commissioned by Manning. Murunga found the reliever Guards at the Head Office by midday. Relievers were not sought, from early that morning. Murunga was not aware that Manning addressed the Guards at Bamboo. Redirected, Murunga told the Court that Kenneth Njiru confirmed on notice to show cause, that buses were sent to Bamboo place.
72. CEO Christopher William Manning, told the Court he was the Respondent's Managing Director, for the period 2018-2021.
73. Initially, the Claimants had protested in the month of April 2018 concerning their association with KPUWU. The Claimants petitioned the Court, which declined recognition of KPUWU by the Respondent, in view of the fact that the Respondent already has a recognition agreement with the KNPSWU.
74. There was a second industrial action, in September 2018. The Claimants were pursuing arrears of commuter allowances. They staged a sit-in. Management held a meeting with the Claimants and they called off their sit-in on 24th September 2018.



75. In October 2018, a court order issued barring the Claimants from taking further industrial action. It was still in force in January 2019.
76. In January 2019, Manning was called by the US Embassy and informed that there had been representations made by the Guards, that they intended to go on strike. He also received messages from Charles Waweru Kimani, indicating that the Guards intended to withdraw their labour. Kimani circulated messages to the Guards, asking them to withdraw their labour, and converge at Bamboo place.
77. Manning held a meeting with Oluoch, a colleague of Kimani in the leadership of the Guards, in the afternoon of 26th January 2019. Oluoch said he could not hold the meeting, in the absence of Kimani. The meeting was rescheduled to 27th January 2019, with Kimani in attendance.
78. The meeting was to dissuade the Guards from going on with their industrial action. The US Embassy was very concerned about security at the Embassy.
79. Kimani used radio to inform the Guards, that Manning would meet them at Bamboo on 28th January 2019. Manning addressed the Guards on 28th January 2019. He told them it was not the right time to strike.
80. A terrorist attack had taken place in Nairobi, at Dusit2 hotel complex, about 2 weeks back.
81. Manning implored the Guards to go back to work, stating that he would do his best to address their grievances. The meeting was tense, but peaceful and occasionally heated. He left Bamboo at about 7.30 a.m. He returned later with the Regional Director Arnold, and addressed the Guards. They declined cessation of their industrial action. They said they would not go back to work, until they received their overtime pay.
82. Murunga went to Bamboo to ferry the Guards back to work in buses procured by the Respondent. He received hostile reception and returned to base.
83. The US Embassy instructed the Respondent to have its access badges withdrawn from the strikers. The Guards were advised to report to the Head Office. They were taken through disciplinary process.
84. The order issued by the Court was drafted to avoid disruption of operations. Manning had addressed the Claimants, and given an undertaking to continue negotiating their overtime grievances. The award of the Court in Cause Number 1449 of 2011 set out guidelines. The Claimant's Union and the Respondent met, negotiated, executed and registered a fresh CBA. The Parties filed consent orders on Appeal, and in the originating Cause Number 1449 of 2011. There was no need to pursue Appeal in light of the fresh CBA.
85. On cross-examination, Manning told the Court that the CBA, provided for commercial Guards, and Guards working at the US Embassy. Consent orders were recorded in 2013. Bamboo meeting was in 2019.
86. Manning stated he had tried to talk to the Guards at the meeting at Bamboo, to arrange for payment of their arrears. He had consulted the Respondent and the US Embassy. He would not recall what formula in computation of overtime pay was adopted. Bamboo meeting was tense, but peaceful. The orders of the Court in the Petition restrained the Claimants from protesting on 29th July 2018. Manning did not recall if the Respondent instituted contempt of court proceedings, in light of alleged disobedience to the order.



87. The meeting of 27th January 2019 involving Manning, Kimani and Oluoch, was called by Manning. The meeting at Bamboo on 28th January 2019, had been organized before 27th January 2019 by the Claimants.
88. Kimani informed the Guards by radio, that Manning would attend their meeting. Manning was not the convenor of this meeting.
89. The Guards went to the meeting in uniforms. They were supposed to start their day shift at 6.00 a.m. Some were at Bamboo by 5.45 a.m. Manning left the meeting at 7.30 a.m. He consulted the Regional Director and the US Embassy. He returned to Bamboo in the company of the Regional Director and implored the Guards to call off their industrial action, and report to work. The Guards declined to return to work.
90. Buses were deployed at around 11.00 a.m. The Guards did not board. US Embassy was not the Claimants' Employer; the Respondent was. The Respondent did not victimize the Claimants, based on the complaint by the US Embassy.
91. Manning did not run the disciplinary hearings. The Human Resource Office led by Helga Kimanani discharged this role. Disciplinary proceedings took place at diverse locations in Nairobi. Manning did not recall participating in Appeal hearings. He did not recall who sat on Appeal.
92. Redirected, Manning told the Court he signed the dismissal decisions on Appeal, but did not conduct the hearings. He and the Regional Director, pleaded with the Claimants to resume work, to no avail. The Claimants were in breach of the order issued by the Court.
93. Helga Kimanani explained that the Respondent formed 10 disciplinary committees at different centres. She sat with other senior managers, heading different committees. All the affected 328 Employees, were given oral hearings and dismissed. They were given the right of appeal.
94. Appeals were similarly handled by different committee. 175 Claimants appealed through their Advocate. Some Claimants attended in person and disowned the Appeals. The Appeals were declined and dismissal decision, communicated to the Claimants.
95. The Claimants were paid their terminal dues, and availed certificates of service. They were paid, notwithstanding that some had not cleared with the Respondent.
96. Francis Kaloli Okoth, Claimant number 198 retired on 31st December 2018, upon attainment of mandatory retirement age. He was not in employment in 2019 and was not involved in the industrial action. He was not summarily dismissed. He retired in 2018. His letter of retirement is exhibited at page 3006 of the Respondent's documents.
97. Kennedy Wafula Kasili, Claimant number 227, was summarily dismissed in February 2021, for reasons unrelated with the industrial action, in January 2021. His letter of summary dismissal is dated 11th February 2021, at page 3007 of the Respondent's documents.
98. Commuter allowance was paid from 2017. It was Kshs. 1,700 per month previously. It was agreed between the Respondent and the US Embassy to increase the same to Kshs. 2,500. It did not stretch back to 2012.
99. Kimani was agitating for arrears from 2012. The award in Cause Number 1449 of 2011 was superseded by the CBA negotiated, executed and registered by the Parties in 2013. The Wage Orders state that Guards are paid overtime, over and above 52 hours a week. US Embassy was seeking review of overtime pay, as Guards there could only work for 5 days a week. Commercial Guards could work for 6 days a



- week. The Claimants were agitating to be paid on daily basis to bring them at par with the Commercial Guards.
100. Cross-examined, Helga Kimanani told the Court, she was not sure if award in Cause 1449 of 2011, was compromised by the Parties on Appeal. She was not sure if there was a Judgment on Appeal. Consent states there was no need to proceed on Appeal. Overtime was not paid as per the award.
 101. The Disciplinary Procedure Manual states that the chair, will chair the disciplinary committee. Kimanani was chair to one of the committees. She did not sit on Appeal. Manning did not chair any committee on Appeal. He communicated decisions to dismiss the Appeals.
 102. Kimanani did not attend the meetings on 27th January 2019 and 28th January 2019. Overtime negotiations would be based on current CBA, not on past CBAs. Parties were not looking backwards. The Claimants were pursuing something the new Management was not privy to. The Claimants were disadvantaged, compared to Commercial Guards. They could only have overtime of 8 hours in a week of 5 working days, while their counterparts could have as many as 20 hours of overtime, working 6 days a week.
 103. There was an order of the Court, which restrained the Claimants from taking industrial action. It is not correct that Management met with the Claimants, and agreed to meet at Bamboo on 28th January 2019. This was a strike, not just a routine employer-employee meeting. Management attended, but did not convene the meeting.
 104. The Claimants were entitled to salary for days worked, accrued annual leave, and any other pending claims as at the date of dismissal. Their terminal benefits were deposited in their respective bank accounts, around April 2019. CBA registered in 2013, did not go by the award of the Court preceding it. It introduced fresh terms and conditions of service.
 105. The issues are whether: -
 - a. The Claimants were involved in industrial action, on 28th January 2019, or just a meeting called by Managing Director Manning, at Bamboo place;
 - b. They were dismissed fairly in accordance with Sections 41, 43 and 45 of the [Employment Act](#); and whether,
 - c. They merit the reliefs sought.

The Court Finds: -

106. The Claimants are former Employees of the Respondent. They were assigned private guard duties at the US Embassy, Nairobi. They were employed on 5-year term contracts, commencing 1st March 2017, lapsing of 28th February 2022.
107. They were dismissed on diverse dates on related grounds, stated by the Respondent to be insubordination; failure to report on duty on 28th January 2019 and instead staging a sit-in/ industrial disruption at Bamboo Tree; and disobeying orders and management directives to return to work.
108. The lead Claimant, Charles Waweru Kimani, was charged and found guilty of the additional offence of inciting the other Guards, to stage sit-in / industrial disruption.



(a) Industrial action / meeting on 28th January 2019.

109. The Claimants' position is that on 28th January 2019, they attended a meeting at Bamboo place, off redhill road, which was convened by Managing Director Manning. The agenda was to appraise the Claimants and other Guards, on payment of their overtime arrears. They hold that they were still on duty while at redhill, and went there adorned in their work uniforms. They were on duty at Bamboo. They were not on strike. They could not turn down a meeting convened by Managing Director Manning.
110. The Respondent's position is that Manning did not convene the meeting. The Claimants, led by Kimani convened the meeting. Kimani had instructed the Guards to withdraw their labour at the US Embassy. Manning met Oluoch, a colleague of Kimani in the leadership of Union-less Guard unit serving the US Embassy, on 26th January 2019, to implore him to call off the intended meeting. Oluoch told Manning that he could only engage Manning, in the presence of Kimani.
111. Manning, Kimani and Oluoch met on the eve of the meeting, on 27th January 2019. Manning engaged Kimani and Oluoch to avert the crisis that was unfolding. Kimani informed Manning that, for the crisis to be averted, he had to attend the meeting on 28th January 2019 and address the Guards, who already had been advised by Kimani to converge at Bamboo.
112. It was therefore not Manning who convened the meeting; he was drawn into the meeting by Kimani, in a desperate bid, to avert the withdrawal of labour by the Guards, slated for 28th January 2019.
113. There is no evidence at all, that Kimani called off his meeting after consulting Manning on 27th January 2019. There is no evidence that the meeting on 28th January 2019 was a Manning-meeting, and not a Kimani-meeting, as submitted by the Claimants.
114. Having ensured that Manning would attend the meeting, Kimani went back to the social media and put out a highly incendiary WhatsApp message to all the Guards, referring to them as Comrades Team, calling them to arms, on 28th January 2019.
115. He told them that: the 11th hour had arrived; command was about to be given; Canaan would be real; the Gardworld [Respondent's umbrella business group] leadership had schemed a very evil plan against Guards everywhere; and that Gardworld intended to revise Guards' salaries downwards, because it was thought that the Guards earned a lot of money.
116. Kimani states that he had given the Respondent an ultimatum, the Wednesday immediately preceding 28th January 2019, and that the Respondent had kept mum. This confirms that Kimani was the convenor of the meeting, and that Manning was just drawn into the meeting, in a desperate bid to avert an industrial crisis.
117. Kimani further went beyond the known grievance concerning overtime arrears, informing the Guards that the Respondent, in addition to cutting their salaries, intended to sack almost 200 Guards in the next 3 months. " Time has come to finish them, before they finish us... I declare Monday the 28th [January 2019] the big day when we get our arrears!" Kimani roared. He told the Guards he expected them to be at Bamboo by 5.30 a.m. Evidence on record confirms the Guards were present at Bamboo, as early as this hour. It is preposterous to turn around and allege that the meeting was convened by Manning.
118. His instructions to Guards, not only in Nairobi but in other outposts such as Kericho, Kombewa, Kisian and Kondele, was clear: no night shift Guard was to hand over duty to any day shift Guard; no day shift Guard was to be at their respective positions; in Nairobi, supervisors were to ensure there was



no shift hand over, and ensure that all Guards were at Bamboo place; and all Guards including those on leave, and in commercial service, were expected at Bamboo.

119. Kimani states that the Americans were well –briefed, and the action would not come as a surprise to them. He declared that the time from midnight [27th January 2019] until midday on 28th January 2019, would be spent by the Guards in fasting and prayer. He declared a fierce battle, that would end in the Claimants receiving “our millions that was taken away from us a long time ago.” It is clear that Kimani called the Guards to arms. He characterized the Claimants as soldiers in a military, concluding ominously that, “Kitaeleweka.” [Kiswahili, loosely translated to mean, there shall be reckoning].
120. The meeting was planned and executed by the Claimants. The Court is convinced that Kimani, not Manning, convened the meeting at Bamboo, on 28th January 2019.

Was the meeting an industrial action?

121. An industrial action is a concerted action, taken by Employees, to put pressure on their Employer to meet certain demands. In this instance, the Claimants were putting pressure on the Respondent to pay them overtime arrears, which in their view, arose from the award of the Industrial Court way back in 2013.
122. Industrial actions include strikes, and actions short of strikes, such as picketing, go-slows, sit-ins, and demonstrations. When Employees cease work, acting in combination, or concerted refusal under a common understanding to continue working, for the purpose of compelling their Employer to accede to any demand in respect of a trade dispute, they are deemed to be on strike, as defined under Section 2 of the *Labour Relations Act*. The key elements, are that there is cessation of work by Employees, aimed at pressuring the Employer to redress grievances, and grant certain demands.
123. The Claimants ceased work, and in concert, demanded to be paid their overtime arrears. They congregated at Bamboo place, which was not their designated place of work. They were supposed to take over from the night shift Guards, on early Monday morning of 28th January 2019. They did not, but instead congregated at Bamboo place. The night shift Guards had no one to hand over to. The instructions by Kimani was that the day shift Guards were to report to Bamboo place, not to the US Embassy, and that there would be no handing over by the night shift Guards. There was cessation of work by the Claimants, the whole day on 28th January 2019.
124. It is absurd, for the Claimants to submit that they were wearing their uniforms, and were at work at Bamboo place. An Employee is not deemed to be at work, simply because he adorns his work uniform; he must be at his designated place of work.
125. The Court is satisfied that the Claimants were engaged in an industrial action, be it characterised as a strike or actions short of a strike.

Legitimacy of the industrial action

126. The Claimants ceased their membership of KNPSWU and sought representation of KPUWU unsuccessfully. They at some point sought to act through what was termed as a Special Purpose Vehicle [SPV], but did not make any headway within the labour relations legislative framework.
127. They designated Charles Waweru Kimani as their leader. The Respondent engaged him on behalf of other Guards. He acted as a trade unionist, and considered himself one. At his disciplinary hearing, he stated he was not accompanied by a trade union representative, because he considered himself a trade union representative.



128. He was acting for non-union Employees, and was not a trade unionist. He was not a member of any union. The question may be asked whether, a non-union Employee has the same right to strike, as enjoyed by Employees represented by trade unions?
129. Article 41 [2] [d] grants every worker the right to go on strike. The right can be exercised individually, or through a trade union. The worker has the right to go on strike, which allows the worker to withdraw his labour, without the involvement of a trade union. He also enjoys the right, under Article 41 [2] [c], to form, join or participate in the activities and programmes of a trade union. Participation in the activities and programmes of a trade union, would include participation in strikes called by the trade union. The right to strike is associational, as well as individual.
130. Strike action is simply work stoppage, in most cases carried out, in support of a concerted activity, such as the Claimants through Kimani engaged in, in pursuit of overtime arrears. Concerted activity can refer to the action of a single Employee, bringing collective grievances to the attention of the Employees' common Employer. The action must be aimed at improving the working conditions of the whole group, not just the individual Employee.
131. The Claimants had the right to go on strike, even though they were not members of a trade union, having resigned from KNPSWU, and having failed to have their trade union of choice, KPUWU, granted recognition by the Respondent.

Was the strike protected?

132. When a strike violates the law, it ceases to have the protection of the law. This principle applies to all forms of strikes, whether called by trade unions, or non-union Employees.
133. The Claimants held a longstanding grievance concerning implementation of the award made by the Court in 2013, in Cause Number 1449 of 2011.
134. They did not in prosecuting the current Cause, justify the filing of a fresh Cause, to implement an award made in another Cause. Why did they not find their way back to Cause Number 1449 of 2011; pursue reopening of proceedings; and, persuade the Court that its award had not been implemented?
135. Judgment in Cause Number 1449 of 2011, was subject matter of proceedings at the Court of Appeal, in Civil Application Number NAI 108 of 2013 [UR 71/2013. Parties registered the following consent orders: -
- a. Industrial Court Cause Number 1449 of 2011, having been settled by the filing of a consent letter in the Industrial Court, it is no longer necessary to proceed with the intended Appeal.
 - b. The bank guarantee of Kshs. 25 million, issued by the Applicant as security in compliance with the order of 14th June 2013, be and is hereby released.
136. The consent orders at the Industrial Court were as follows: -
- a. The terms of the orders issued on 28th March 2013 be varied, and have been satisfied by the execution of the Collective Bargaining Agreement dated 24th September 2013 and registered on 24th September 2013 in Certificate of Registration of Collective Bargaining Agreement CA No. 221 of 2013.
137. The Court understands the 2 consent orders at the Court of Appeal and the Industrial Court, to have compromised any, and all disputes, revolving around the Judgment of the Court, in Cause Number 1449 of 2011. The Claimants' Union KNPSWU and its Advocates, the Respondent and its Advocates,



- all considered there was no pending dispute, relating to Cause Number 1449 of 2011, when they executed consent orders.
138. The Respondent herein forfeited its right to pursue the Appeal, and the Claimants through KNPSWU abandoned any and all outstanding claims, and embraced what was offered under the freshly negotiated and registered CBA.
 139. A strike ceases to have the protection of the law, if it is in the nature of seeking a solution to a legal conflict. Legal conflicts, resulting from interpretation of Judgments of a Court, should be left to the competent Courts. Courts will not readily protect strikers who take matters into their own hands, giving their own interpretation of judicial pronouncements, and who seek to enforce Judgments of the Court as interpreted by themselves, through strike actions. Prohibition of such a strike, does not constitute a breach of freedom of association and the right to strike.
 140. Section 78 [1] [c] does not allow Parties to take part in a strike, where their dispute has been referred to this Court or to arbitration. The dispute on the CBA was referred to this Court in Cause Number 1449 of 2011, it was determined, and interpretation of the award made by the Court, whether it had been acted on in full, should have been left to the Court.
 141. Charles Waweru Kimani, the lead Claimant herein, was the lead Petitioner in this Court's Petition Number 49 of 2018. The Respondent herein was the Respondent in the Petition.
 142. On 28th September 2018, the Court granted the Respondent orders in the following terms: -
 - a. Pending hearing of the application inter partes, an injunction is hereby granted, restraining the Petitioners, by themselves or agents, representatives or any other person or party acting on their behalf or instructions from-
 - I. Demonstrating pursuant to the verbal threats made by the 1st Petitioner on 27th September 2018, or howsoever proceeding with any demonstration against the Respondent or in any way threatening or intimidating the Respondent, its Employees or any of the Respondent's customers over matters that are subject of the proceedings herein.
 - II. Threatening or intimidating the Respondent and / or its Employees or interfering with the Respondent's business and operations at its Headquarters at 21 School Lane Westlands, at the Embassy of the United States and related assignments elsewhere or otherwise.
 - III. Demanding to negotiate for the terms and conditions whether arrears, current or future of the Respondent's Employees assigned duties at the Embassy of the United States or any other of the Respondent's customers, unless invited by the Respondent to participate in such meetings.
 143. The Claimants agree that at the time they engaged in strike action on 28th January 2019, the orders above were still in force. It was not helpful for them to enquire from the Respondent, whether the Respondent commenced contempt of court proceedings, in view of their disobedience.
 144. Their representative Kimani was the lead Petitioner, and was aware about the orders barring strike action. The orders barred him and his colleagues, from disrupting operations at the US Embassy, and from demanding to negotiate terms and conditions of service on behalf of Employees, and from demanding arrears of benefits alleged to have been due to the Claimants.



145. The Claimants had engaged in threats of industrial action previously, to compel the Respondent to recognize KPUWU and to press for payment of commuter allowances. There was a pattern of non-union industrial actions by the Claimants.
146. The strike action was clearly against the valid orders of the Court issued in the Petition. It was against the law, and would not benefit the protection of the Court.
147. The industrial Relations Charter, 1984 binds Employers and Employees in dealing with each other, to avoid the use of inciteful, abusive and derogatory language, such as, was employed by Kimani, in calling the Claimants to arms, on 28th January 2019. Civility must be maintained at all times, in exercise of industrial relations. Use of terms such as, “evil plans,” “finish them before they finish us,” and “kitaleweka,” are not acceptable under the Industrial Relations Charter.
148. Strike action can also cease to have protection of the law, in instances where it is conducted in a manner, that violates other workers’ rights and freedoms.
149. Claimant Number 149, Maurice Akure, states in his response to the letter to show cause, that he was new at the Respondent. He did not have any claim of arrears of overtime pay. He was compelled to attend the meeting at Bamboo by his colleagues, and to remain there even when the Claimants were instructed to return to work by their superiors. He was denied by the strikers, his right not to participate in the strike action, a strike action which he had no stake in. He was denied his freedom to dissociate with the Co-Claimants, and not to participate in their Bamboo assembly.
150. A protected strike concerns defined terms and conditions of employment. The disputed item or items, must be well- defined from the outset. The subject matter needs to be known to the Employer and the Employees, and kept within the written script. Employers and Employees have no right to engage in wild goose hunt. The issues must be defined from the inception, and remain known.
151. As shown in the circular issued by Kimani calling the Guards to the meeting of 28th January 2019, the subject matter was expanded by Kimani, to include removal of almost 200 Guards from employment; and revision of the Guards’ salaries downwards. There was a single issue subject matter of the strike action of 28th January 2019. Expansion of the grievances, would place the strike outside the protection of the law.
152. The Court further, is of the view that the Claimants and the Respondent were involved in an essential service, and the strike action by the Claimants could not have the protection of the law.
153. Section 81 of the *Labour Relations Act*, defines “essential services,” to mean service the interruption of which would probably endanger the life of a person or health of the population.
154. The Minister for Labour, in consultation with the National Labour Board is mandated to come up with a list of essential services, amend the list from time to time, and declare any other service an essential service.
155. Essential services listed under the 4th Schedule to the *Labour Relations Act*, include water supply, hospital, air traffic control, civil aviation, telecommunications, fire, post office, local government and ferry.
156. The list is not exhaustive, and can be amended from time to time by the Minister. The Court, having taken into consideration all the circumstances of a strike action, and the service which is interrupted by the strike action, is within its mandate to find the service to be an essential service, and the strike to be unprotected under the law. Section 80 [3] of the *Labour Relations Act*, allows the Court to determine whether any strike complies with the provisions of the *Labour Relations Act*.



157. In this dispute, the Claimants were assigned private guard duties at the US Embassy, Nairobi. The Respondent submits, that this is a high security risk, and highly protected area, and the Claimants were aware that there had been a terrorist attack at DusitD2 hotel, about 2 weeks before their strike action. They were aware that withdrawal of security services at the Embassy, logically would endanger lives and property. Provision of private security services at the US Embassy was an essential service at the time, placing any industrial action by the Guards, outside the protection of the law. There was no justification in the Claimants' use of threats of insecurity, and endangering of lives and property, as a bargaining chip. They were correctly advised by Manning, that whatever grievances they had, the timing of their strike action, was all wrong.
158. It was known to them that the US Embassies across the globe, have been targets of terrorists attacks, and terrorists had attacked a hotel in close vicinity to the US Embassy at Nairobi, 2 weeks earlier. It is commonly known, and a matter of judicial notice, that the US Embassy at Nairobi had previously been attacked by terrorists, where lives and properties were lost. Why would Employees rendering such an essential service, withdraw their labour at such a time?
159. Lastly, the strike action was unprotected because the Claimants largely, were not in compliance with Part X of the *Labour Relations Act*, which in general, regulates strikes and lockouts. Non-compliance can be attributed to the fact that this law, is premised on regulation of industrial actions called by organized labour, that is to say trade unions and employer groups, and not strikes called by non-union Employees. The law has procedural requirements for strike actions, such as prior conciliation and strike notification. When these requirements are unmet, it results in unprotected strike. Strikes are understood to be part of the right to organize and collectively bargain, under ILO Convention 98 of 1949. The Convention recognizes the right to assemble, to demonstrate, to picket and to take industrial actions. This recognition is replicated under Article 41 of *the Constitution*. The right to organize and collectively bargain, is presently exercised within the legal framework of organized labour. The Respondent did not fully embrace Kimani and his team, in engaging the Guards collectively, and indeed sought and was granted an order from the Court, barring Kimani from purporting to negotiate for his colleagues. The *Labour Relations Act* has not yet accepted the role of non-union Employees, in undertaking roles conventionally performed through organized labour. It is always likely that strikes called by non-union Employees, would fall within the category of unprotected strikes. Non-union Employees have the constitutional right to strike. It is a difficult task however, for them to bring any of their industrial actions, within the protection of the law.

(b) whether termination was unfair.

160. The Claimants did not establish that their Claim is properly before the Court.
161. Claimant Number 194 Wycliffe Wanzala was dismissed by the Respondent, on 5th November 2020. The Claimants' Advocates issued demand letter to the Respondent, dated 19th March 2021, alleging that Wanzala was unfairly dismissed. He was paid overtime arrears, at Kshs. 239,811, which are indicated to cover the period 1st March 2017 to 31st October 2020. Payment of commuter allowances in arrears, according to the evidence by Kimanani, covered this same period, beginning in 2017. This commuter and overtime benefits appear to have been based on a fresh CBA. Wanzala executed discharge. Why is he a Claimant in this Claim? Why does he claim overtime pay? Was he dismissed in 2019 and did he grant Kimani a written authority to prosecute the Claim?
162. Claimant Number 49 Maurice Akure states in his reply to the letter to show cause, that he did not have any arrears of overtime. Why have the Claimants made him a party to such a claim?



163. Claimant Number 198, Francis Kaloli Okoth, retired on 31st December 2018, upon attainment of mandatory retirement age. His letter of retirement is exhibited by the Respondent at page 3006 of the Respondent's documents. He was not in employment on 28th January 2019. He was not one of the strikers. He was not summarily dismissed, but retired in December 2018.
164. Kennedy Wafula Kasili, Claimant Number 227, was summarily dismissed for reasons unrelated to the strike of 28th January 2019. His letter of summary dismissal, at page 3007 of the Respondent's documents, shows he was summarily dismissed on 11th February 2021.
165. Cross –examined, Kimani told the Court he did not know when these Claimants' contracts were terminated, and would not insist that the prayers pursued in the Claim, apply to the particular Claimants.
166. There is therefore considerable doubt, whether these Claimants were validly joined to the Claim, and whether indeed they authorized Kimani to present the Claim on their behalf.
167. The Court has concluded that the Claimants were engaged in an unprotected strike. An Employee who engages in an unprotected strike, is deemed to have acted in violation of his contract of employment.
168. Section 80 of the *Labour Relations Act* states that an Employee, who takes part in a strike that is not in compliance with the Act, is deemed to have breached his contract of employment and is liable to disciplinary action, and forfeiture of any payment and any other benefit under the *Employment Act* during the strike period.
169. Section 46 [i] of the *Employment Act*, states that an Employee's participation in a lawful strike, does not constitute a fair reason for dismissal, or for imposition of a disciplinary penalty. The corollary is that an Employee's participation in an unlawful strike, which is what the Claimants participated in, constitutes a fair reason for dismissal, or for imposition of a disciplinary penalty.
170. The Claimants were absent from the place appointed for the performance of their work, without the leave of their Employer, or other lawful cause. Having been absent in the morning hours, they were addressed by both Manning and Regional Director, and advised it was the wrong time to be disrupting security services, at the US Embassy. They were instructed to report back to their workstations, take over the day shifts, but did not comply.
171. The night shift Guards did not hand over to the Claimants, because the Claimants, on the instructions of Kimani, assembled from early morning, at Bamboo. They had strict instructions, not to take over from their night colleagues.
172. Even when the buses were sent to Bamboo, the Claimants declined to Board. Their position that they waited, and buses never came, was discounted by the evidence of some of the Claimants and that of the Respondent's first witness, MacMillan Murunga.
173. Kenneth Njiru, Claimant Number 197, states in his response to the letter to show cause, that the crowd at Bamboo was hostile and aggressive; he did not have any claim for arrears; he was forced to stay at Bamboo as colleagues were threatening anyone who dared to leave; and that buses were sent to pick the Claimants, but were jeered away by the crowd. Claimant Number 49, Maurice Akure gave similar evidence on notice to show cause. The buses were sent, but the Claimants did not board.
174. Akure states in his response that he had walked to Bamboo place with some colleagues that morning. Why did not the Claimants find their way back to their workstations using their own means, if it was true that they failed to return to work, because the buses were not availed? They were being paid commuter allowance.



175. The Court is persuaded by the evidence given by the Respondent, which is supported by statements from some of the Claimants, that the buses were sent to Bamboo to return the Claimants to work, and that the Claimants refused to board, and threatened other Guards with no stake in the strike, not to return to work.
176. Their access badges were withdrawn by the US Embassy. They were in a triangular employment relationship. The Respondent was their Employer and the Provider of security services at the US Embassy. They guarded a 3rd Party, the US Embassy and the user in the triangular relationship. Once the user locked the Guards out of its premises, by withdrawing access badges, it meant the Respondent, had no place to assign the Guards work, from 29th January 2019. The Respondent did not have the mandate to reopen the gates at the US Embassy. The Claimants left themselves dangling in the wind, upon their refusal to go back to work, on 28th January 2019. It would be an uphill task for the Provider to find another user, and assign 328 Security Guards, to another user. Termination of the contracts of employment was always going to be the most likely outcome.
177. They were involved in an unprotected strike. Summary dismissal was based on fair and valid reasons, under Section 80 of the [Labour Relations Act](#) and Sections 43, 44 [4] [a] and [e], 45 and 46 [i] of the [Employment Act](#).
178. Procedure met the minimum standards of fairness under Section 41 and 45 of the [Employment Act](#). The Claimants were each issued letters to show cause. The letters to show cause were detailed, giving the facts and the provisions of the [Employment Act](#), alleged to have been violated by the Claimants. They were suspended for 7 days each. They replied in detail. They were invited individually to disciplinary hearing. The venue and time of the hearing was communicated. They were advised that they were entitled to have trade union representative of their choice.
179. They were heard orally, by different panels constituted by the Respondent at different stations. Kimanani told the Court that there were 10 different panels. Considering that there were 328 Employees involved, the split panels was a logical mode of hearing.
180. Decisions were made to dismiss the Claimants. They were informed of their right of appeal. Most of them, at least 175 of them, appealed through their Advocates.
181. Again the Appeals were heard, by different panels, and dismissed. There is no evidence that Manning heard any of the Appeals, or was involved in any of the disciplinary hearings.
182. The Court does not find anything substantially defective in the procedure employed by the Respondent, that would lead to a finding that termination was unfair, warranting any form of compensation.

(c) Remedies.

183. Termination was substantively and procedurally fair, and prayers [a] [b] and [c] of the Further Amended Statement of Claim, are declined.
184. The Claimants did not establish their prayers for service pay / gratuity.
185. The Court has expressed the view that the prayer for overtime arrears should have been pursued under the Claim in which overtime pay was awarded. That Claim was compromised, and Appeal upon which it was founded was not pursued. The Claimants through their trade Union KNPSWU, marked their dispute with the Respondent as settled. They negotiated, executed and registered a fresh CBA, the same



year the Court made its award, 2013. The consent orders filed at the Court of Appeal and the Industrial Court, signified closure of the trade dispute, as was presented in 2011, and determined in 2013.

186. Arrears of overtime paid to Claimant Number 194, Wycliffe Wanzala at Kshs. 239, 911, represented the period 1st March 2017 to 31st October 2021. The arrears seemingly arose from another CBA, not the award of the Court of 2013. Wanzala executed discharge, stating there was no further liability on the part of the Respondent. He did not have further claim on overtime arrears. The Claimants pursue overtime pay, computed from June 2012 to January 2019. This prayer has not been established. Prayer [g] of the Further Amended Statement of Claim is declined.
187. The Claimants were dismissed on valid and fair grounds, and there is no merit in their respective claims for anticipated salaries. They withdrew their labour, in circumstances that made it highly unlikely to return to work. It is not likely that any Court would award them salaries for contractual periods they were not in service. The Respondent assigned them work at the US Embassy. The US Embassy locked them out, after they boycotted work. They withdrew their labour, and the law does not contemplate that an Employee is paid salary, for no labour supplied. Prayer [h] is declined.
188. The same applies for prayer [i] on accrued and anticipated annual leave. They were paid accrued annual leave on termination. They do not merit annual leave for a period they were not in service. Helga Kimanani confirmed that the Claimants received their certificates of service, and nothing turns on this prayer.
189. This Claim and others were presented by Charles Kimani Waweru with the written authority, allegedly given by the other Guards. There are Claimants who have been shown not have had any cause of action against the Respondent, and it is doubtful that they authorized Kimani to file and prosecute the Claim. It is noted that initially, Claims by Employees who have filed different Claims in other Courts, were joined to this Claim. Kenneth Njiru and Maurice Akure did not have any claim of arrears and were compelled by their colleagues to participate in the strike. Francis Kaloli Okoth was retired on 31st December 2018. Kennedy Wafula was summarily dismissed long after the strike, on 11th February 2021, over matters unrelated to the strike. The inclusion of these Claimants to this dispute is irregular and illegal. It would suggest to the Court that the lead Claimant joined some Claimants to the Claim against their will, much similar to the way some Claimants were held hostage by other Employees at Bamboo place, on 28th January 2019.
190. Ordinarily the Court is slow in giving orders for costs against Employees, but in this Claim, the Court is satisfied that the Respondent should be paid costs. The lead Claimant filed and prosecuted the Claim, even on behalf of Claimants who have no stake in the dispute.

It is ordered: -

- a. The Claim is dismissed.
- b. Costs to the Respondent, to be paid by the 131st Claimant, Charles Waweru Kimani.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 16TH DAY OF AUGUST 2023.

JAMES RIKA

JUDGE

