



**Muendo & 33 others v Quality Inspectors Limited (Employment and Labour Relations Cause 230 of 2018) [2023] KEELRC 2704 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2704 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 230 OF 2018  
K OCHARO, J  
SEPTEMBER 28, 2023**

**BETWEEN  
BENJAMIN WILLY MUENDO & 33 OTHERS ..... CLAIMANT  
AND  
QUALITY INSPECTORS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimants herein filed a Statement of Claim dated 23<sup>rd</sup> February 2018 seeking: -
  - a. An order directing the respondent, Quality Inspectors Limited, to pay the claimants their outstanding salary arrears for the period between May 2017 and February 2018 amounting to Kenya Shillings sixteen million, six hundred and forty one thousand, five hundred and forty one (Kshs. 16,641,541.00) only tabulated as follows:



<b>NO.</b>	<b>claimant</b>	<b>MONTHLY SALARY (KSHS)</b>	<b>SALARY ARREARS AS AT FEBRUARY 2018</b>
1.	Benjamin Willy Muendo	20,000.00	200,000.00
2.	Bonface Injira Asuva	65,000.00	650,000.00
3.	Christine Kwamboka Sagana	20,000.00	200,000.00
4.	David Gichuki Muhota	75,000.00	750,000.00
5.	David Kuria Kamande	40,000.00	400,000.00
6.	David Njehia Warui	40,000.00	400,000.00
7.	Edward Mwirigi Ndungu	150,000.00	1,500,000.00
8.	Franco M. Mwangala	92,949.00	836,541.00
9.	Grace Njeri Gichinga	30,000.00	300,000.00
10.	Ian Nyoro Njoroge	80,000.00	400,000.00
11.	Jacob Mukoma Namwalira	15,000.00	150,000.00
12.	James Ontere Ongubo	60,000.00	600,000.00
13.	Jacinta Muthoni Kiama	50,000.00	500,000.00
14.	Jeremiah Kaibiria Mbui	70,000.00	700,000.00
15.	John Kiarie Kimuhu	35,000.00	350,000.00



16.	John Nganga	70,000.00	700,000.00
17.	Joshua Wamai Maina	35,000.00	350,000.00
18.	Josephine Wanjiru Munyui	40,000.00	400,000.00
19.	Joyce Njeri Wambugu	70,000.00	700,000.00
20.	Juliana Njeri Gathure	25,000.00	250,000.00
21.	Lazarus Muriuki Ndegwa	40,000.00	400,000.00
22.	Levis Mwadime	40,000.00	400,000.00
23.	Martin Murimi Robert	63,500.00	635,000.00
24.	Michael Mugo Mwangi	150,000.00	1,500,000.00
25.	Michael Terit Kaimess	59,000.00	590,000.00
26.	Peter Ndirangu Mwangi	35,000.00	350,000.00
27.	Peter Njogu Tuigo	40,000.00	80,000.00
28.	Philip Mwaura Wangui	40,000.00	400,000.00
29.	Rashid Sudi Mchombo	30,000.00	300,000.00
30.	Rasoh Kanga Munga	25,000.00	250,000.00
31.	Samuel Ochong Odhiambo	40,000.00	400,000.00
32.	Stephen Mwangi Kanyoro	35,000.00	350,000.00



33.	Victor Makokha Ogutu	40,000.00	400,000.00
34.	Victoria Mbithe Muendo	25,000.00	250,000.00
-	Total Salary Arrears As At February 2018	-	16,641,541.00

- b. An order directing the respondent, quality inspectors limited, to pay to the claimants accumulated salary arrears for the period between March 2018 till settlement in full at the following tabulated monthly rate



<b>claimant</b>	<b>Monthly Salary (KSHS)</b>
Benjamin Willy Muendo	20,000.00
Bonface Injira Asuva	65,000.00
Christine Kwamboka Sagana	20,000.00
David Gichuki Muhota	75,000.00
David Kuria Kamande	40,000.00
David Njehia Warui	40,000.00
Edward Mwirigi Ndungu	150,000.00
Franco M. Mwangala	92,949.00
Grace Njeri Gichinga	30,000.00
Ian Nyoro Njoroge	80,000.00
Jacob Mukoma Namwalira	15,000.00
James Ontere Ongubo	60,000.00
Jacinta Muthoni Kiama	50,000.00
Jeremiah Kaibiria Mbui	70,000.00
John Kiarie Kimuhu	35,000.00
John Nganga	70,000.00
Joshua Wamai Maina	35,000.00
Josephine Wanjiru Munyui	40,000.00
Joyce Njeri Wambugu	70,000.00
Juliana Njeri Gathure	25,000.00
Lazarus Muriuki Ndegwa	40,000.00
Lewis Mwadime	40,000.00
Martin Murimi Robert	63,500.00



Michael Mugo Mwangi	150,000.00
Michael Terit Kaimess	59,000.00
Peter Ndirangu Mwangi	35,000.00
Peter Njogu Tuigo	40,000.00
Philip Mwaura Wangui	40,000.00
Rashid Sudi Mchombo	30,000.00
Rasoh Kanga Munga	25,000.00
Samuel Ochong Odhiambo	40,000.00
Stephen Mwangi Kanyoro	35,000.00
Victor Makokha Ogutu	40,000.00
Victoria Mbithe Muendo	25,000.00
Total Salary Arrears As At February 2018	16,641,541.00

- c. Interest on prayers (1) & (2) above at court rates since the date of filing the Claim till settlement in full.
  - d. Costs; and
  - e. Such other and further orders that this Honourable Court deems just and expedient to grant.
2. Contemporaneously with the statement of claim, the claimants filed; verifying affidavits of all the claimants sworn on February 23, 2018; Documents under a list of documents dated February 23, 2018; Witness Statement of Michael Mugo Mwangi dated February 23, 2018; a Further List of Witnesses dated September 23, 2021; further list and witness statements dated January 4, 2022; and claimants' further bundle of documents dated January 4, 2022.
  3. In response to the statement of claim, the respondent filed a defence and answer to the claimants' memorandum of claim, dated May 28, 2018.
  4. The respondent also filed a list and bundle of documents dated 22<sup>nd</sup> July 2021; and a witness statement dated 22<sup>nd</sup> July 2021.
  5. This matter proceeded for the hearing of the claimants' case on September 23, 2021, April 27, 2022 and July 12, 2022, when the 24<sup>th</sup>, 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 26<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup> and 34<sup>th</sup> claimants testified.
  6. The respondent's case was heard on the 12<sup>th</sup> of July 2022 when its Managing Director, John Kiragu, testified on its behalf.
  7. Following the Court's direction, the parties file their written submissions. Their submissions and authorities are on record.



### **claimants' case**

8. It is the claimants' case that they were employed by the respondent in various capacities between the years 2012 to 2018 with varying monthly salaries, particulars whereof are in paragraphs 4-71 of the Statement of Claim dated February 23, 2018.
9. The claimants stated that whereas they were entitled to be paid their salaries at the end of every month, the respondent failed to pay their respective salaries for the period between May 2017 to February 2018, a period of 10 months, without justification.
10. This act was in breach of a fundamental term of their contracts of employment, and, their right to fair labour practice under articles 41 (1) and 41 (2) (a) and (b) of the Constitution of Kenya 2010, and their right against slavery and servitude guaranteed by article 30.
11. As of February 2018, the respondent owed the claimants cumulative salary arrears of Kshs. 16,641,541.00
12. In their evidence under cross examination which had general threads, the claimants testified that; they were employees of the respondent at all material times; some of them had tendered contracts of employment before this court as proof of the employment relationship, while those who didn't have tendered documents like NSSF statements from which the relationship can be deduced; their salaries were as set out in the table set out in the statement of claim; payment of their salaries was not dependent on the contract between the respondent and the main contractor; the respondent has not by document[s] shown that the contract between it and the main contractor; and that there was no written termination of their employment.

### **respondent's case**

13. The respondent's witness stated that the claimants were never employees of the respondent as they allege.
14. The witness stated that in or about January 2015, the respondent was sub-contracted by Zakhem International Construction Limited [the main Contractor] to undertake works relating to the procurement, construction, Testing and Commissioning of Kenya Pipeline Company Limited Line1 Replacement project.
15. The witness stated that owing to the scope of the sub-contracted works, it had to hire the claimants for the sole purpose of performing the contract.
16. Despite discharging its obligations in relation to the sub-contract, and submitting to the main contractor requests for payment for the works done on a monthly basis, the main contractor refused to remit payments to the respondent, rendering it unable to pay some of the claimants.
17. Further, the main contractor is indebted to the respondent in the sum of USD 1,914,658.99, for the services rendered. Despite several requests for settlement of the same, the main contractor failed to, thereby fundamentally breaching the contract between it and the respondent. The respondent was forced to terminate the sub-contract on or about May 2017.
18. The respondent states that there are ongoing arbitration proceedings between it and the main contractor meant to recover the outstanding amounts.
19. The witness stated that the respondent is committed to settling all the genuine outstanding payments to the claimants once the main contractor settles its indebtedness to it. He asserted that most of the



- claimants have exaggerated what they allege to be owed. Others were not employees of the respondent at all.
20. The witness alleged that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 26<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup> and 34<sup>th</sup> withdrew their cases against the respondent on diverse dates, consequently, the court should disregard their claims.
  21. That the claimants were employed purposely for the performance of the sub-contract. As the sub-contract was terminated on or about May 2017, the claimants became redundant as they had no tasks to perform. Therefore, thereafter they never rendered any service to the respondent. It would be unconscionable for them to claim entitlement to salary for the period, the subject matter herein.
  22. In his evidence under cross-examination, the witness admitted the fact that the respondent did receive a demand letter by Counsel for the employees. In its letter dated January 26, 2018, the respondent made a response to it. It emerges that the number of employees appearing on the list set forth in the letters is higher compared to the number of claimants in this matter.
  23. In the response it was admitted that the respondent owed some employees. However, the specifics of those owed were not brought out. The witness admitted that he too could not give the details. He has no details as regards what the respondent owed who, in a version that could contradict the details the claimants have placed before this Court.
  24. The witness alleged that salary payments for the claimants were dependent on the contract between it and the main contractor. The respondent has not presented a document to show that indeed the sub-contract was terminated as alleged. Too, it has not any termination letter[s] in respect of the claimants' contracts of employment.
  25. Re-examined by Counsel for the respondent, the witness testified that the respondent's business was largely inspecting project[s] for its clients. At the end of each project, it often released the workers it had engaged in the project. Most of the workers who could be engaged for the inspection were freelance. After being released they would look for employment elsewhere.
  26. Referring to the contract of employment between the respondent and the 12<sup>th</sup> claimant, the witness stated that the same was specific on its lifespan. It was to last up to the end of the Pipeline project.
  27. The NSSF remittances by the respondent on the claimants' accounts stopped in May 2017. This is discernable from the statements produced in evidence by the respondent.

#### **claimant's Submissions**

28. According to the claimants, their case for salary arrears has been admitted. In the letter dated January 26, 2018 in response to the claimants' letter of demand, it stated; -
  - “(i) It is true that QIL has outstanding payments in salaries & wages to some of the persons appearing on the list. However, QIL has been perusing payments owed to us, particularly for the KPC Pipeline Project of which most of these people were involved. Arbitration is ongoing and set for hearing in February and March 2018.
  - (vi) Notwithstanding the above, QIL is committed to settling of all genuine outstanding payments once our funds come through to those who have dissociated themselves from this legal process...”
29. The respondent does not deny having employed the claimants. It was therefore duty upon it to demonstrate that it terminated their employment in one of those ways recognized by law. For instance,



since it was alleging redundancy, it was obliged to show that it issues the necessary legal notices. It produced none. The respondent failed to establish that it paid the salary arrears, and that some of the claimants had withdrawn their claims against it.

30. Section 18 of the *Employment Act* enjoined the respondent to pay the claimants their salary. The statutory obligation on the employer to pay his or her employees' salary is not an idle obligation, it reinforces the right to fair labour practice under article 41 [1] of the *Constitution* of Kenya, the right to human dignity under article 28, and freedom from servitude- article 30[1].
31. That the respondent breached its statutory obligation under section 18 (2)(c) of the *Employment Act* and violated article 23 (3) of the *Universal Declaration of Human Rights* to which Kenya is signatory.
32. The claimant cites the cases of *Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA Workers) v Garden Hotel Machakos* [2018] eKLR; *Kusow Billow Isaack v Ministry of Interior and Coordination of National Government & 3 others* [2021] eKLR; and *Jonathan Spangler v Centre for African Family Studies* [2017] eKLR in support of their submissions.
33. The claimants asserted that they proved to the requisite standard that they were employed by the respondent including during the period between May 2017 and February 2018, and that the respondent did not pay them salary within that period.

#### **respondent's Submissions**

34. The respondent filed submissions dated January 30, 2023. It identified two issues for determination, thus; whether the claimants have proven their claim, and whether the claimants are entitled to the reliefs sought.
35. It was submitted that the claimants have only claimed for salary arrears for the period May 2017 and February 2018. They do not suggest that what they are seeking either flows from an unlawful termination or constructive dismissal.
36. The respondent submitted that under the provisions of section 107 of the *Evidence Act*, a legal burden lay on the claimants to prove that; they were receiving the salaries they allege; they were working for the respondent during the 10-month period in which they claim not to have been paid. These they didn't prove.
37. The respondent further submitted that all through the proceedings it maintained that the sums claimed were not a true reflection of the claimants' true salary. The response letter dated January 26, 2018, reiterated the same.
38. The Court was urged to note that the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup> 15<sup>th</sup> 17<sup>th</sup> 22<sup>nd</sup> 23<sup>rd</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 32<sup>nd</sup> and 34<sup>th</sup> failed to adduce any evidence to prove that they earned the salary they are claiming. From the material before the Court, it is clear that the 16<sup>th</sup>, 21<sup>st</sup> and 30<sup>th</sup> have exaggerated their claims. They used to earn, KShs. 20,000. KShs. 30,000 and KShs. 15,000 respectively. They have instead claimed KShs.70,000, 40,000 and 25,000 respectively.
39. The respondent reiterates that with a view to fulfilling its obligations under the contract, it hired several employees including the claimants, for the sole purpose of performing the contract. Despite meeting its obligations under the contract, Zakhem International Construction Limited did not remit its payments for work done, forcing it to terminate the contract in May 2017. As there was no more work to be done, the respondent had to let go of its employees including the claimants.



40. There cannot be any justification for an employee in the construction industry to receive a salary once the project is over. To support this position reliance was placed on the holding in the case of Benson Omuyonga v Laxmanbai Construction Ltd [2014].
41. The respondent relies on the claimants' own NSSF Slips and Bank Statements which show that there was consistent payment until May 2017, to state that the claimants did not work for it beyond that point.
42. It is the respondent's position that once the sub-contract with Zakhem International Construction Limited was terminated, the works on the project stopped, and the claimants' employment was also terminated. It is therefore impossible that the claimants remained in employment for a further 10 months, while not doing any work.

### **Analysis and Determination**

43. I have reviewed the pleadings, the evidence, and the submissions and authorities by the parties and distil the following issues for determination, thus;
  - a. Whether the claimants were employees of the respondent?
  - b. If the answer to [a] above is in the affirmative, were they during the period May 2017 to February 2018?
  - c. Whether the claimants are entitled to the reliefs sought.

### **Whether the claimants were employees of the respondent.**

44. From the onset it is imperative to state that a careful and detailed analysis of the material placed before this Court, leaves me with no other impression than, that on the contentious issue[s] of the claimants' employment and their salary, the respondent has been overly evasive. Such, never aids justice or a party's case, it should be borne in mind.
45. The respondent in an evasive manner stated hereinabove, indirectly admitted that some of the claimants were its employees but opted not to set forth details of who among them was and wasn't. However, that is not to say that the claimants' legal burden to prove that all of them were employees of the respondent became less weighty in any manner. He who asserts must prove. Sections 107 and 109 of the Evidence Act enjoined them to prove this.
46. I have reviewed the claimants' documents filed under the list of documents dated February 23, 2018, and the claimant's further list of documents dated January 4, 2022, and take note that some claimants have produced letters of offer of appointment, contracts of employment, NSSF Slips and copies of Pay Slips as proof of employment.
47. However, some claimants have not produced any record of employment whatsoever. Specifically, the 6<sup>th</sup> (David Njehia Warui), 11<sup>th</sup> (Jacob Mukoma Namwalira), 15<sup>th</sup> (John Kiarie Kimuhu), 22<sup>nd</sup> (Levis Mwadime), 23<sup>rd</sup> (Martin Murimi Robert), 26<sup>th</sup> (Peter Ndirangu Mwangi), 29<sup>th</sup> (Rashid Sudi Mchombo) and 33<sup>rd</sup> (Victor Makokha Ogutu), who only tendered their National IDs as evidence in this case.
48. Consequently, it is considerably difficult for this Court to find that these specific claimants were employed by the respondent, in light of the respondent's denial of their claim, both in its pleadings, evidence and submissions.



49. Consequently, with regard to the individual claimants listed in paragraph 47 hereinabove, I return that they have failed to prove that they were employed by the respondent.
50. In relation to the rest of the claimants I find thus: -
- a. That the NSSF slips produced by the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup> and 34<sup>th</sup> claimants are sufficient proof that they were employed by the respondent. This is because under the heading “Employer”, the respondent is listed. Further, the respondent has admitted to remitting NSSF contributions on behalf of the claimants up until May 2017.
  - b. That the Bank Statements produced as evidence by the 2<sup>nd</sup> and 20<sup>th</sup> claimants are sufficient proof that the two were employed by the respondent. The Bank Statements show regular payments of the same amounts (slightly less than the claimed monthly salary) credited into their bank accounts with the narration Sal Quality or some variation thereof.
  - c. That the Letters of Offer/Employment Contracts adduced as evidence by the 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 16<sup>th</sup>, 19<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> claimants are sufficient proof of the employee-employer relationship between them and the respondent.
51. The production of the above-stated documents in evidence, shifted the evidential burden to the respondent. At that point, respondent, who is the keeper of employment records, become bound to discount the claimants’ assertion on the existence of the employer-employee relationship. It needed to produce employment records. It didn’t, consequently failing to discharge the evidential burden.
52. This needs the Court’s comment, the respondent asserted that the claimants were employed specifically for the sub-contracted works by Zakhem International Construction Company Ltd. The respondent in its Response to the claimant’s Memorandum of Claim, and through the witness statement of its witness asserted that the contract between the respondent and the main contractor was entered into in or about January 2015. But, apparently, a large number of the claimants appear to have been in the respondent’s employment way before January 2015.
53. For instance, the 1<sup>st</sup> claimant, Benjamin Willy Muendo, was employed on June 4, 2014 per the NSSF Slip produced; the 5<sup>th</sup> claimant, David Kuria Kamande, was employed on January 6, 2014 per the NSSF Slip; and the 7<sup>th</sup> claimant, Edward Mwirigi Ndungu was employed on May 15, 2013 per Letter of Offer tendered as evidence by the claimants.
54. This puts the respondent’s truthfulness in doubt. It was not candid to this Court, I conclude.

**Whether the claimants were in the respondent’s employment in the period May 2017-February 2018.**

55. Under section 2 of the *Employment Act* 2007 an employee is defined as:
- “Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner”
56. The claimants, save for those particularized in paragraph 47 hereinabove, have proven that they were indeed employed by the respondent. The claimants state that they left the respondent’s employment in February 2018, following 10 months of non-payment of their salaries.
57. The respondent, on the other hand, argues that when the contract with Zakhem was terminated on or about May 2017, the claimants’ employment was also terminated. They were declared redundant.



58. Despite its vehement arguments, the respondent did not produce before this Court the alleged sub-contract between it and Zakhem, the Notice of Termination of the said sub-contract in or about May 2017, the arbitration proceedings relating to the alleged dispute between it and Zakhem, Notices of Termination of the employment contracts between it and the claimants, and/or Notices of Intention to declare the claimants redundant.
59. As such, the respondent's assertions, regarding the sub-contract, the termination thereof, and the relationship between the sub-contract and the claimants' contracts of employment were not proved on a balance of probabilities. No documents were put in to support the assertions.
60. This Court is not a Court of speculation. If the respondent wanted the Court to believe its account of events, it should have produced documentary evidence, which was no doubt in its possession.
61. I am therefore compelled to conclude that the claimants' employment was not terminated and/or the claimants declared redundant on or about May 2017, as alleged by the respondent or at all.
62. My view flows from the fact that the *Employment Act*, 2007, elaborately sets forth and more specifically sections 35 and 40 the kind of notice[s] any employer wishing to terminate an employee's employment or declare one redundant, has to issue, respectively. The respondent has not pleaded or contended that any of the notices [notices of termination or redundancy notices] were issued.
63. In the absence of notices of termination or redundancy, and in light of the fact that the claimants were employees of the respondent prior to May 2017, I hold that the claimants have proved on a balance of probabilities that they remained employees of the respondent during the period May 2017 to February 2018.

**Whether the claimants should be awarded the salary arrears sought.**

64. The claimants' claim is for unpaid salaries for 10 months starting May 2017 to February 2018.
65. The respondent opposes this claim because, in its view, the claimants have not proven that they were receiving the salaries claimed.
66. A perusal of the claimant's employment records, which are attached to the claimants' further list of documents dated January 4, 2022 reveal the following: -
  - a. For the claimants who have produced NSSF Slips as proof of employment, namely the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup> and 34<sup>th</sup> claimants, no monthly salary is indicated on the said slips.  
  
The respondent, has, however, not produced any evidence to show that the salaries claimed by these claimants are exaggerated, as alleged. Without evidence to rebut their claims, this Court finds that these claimants have proved on a balance of probabilities that they received the salaries claimed.
  - b. The 2<sup>nd</sup> (Boniface Injira Asuva) and 20<sup>th</sup> (Juliana Njeri Gathure) claimants have produced Bank Statements to prove their monthly salary. The Statements show regular payments of same amounts (slightly less than the claimed monthly salary) to both claimants by the respondent.  
  
For the 2<sup>nd</sup> respondent, his Bank Statements [ see pages 7-11 of the claimants' Further List of Documents dated 4<sup>th</sup> January 2022] indicate that he received Kshs. 61, 750/- on 6<sup>th</sup> May 2016 and 31<sup>ST</sup> May 2016 from Sal Quality; and Kshs. 60,250/- on 8<sup>th</sup> July 2016 from Sal Quality. The 2<sup>nd</sup> claimant claims a monthly salary of Kshs. 65,000/-.



I am persuaded that the 2<sup>nd</sup> claimant has proved on a balance of probabilities that his monthly salary was Kshs.65,000/-.

For the 20<sup>th</sup> claimant, her Bank Statements indicate that she received Kshs. 21,647/- from 12<sup>th</sup> August 2016 to 5<sup>th</sup> December 2016 from Sal Quality; Kshs. 33,647/- on 22<sup>nd</sup> December 2016; and Kshs. 21,914/- from February 17, 2017 to June 23, 2017 from.

The 20<sup>th</sup> claimant claims a monthly salary of Kshs. 25,000/-. I am persuaded that she has proved her claim on a balance of probabilities.

- c. The 7<sup>th</sup> claimant, Edward Mwirigi Ndung'u, pleads that his last salary was Kshs. 150,000/-. His letter of offer dated May 15, 2013 (pages 21-22 of the claimants' Further List of Documents dated January 4, 2022) shows a consolidated salary of Kshs. 80,000/- per month. However, his Bank Statements (pages 23-38 of the claimants Further List of Documents dated January 4, 2022) show that he received Kshs. 140,600/- from Sal Quality on February 17, 2017, March 15, 2017, May 17, 2017 and 23<sup>rd</sup> June 2017.

It is this Court's considered view that it is plausible that the 7<sup>th</sup> claimant earned a sum of Kshs. 150,000/- per month as his latest gross salary, which after statutory deductions, amounted to Kshs.140,600/-. The respondent has not produced any evidence to rebut his claim. This Court therefore finds that the 7<sup>th</sup> claimant has proved on a balance of probabilities that his monthly salary was Kshs. 150,000/-.

- d. In relation to the 12<sup>th</sup> claimant (James Ontere Ongubo), his employment records [ see pages 55-56 of the claimants' Further List of Documents dated January 4, 2022], show that he earned Kshs. 50,000/-, rather Kshs. 60,000/- as claimed.

I find that the 12<sup>th</sup> claimant was earning KShs. 50,000 monthly salary.

- e. The 16<sup>th</sup> claimant (John Kimangu Nganga), alleged that his monthly salary was KShs. 70,000/-. However, his documents produced [ see page 69 of the claimants' Further List of Documents dated January 4, 2022] show a figure of Kshs. 20,000/- consolidated salary. The discrepancy between the salary claimed and the amount that reveals itself on the documents is huge for this Court to ignore.

I am compelled to conclude that the 16<sup>th</sup> claimant's monthly salary was Kshs. 20,000 as opposed to the KShs. 60000 as claimed.

- f. In relation to the 18<sup>th</sup> claimant (Josephine Wanjiru Munyui), her Letter of Offer of Employment dated 28<sup>th</sup> January 2015 set out her consolidated salary as Kshs. 30,000/-.

The said claimant has also produced bank statements [ see pages 74-82 of the claimant's Further List of Documents dated January 4, 2022] showing that she received Kshs. 26,153/- from March 6, 2015 to March 7, 2016 from Quality INSPECT; Kshs. 25,573/- on 15<sup>th</sup> April 2016 from SAL Quality; Kshs. 20,000/- on 3<sup>rd</sup> May 2016 from Sal Quality; Kshs. 32,927/- from 9<sup>th</sup> May 2016 to 5<sup>th</sup> December 2016 from Sal Quality; Kshs. 44,927/- on 22<sup>nd</sup> December 2016 from Sal Quality; Kshs. 33,387/- from February 17, 2017 to June 23, 2017 from Sal Quality.

This Court is persuaded that the 18<sup>th</sup> claimant has proved, on a balance of probabilities, that her salary was indeed Kshs. 40,000/-.

- g. In relation to the 21<sup>st</sup> claimant (Lazarus Muriuki Ndegwa), his claim is for a monthly salary of Kshs. 40,000/-. His employment records produced [ see Pages 100-101 of the claimant's



Further List of Documents dated 4<sup>th</sup> January 2022] indicate his monthly consolidated salary was Kshs. 30,000/-.

I find that the 21<sup>st</sup> claimant has proved that he earned a monthly salary of Kshs. 30,000/-.

- h. The 30<sup>th</sup> claimant (Rasoh Kanga Munga), he has claimed a salary of Kshs. 25,000/-. However, his Letter of Offer [ to Pages 55-56 of the claimant's List of Documents dated 23<sup>rd</sup> February 2018, and Pages 119-122 of the claimant's Further List of Documents dated 4<sup>th</sup> January 2022] provides for a monthly consolidated salary of Kshs. 15,000/-.
- i. The employment records produced by the 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, and 19<sup>th</sup> claimants are consistent with their claimed salaries. I find that they have proven, on a balance of probabilities that they earned the monthly salaries claimed.
- j. For the claimants particularized in paragraph 47 herein, this Court demonstrated that they had failed to prove that there existed an employer-employee relationship between them and the respondent. Due to the foregoing, there is no need to delve into their salaries.
67. Payment of salary by an employer to an employee is a fundamental term of the contract of service and any unjustified failure to pay employee salary, is a repudiatory act. In the case of *Mutai v Kisa & another* (Cause E002 of 2020) [2022] KEELRC 1543 (KLR) (25 May 2022), the Honourable Makau J. found as follows: -
- “Withholding of an employee’s salary without any excuse is a fundamental breach of integral part of employment contract and therefore on that ground alone, the claimant was justified to resign and sue. An employee, in such circumstances, is entitled to deem that the employer has chosen to repudiate the contract.”
68. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the honourable Manani J. found: -
- “67. Under the general principles of the law of contract, remuneration certainly constitutes one of the fundamental terms in a contract of service. Consequently, breach of such term would result in the collapse of the contract. Indeed, part IV of the *Employment Act* recognizes remuneration as a protected right of an employee.
68. Being a fundamental term of the contract of service and a protected right, an employer can only withhold the entire of employee’s salary either with the consent of the employee or where the law permits it. For instance, section 63 of the *Anti-Corruption and Economic Crimes Act*, of 2003, permits suspension without pay of public officers who have been pronounced guilty of crimes under the Act but have elected to appeal the decisions. This is to remain until such appeals are determined.”
69. In sum, the Court notes that the respondent, didn’t set forth in its pleadings and or evidence details regarding any salary payments to the claimants, the respondent has admitted to its failure to pay the claimants’ salaries, in their pleadings and in its letter dated January 26, 2018 and, undertakes to pay the outstanding salaries once the main contractor settles its indebtedness to the respondent.
70. It becomes imperative to state that payment of employee remuneration is a statutory obligation which must be discharged. The employer would not be heard to assert that financial constraints on its part



justifies the failure to honour the employee's right to receive his or her remuneration as and when it falls due as per the terms of the contract of service and or as provided in law.

71. I agree with the Court in *Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA Workers) v Garden Hotel Machakos* [2018] eKLR that despite an employer experiencing hardship, they must pay the salaries due to their employees.
72. Per Section 51 of the Act, the claimants are entitled to a Certificate of Service.
73. By reason of the foregoing, I allow the claimants' claim in the following terms: -
  - a. Judgment be and is hereby entered that Quality Inspectors Limited shall pay the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup> and 34<sup>th</sup> claimants outstanding salary arrears for the period between May 2017 and February 2018 tabulated as follows:



No.	claimant	Monthly Salary (kshs)	Salary Arrears As At February 2018
1.	Benjamin Willy Muendo	20,000.00	200,000.00
2.	Bonface Injira Asuva	65,000.00	650,000.00
3.	Christine Kwamboka Sagana	20,000.00	200,000.00
4.	David Gichuki Muhota	75,000.00	750,000.00
5.	David Kuria Kamande	40,000.00	400,000.00
7.	Edward Mwirigi Ndungu	150,000.00	1,500,000.00
8.	Franco M. Mwangala	92,949.00	929,490.00
9.	Grace Njeri Gichinga	30,000.00	300,000.00
10.	Ian Nyoro Njoroge	80,000.00	400,000.00
12.	James Ontere Ongubo	50,000.00	500,000.00
13.	Jacinta Muthoni Kiama	50,000.00	500,000.00
14.	Jeremiah Kaibiria Mbui	70,000.00	700,000.00
16.	John Nganga	20,000.00	200,000.00
17.	Joshua Wamai Maina	35,000.00	350,000.00
18.	Josephine Wanjiru Munyui	40,000.00	400,000.00
19.	Joyce Njeri Wambugu	70,000.00	700,000.00



20.	Juliana Njeri Gathure	25,000.00	250,000.00
21.	Lazzarus Muriuki Ndegwa	30,000.00	300,000.00
24.	Michael Mugo Mwangi	150,000.00	1,500,000.00
25.	Michael Terit Kaimess	59,000.00	590,000.00
27.	Peter Njogu Tuigo	40,000.00	80,000.00
28.	Philip Mwaura Wangui	40,000.00	400,000.00
30.	Rasoh Kanga Munga	15,000.00	150,000.00
31.	Samuel Ochong Odhiambo	40,000.00	400,000.00
32.	Stephen Mwangi Kanyoro	35,000.00	350,000.00
34.	Victoria Mbithe Muendo	25,000.00	250,000.00

- b. Interest on (a) above at Court rates from the date of Judgment until payment in full.
- c. The respondent bears the costs of this suit.
- d. The respondent is ordered to issue the claimants with a Certificate of Service within 30 days from the date of this judgment.

**READ, DELIVERED AND SIGNED THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Okoth for the claimants.

No Appearance for the respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

**OCHARO KEBIRA**

**JUDGE**

