



**Mambili v Freight Wings Limited (Cause 1407 of 2018)
[2023] KEELRC 2162 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2162 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1407 OF 2018
SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

BENJAMIN LUTENYO MAMBILI CLAIMANT

AND

FREIGHT WINGS LIMITED RESPONDENT

JUDGMENT

1. It is not in contest that the Claimant was employed by the Respondent with effect from 1st July, 2012 until 27th April, 2018 when he was dismissed from employment. It is that dismissal which has triggered the instant suit. The Claimant has termed his dismissal from the Respondent's employment as unlawful, unfair and inhumane hence seeks against the Respondent the following reliefs:
 - a. Determination that the Respondent's actions infringed on his constitutional right to fair labour practices;
 - b. Determination that he was unlawfully, unfairly and wrongfully terminated;
 - c. Determination that he was defamed by the Respondent suffering huge losses both financially, economically, socially;
 - d. Declaratory Order that the act of addressing a letter to other industry players with regard to his suspension and/or disciplinary process amounted to professional reputation injury;
 - e. Order for payment of the actual pecuniary loss suffered as result of wrongful termination from the date of such termination to the date of such determination and as detailed through paragraphs 11 to 28;
 - f. Order for payment of general damages, as will be determined by the Court of the actual pecuniary loss suffered as result of defamatory remarks and/or letter written by the Respondent with regard to him and as detailed through paragraphs 18 to 21;



- g. Order for payment of interest in (e) and (f) above at court rates by the Respondent;
 - h. Order for payment of legal costs;
 - i. Order for the payment of other costs and any other relief this Honorable Court may deem fair and fit to grant.
2. Opposing the Claim, the Respondent filed a Response and Counterclaim dated 20th March, 2019 through which it has contended that the Claimant's employment was terminated in accordance with the procedure set out in Sections 41, 44(3), 4 (e) and (g) of the Employment Act, 2007 and Articles 47 and 50 of the Constitution. The Respondent further avers that the Claimant was lawfully, fairly and legally terminated from employment. According to the Respondent, the Claimant has not made any case to warrant award of any of the remedies sought. The Respondent further counterclaims against the Claimant the sum of Kshs 191,250,000/= which it says is the loss occasioned as a result of theft of flowers from 25th January, 2018 to 10th February, 2018.
 3. During the hearing which proceeded on 29th November, 2022 and 15th March, 2023, both sides called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.
5. It was the Claimant's evidence that he was the Head of Operations at the Respondent company. That as Head of Operations, he had clerks, supervisors and team leaders who do the palleting. His role was just to confirm what has been loaded by the said team leaders, supervisors and clerks.
6. It was his testimony that on 25th February, 2018, they had 860 flower boxes that were to be dispatched on board Air France. According to the Claimant, all the flower boxes were loaded by the palleting team. That the clerk on duty was Frank Ameka who confirmed that all the boxes had been loaded and signed for. That it was 21 days down the line that they received a report that the client had not received 32 flower boxes. It was subsequent to that, that he was suspended from duty with effect from 13th March, 2018.
7. It was the Claimant's further testimony that on 28th March, 2018, he went to the Respondent company to make his statement on the 32 missing flower boxes. On 29th March, 2018, the Respondent through its Group Human Resource Manager, in the presence of two other members of staff purported to conduct a sham hearing wherein various baseless and unfounded allegations on the loss of 32 flower boxes, were leveled against him, and to which he responded accordingly to the best of his abilities.
8. During the aforementioned hearing, he was not provided with any form of documentation to prove and/or buttress the mentioned allegations thus putting him at a disadvantage as to how to respond to the same.
9. He averred that the Respondent thereafter proceeded to send him on suspension of which it kept extending without sufficient Cause and/or reason.
10. It was the Claimant's further evidence that the Respondent issued him with a show cause letter while he was still under suspension and to which he dutifully and to the best of his abilities satisfactorily respond to.



11. On 27th April, 2018, he was informed by the Human Resource Manager of the Respondent's decision to unlawfully, unfairly and wrongfully terminate his services with immediate effect from even date without any proper reason or any reason at all thereof.
12. According to the Claimant, he was unlawfully, unfairly and wrongfully terminated from employment by the Respondent without any lawful justifiable reason and/or without a warning or disciplinary process. He contended that the termination bore grounds that had never been presented to him to respond to.
13. The Claimant further averred that he was never given an opportunity to defend himself against the grounds raised in the termination letter, which grounds are different from the grounds leveled against him during the Respondent's sham hearing of 29th March, 2018 and the Show Cause Letter dated 28th March, 2018. He just came to know of the said allegations when he was served with the termination letter on resumption from suspension.
14. It was the Claimant's further evidence that during the course of his employment with the Respondent, he was subjected to defamatory remarks made by the Respondent in a bid to tarnish his character and lower how the right-thinking members of society especially that connected with his career and/or profession view him.
15. Closing his testimony in chief, the Claimant asked the Court to allow his claim as prayed.

Respondent's Case

16. On its part, the Respondent called oral evidence through Mr. John Matanyi and Mr. Joseph Changa who testified as RW1 and RW2 respectively. Mr. Matanyi was the first to go. He identified himself as the Respondent's Human Resource Officer. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
17. It was RW1's evidence that on 13th March, 2018 the Claimant was issued with a suspension letter on the premise that 32 boxes from a shipment destined for France, were missing. Subsequently, the suspension was extended to enable investigations continue.
18. The Respondent conducted investigations which revealed that there was a cartel that was siphoning goods from its premises especially flowers and fish and this would take place largely in the night from 8.00pm to 9.00pm.
19. According to RW1, the process of stealing flowers involved the following:
 - i. The Flower Team who were tasked with receiving the packing list, would consult with the "customer" on the available varieties. The Customer needs were relayed to the rest of the Cartel who understand their specific roles.
 - ii. On arrival of a farm truck, the acceptance team would manipulate the docket weights less the number of boxes they have already planned to siphon.
 - iii. The supervisors and Team leaders would ensure specific pointers are allocated in the cold room to put aside the boxes of interest.
 - iv. The porters would palletize genuine Freight Wings Limited Cargo siphoning out 15-20 boxes which would be consolidated to ensure on Ball pallet or about 200 and above boxes.



- v. That on occasions where there were massive rollovers in the cold-room for example 800 boxes the thieves would get out 50-100 boxes.
 - vi. That Air France customer's boxes was known to be full of complaints and further there were occasional claims from the Customers in the United Kingdom.
 - vii. There was an employee in charge of requesting dollies from the airlines who would use one of the dollies requested earlier under the auspices of the Freight Wings Limited to transport the special cargo. This "special cargo" would pass as a normal shipment complete with net and polythene. They would also use trucks in siphoning loose loads.
 - viii. A contracted senior security guard would authorize the opening of the gates purporting to have written details in the security book and the guard would obey his orders without question.
 - ix. The internal security whose role was to escort the shipment would compromise the route contrary to the genuine documentation available. The tractor would be diverted to Signon or Africa Management Logistics for off- load of the "special cargo". The drivers used in the escort vehicles were also managed by the Operations team so that only specific drivers were used in a trip with the "special cargo" or the coordinator himself would escort the shipment.
 - x. At Signon, a team of 20-30 casuals (paid by the cartel) would be waiting to off-load the pallet into a local dealer's waiting truck. They would further invert the boxes inside out to hide the labels of the consignment or sometimes have their own boxes.
 - xi. The truck would then proceed to Africa Management Logistic/HCDA for final shipment with all necessary documentation already prepared.
 - xii. To complete the transaction the local dealer would always pay within 24 hours which money would be distributed in cash to all the staff involved even if on leave or off day at all sorts of places within and outside the Respondent's premises including the Respondent's toilets and occasionally, money distribution would be via m-pesa.
20. It was RW1's further evidence that as a result of the monies received in the theft of flowers from the Respondent, the Claimant made a lifestyle adjustment and bought a car and spent money lavishly on fun, buying lunches especially for females that saw him elected as the Sacco Chairman. The Claimant had also set up a company that exports mangoes and avocados at least 4 times a month which is said to cost him about Kshs 300,000/= to do the documentation and gets profits of about Kshs 180,000/=.
21. The Claimant and three others namely Musalia Maneno and Frederick would clock out at the end of their shift until about midnight and on one occasion when the "business" was good they would ask the person in charge of transport to give them another truck for purposes of transporting their "special cargo".
22. RW1 further stated that the Claimant among three others namely Frederick, Ameka and Kyere, were deemed as dangerous to the extent of eliminating persons who cross their paths. There had been reports that the Claimant, Frederick, Ameka and Kyere had planned to kill a staff by the name Hellen who was in Human Resource department in 2017 and had informed her to "watch her back" in this current scandal.
23. RW1 further stated that the Claimant has occasioned loss to the Respondent as a result of the flower theft from the period between 25th January, 2018 to 10th February, 2018 and the total number of stolen flower boxes were 300 boxes, with a market value of Kshs. 191,250,000/=.



24. He went on to state that a notice to show cause dated 28th March, 2018 was issued to the Claimant after investigations were conducted to the effect that 32 flower boxes were missing on arrival at their destination in France and as the Head of the Operations department, he was in charge of ensuring and confirming that all units palletized have the right number of boxes and the same correctly documented. The Claimant in his response denied all the allegations. His explanation was considered and he was subsequently invited for a disciplinary hearing. Contrary to the Claimant's assertions that the hearing held on 29th March 2018 was a sham, it is evident that his allegation is merely scandalous since he was given the right to appeal, which he did not invoke.
25. The Respondent pursuant to section 45 (2) of the *Employment Act*, 2007, terminated the Claimant for a valid reason as they related to his conduct. In RW1's view, the termination was for a fair reason and was done in accordance with fair procedure. Moreover, the Respondent adhered to all the necessary provisions of the Act, including Section 41 of the *Employment Act* by inviting the Claimant for a disciplinary hearing. RW2 termed the Claim as baseless, fatally defective, frivolous, vexatious and a waste of the Court's time.
26. Mr. Joseph Changa who testified as RW2, stated that he holds the position of Senior Supervisor in the Respondent company. At the material time, he was holding the position of flower chain team leader and by virtue of his role, he used to oversee the packing of shipments to their various destinations. He was primarily involved in the packing of flowers that were to be exported and or dispatched locally.
27. He personally knows the Claimant in light of the interactions he had with him. Given his position, the Claimant needed his compliance to enable him in conjunction with others steal flowers and deliver them to their respective operatives. The Claimant would inform him what they had organized in order for him to allow porters to take flowers from the warehouse and he would organize how the flowers would be taken out of the premises without anybody knowing.
28. It was RW2's further evidence that he went on leave and reported back towards the end of December, 2017. On or about 23rd December, 2017, he was informed by one porter by the name John Mwangi that one Frank Ameka and the Claimant had managed to get some boxes from the warehouse. Whenever the Claimant and Frank Ameka got an opportunity, they would take advantage and steal flowers. Ameka told him that together with the Claimant, they had spoken with a broker and the coordinator would speak to the security head Mr. Fredrick Adesia. He wanted him (RW2) to let them take the flowers like they had done before. He declined their proposal and they were not amused. The Claimant started exerting pressure on him in a bid to make him give in to their proposal.
29. It was RW2's further evidence that the Claimant advised him very strongly to give in but he persistently refused and this led him to use other means to coerce him. For instance, he would shout at him over the walkie talkie and also call him persistently. At one point, he wrote an internal memo stating that they had looked for him but he was not there which did not sit well with the management. In spite of the Claimant's tactics, he was still adamant and refused to be involved in their illegal activities.
30. Before 28th March, 2018, the Claimant followed up by enquiring from him whether he had given thought and decided on their proposal. He responded by informing him that he was not ready to be involved in their illegal activities. The Claimant tried to sweet talk him by telling him that he would make a lot of money from the deal if he let them steal but he was adamant that he was not ready to be involved.
31. On or about 4th February, 2018, thinking that he had convinced them about his disinterest, he learnt that they had already stolen flowers. The next day, he went in and took stock and found only 3 pallets remaining from the night shift to be palletized. He built 2 pallets that were enough boxes for one pallet



and discovered that there was an excess of 40 boxes left. Afterwards, he went and confronted Ameka and Benjamin Kyere and enquired as to why there was an excess of 40 boxes. They both apologized for not informing him about the deal.

32. When making out the report, he could not include the excess 40 boxes so he told them that he should not find the excess boxes there the following day but should find everything as per the packing list. On reporting the following day, he did not find the excess boxes at the warehouse. He proceeded to check the load sheets and realized that Ameka and Benjamin Kyere had tampered with the pallet he had built. After the incident, he started taking stock before the end of the shift so as to block the theft.
33. RW2 further stated that out of nowhere, Ameka gave him Kshs 13,000/= which he took but he did not participate in the theft.
34. According to RW2, it was the Claimant who was the mastermind of “swindling” flower boxes from the warehouse. He would give access then he would talk to Fedrick Adesia who was the head of security and who would physically escort the loot to the designated place. On its part, the outsourced security would not record anything about the stolen flowers leaving the warehouse.

Submissions

35. It was Claimant’s submission that the documentary evidence he had produced before Court has not been controverted in any way. He maintained that the evidence cannot be impeached by oral evidence which screams of malice from the Respondent and which is not accompanied by any document. The Claimant further submitted that from the outset, the Respondent knew that it did not have any evidence against him to warrant termination. He further urged that the Respondent did not have a valid reason to terminate him from employment. It was further submitted by the Claimant that there was no hearing and that he was condemned unheard. In support of his submission, the Claimant relied on the cases of *Kenfreight (EA) Ltd vs Benson K Nguti* (2016) eKLR and *Loice Otieno vs Kenya Commercial Bank Limited*, Cause No. 1050 of 2011.
36. At the time of writing this Judgment, the Respondent’s submissions were missing from the Court’s physical record and were not traceable on the online portal. In any event, as per the Court’s directions issued on 20th June, 2023, the same were to be filed by 7th July, 2023.

Analysis and Determination

37. Having considered the pleadings, the evidentiary material before Court and the submissions on record, the issues falling for determination can be distilled as follows: -
 - a. Whether the Respondent has proved that it had a valid and fair reason to terminate the Claimant’s employment;
 - b. Whether the Respondent accorded the Claimant procedural fairness prior to termination;
 - c. Whether there is a case of defamation;
 - d. Is the Respondent’s Counterclaim justified?
 - e. Is the Claimant entitled to the reliefs sought?

Fair and valid reason?

38. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. In addition, Section 45



(2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.

39. As can be discerned from the Claimant's letter of termination, his exit from the Respondent's employment was connected to the flower theft syndicate of 32 boxes. The letter of termination reads in part:

“This is to inform you that your contract has been terminated with effect from 27th April 2018.

This is in reference to a flower syndicate that has been brought to the attention of management in the course of investigating the loss of 32 flowers boxes that occurred on 25th February, 2018 that has since been reported to the police for further investigations. This syndicate has been stealing flowers from the company and selling to unknown and unauthorized dealers.

Management has since reviewed the flower theft syndicate report that has been going on and is totally perplexed at the level of illegal operations that went on for a very long time unnoticed and/or underestimated within the company premises.

As the Operations Coordinator, you were responsible for the overall team management and ensure that service levels expected were achieved. Management can now confirm that there was massive theft of flowers between 29th January 2018 and 5th February 2018 and other dates not mentioned herein in addition to the loss that happened on 25th February 2018 that has now been formally recorded with the Government police as OB NO 29/10/0418.

It has also been confirmed that two of your staff Benjamin Kyere and Joseph Changa were on 4th February 2018 engaged in a bitter verbal altercation in relation to a "flower deal" that had occurred earlier in the same day. This happened in your presence but has never been reported to date.

One of your main responsibilities was the management of the cold-room to ensure that most importantly all cargo especially flower boxes during valentine season 2018 were handled diligently and secured during this period of valentine. The issue of flower theft especially during valentine has been discussed and all staff were asked to be on high alert as the season for 2018 approached. The high level of theft should have happened under your watch whether by commission or omission. As a Head of Department your responsibility to ensure that company interests were protected.

Management has noted that over 200 boxes were stolen daily in the period stated above and unknown and unauthorized dealers; the stolen boxes of flowers being delivered by pallets pulled by company tractors and/or trucks.

It has also been noted that during this period, you personally took the responsibility of escorting most late flower shipments. Coincidentally, stolen flowers were delivered to unauthorized destinations during these times.

Management has also noted there were suspicious M-pesa transactions between yourself and staff that provides reasonable doubt to your involvement in the flower cartel and also notes that you have been adversely mentioned in this conspiracy to defraud the company through theft of flower boxes.”



40. The Claimant distanced himself from the flower theft and in his statement dated 29th March, 2018, he was categorical that he did not participate in the loading and palletizing of the flower shipment. He further stated that on 25th February, 2018, he confirmed and dispatched 860 boxes according to the palletizing load sheet. The Claimant further stated that he had not heard of the flower syndicate.
41. In support of his case, the Claimant exhibited the perishable load sheet which indicate that 860 flower boxes were loaded on 25th February, 2018. The said perishable load sheet is signed by one Ameka.
42. The Claimant further exhibited the Air Waybill issued by Air France on 25th February, 2018. Notably, the same indicates that 860 flower boxes were loaded.
43. Worthy to note, is that the Respondent did not challenge the authenticity of the perishable load sheet and the Air Waybill. In addition, the Respondent did not exhibit evidence to discount the aforementioned documentary evidence. In essence, the Respondent failed to provide evidence of the loss of the 32 flower boxes.
44. It is also notable that the Respondent indicated in the notice to show cause letter issued to the Claimant that the clearing agent, Sotracom and the customer MM flowers counted the boxes and confirmed that they received 828 boxes instead of 860 boxes. Be that as it may, the Respondent did not adduce evidence in whatever form or manner from either the said agent or its client confirming the shortfall. It goes without saying that such confirmation was crucial in proving that indeed, the flower boxes dispatched from the Respondent's warehouse were less by 32. This is moreso noting that the perishable load sheet and the Air Waybill were in consonance that 860 flower boxes were dispatched on the material day.
45. Further, it is notable that the Air Waybill was apparently generated by Air France, which is a different entity from the Respondent company. In this regard, one wonders why the said Airline would indicate that it received 860 boxes from the Respondent if that was not the case? How did the alleged shortfall occur if at all 860 flower boxes were confirmed as loaded by Air France? At what point was the alleged shortfall detected? Were the said flowerboxes counterchecked before loading?
46. Needless to say, the foregoing gaps impair the Respondent's case that 32 flower boxes went missing and did not reach their intended destination. As such, the allegations against the Claimant were not substantiated.
47. In the circumstances, I am unable to find that the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment arising from theft of 32 flower boxes.
48. In light of the foregoing, I cannot help but find that the Respondent did not satisfy the requirements of Section 45(2) (a) and (b) of the Act in that it had a fair and valid reason to terminate the Claimant's employment based on his conduct. As such, it has not proved that there was substantive justification to warrant termination of the Claimant.

Procedural fairness?

49. Beyond proving that there was a valid and fair reason to terminate the employment of an employee, an employer is required under the Act to further prove that it accorded such an employee procedural fairness prior to terminating his or her employment.
50. This position is aptly captured under Section 45(2) (c) of the Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. As to what constitutes fair procedure, Section 41(1) requires an employer to give the employee notification of the allegations for which it is considering termination of the employment contract and to accord the employee a hearing prior to termination.



It is worth pointing out that the employee is entitled to have another employee or a shop floor union representative of his choice present during such explanation.

51. In this case, the record bears that the Claimant was suspended from duty and subsequently issued with a show cause letter stipulating the allegations levelled against him. The Claimant's explanation to the allegations is noted in the said show cause letter. It was the Claimant's case that he was subjected to a sham hearing. This position was disputed by the Respondent.
52. In view of the opposing positions taken by both parties over the issue, it is apparent that the same could only be resolved by evidence with regards to the steps undertaken by the Respondent before the hearing and during the hearing. For instance, how was the Claimant notified of the hearing? Was he notified of his right to be accompanied to the hearing in line with Clause 11.2 (c) of the Respondent's Company Manual? The answers to these questions are definitely not on record as the Respondent did not avail evidence of a notification and more importantly, a record of the disciplinary hearing.
53. Pursuant to Section 45(2) (c) of the Act, it is the employer who bears the burden of proving that an employee was terminated in accordance with a fair procedure. In absence of any evidence in this regard, the Respondent did not discount the Claimant's assertions that he was not accorded a fair hearing within the meaning of Section 41 of the Act.
54. In total sum, the Respondent in this case failed to discharge its burden by proving that the procedure it applied against the Claimant was fair and in accordance with Section 41 of the Act. I am therefore led to conclude that the Claimant's dismissal was not lawful.

Whether there is a case of defamation

55. It is the Claimant's case that the letter emanating from the Respondent to African Cargo was intended to defame him. The letter in question which is dated 21st March, 2018, reads in part:

“The above-named person is an employee of Freight Wings limited. We however wish to inform you that Mr. Mambili is undergoing a serious disciplinary process and is not allowed to transact any business in the name of or on behalf of Freight Wings Limited and any other companies associated with Vegpro (K) Ltd until further advise. Any changes will be communicated in writing by the undersigned.”
56. In my considered view, the above mentioned letter is not defamatory in any way, considering the context in which the communication was being made. Further, it was factual that at the time, the Claimant was undergoing a disciplinary process.
57. Consequently, the claim for defamation cannot be sustained.

Counterclaim

58. The Respondent has counterclaimed against the Claimant the sum of Kshs 191,250,000/= being what it termed as a loss of 300 flower boxes from the period between 25th January, 2018 to 10th February, 2018.
59. As stated herein, the Respondent did not adduce evidence of the loss of the flower boxes, be it 32 or 300. Further, it is notable that the Claimant had been cited for theft of 32 boxes. How did the same rise to 300?



60. Further, as it is the Respondent alleging loss of the flower boxes, it follows that it had the burden to prove the said loss and more importantly, that the same was occasioned by the Claimant. From the record, it is evident that the Respondent failed to do as much.
61. To this end, I cannot help but find that the Respondent has failed to prove its Counterclaim against the Claimant hence the same is dismissed in its entirety.

Reliefs?

62. As the Court has found that the Claimant's termination was not fair and lawful, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to six (6) months of his gross salary. This award takes into account the length of the employment relationship as well as the circumstances attendant to the Claimant's termination.
63. The Claimant is also awarded leave pay as the Respondent did not exhibit his leave records in line with its obligation under Section 74(1) (f) of the Act to demonstrate the leave days taken by the Claimant and those outstanding. However, pursuant to Section 28(4) of the Act, this will be limited to 18 months preceding the Claimant's termination.
64. The claims for pension loss for the remainder of service upto 60 years, pecuniary loss and general damages are all declined.

Orders

65. It is against this background that I enter Judgment in favour of the Claimant against the Respondent in the following manner: -
- a. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - b. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 120,000.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 720,000.00 being equivalent to six (6) months of his gross salary.
 - d. The Claimant is further awarded leave pay in the sum of Kshs 156,000.00
 - e. The total award is Kshs 996,000.00.
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The Counterclaim is dismissed.
 - h. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Otieno instructed by Mr. Onyony

For the Respondent Ms. Atieno instructed by Ms. Oduo

