



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nderitu & 94 others v Flower City (K) Limited (Cause E6499 of 2020)  
[2023] KEELRC 2998 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2998 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6499 OF 2020  
JK GAKERI, J  
NOVEMBER 22, 2023**

**BETWEEN**

**SIMON MUHARI NDERITU & 94 OTHERS ..... CLAIMANT**

**AND**

**FLOWER CITY (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimants commenced this suit by a Statement of Claim filed on 20<sup>th</sup> November, 2020 alleging the Respondent's refusal to allow the Claimants access the place of work which amounted to termination of employment.
2. It is also the Claimants' case that the Respondent did not remit NSSF and NHIF contributions for the months of January, February, March, April and May 2019.
3. The Claimants aver that Respondent's failure to pay salary for work done, remit contributions and pay terminal dues amounted to breach of contract.
4. The Claimants prays for;
  - a. A declaration that the Respondent has breached the contract of employment with the Claimants and violated the provisions of the *Employment Act*.
  - b. An order directing the Respondent to pay the Claimants outstanding salary arrears of Kshs.1,837,877.16 comprising;
    - i. Balance of the April 2019 salaries for employees in the subordinate departments of Kshs.92,049.91.
    - ii. May 2019 salaries Kshs.1,040,242/=.



- iii. July (and a few June salaries for employees in the Production Department Kshs.167,250/=.
- iv. August 2019 salaries for 2 weeks Kshs.524,835.25.
- v. March and September unpaid salaries for days worked for 2 employees in Maintenance and Fertigation Department Kshs.13,500.00.
- c. Salary in lieu of leave Kshs.792,528.71.
- d. Order directing the Respondent to refund or remit NHIF deductions for January, February, March, April and May 2019, Kshs.94,600/=.
- e. Order directing the Respondent to refund or remit NSSF contributions Kshs.94,600/=.
- f. Severance pay Kshs.1,442,350.50.
- g. General damages for unfair termination.
- h. Costs; and
- i. Any other order the court may deem fit to grant in the circumstances.

### **Respondent's case**

5. The Respondent's case is pleaded as follows;
6. The Respondent avers that it established a flower farm at Kithimani in 2015/2016 and engaged the Claimants in related areas such as greenhouse, maintenance, planting, weeding, irrigation, pest control, watering, harvesting, quality control, grading, transport, plumbing, machine maintenance, operations and security and business was good until the early 2018 when market prices for cut flowers fell affecting the Respondent adversely and income declined.
7. That from September 2018 to May 2019, the Respondent used bank credit to pay salaries and finance operations and the Claimants were notified of the challenges and requested to be patient but they engaged in picketing, go-slows and sit-ins the entire month of May 2019 and deserted the workplace at the end of the month but not before the Claimants in cohorts with the union intimidated, threatened and assaulted the Chief Executive Officer, Pardeep Kumar forcing him to remove shoes, kneel on the floor and to sit down on the ground. The Respondent had not recognized the union and it had no membership from the Respondent's employees.
8. That the union delivered a letter on 2<sup>nd</sup> July, 2019 of a planned demonstration at the director's residence at Thika and they did so on 4<sup>th</sup> July, 2019.
9. The Respondent avers that its director and the Chief Executive Officer attended a meeting at the County Labour Office on 9<sup>th</sup> July, 2019 and were forced to sign a Memorandum of Agreement of even date.
10. That the Respondent's operations stopped in May 2019 and had no means of resuming operations.
11. That the union had commenced a similar suit but withdrew it as its documentation was faulty having been prepared after the Respondent company had ceased to operate.



## Claimant's Evidence

12. In his evidence in chief, the witness testified that he was giving evidence on his behalf and 92 other Claimants in the suit, yet the suit has 95 names.
13. That he joined the Respondent in 2016 and was an employee until August 2019.
14. According to the witness, the Respondent commenced operations in 2015 and continued until around October 2018/2019 when challenges set in and it stopped paying salaries.
15. The witness testified that sometime in early 2019, some employees approached the County Commissioner who summoned a meeting and a return to work formula was signed on 29<sup>th</sup> June, 2019 and they later engaged the Kenya Plantation and Workers Union on the delayed salaries and registered with the union.
16. That the Recognition Agreement was signed on 12<sup>th</sup> July, 2019.
17. The Claimant confirmed that workers resumed duty on 19<sup>th</sup> August, 2019 for only 2 weeks and rendered no services thereafter and later learnt that the company had ceased operations.
18. On cross-examination, the witness confirmed that he had authority to testify for 92 Claimants only who signed the letter of authority and had no authority to plead for the others.
19. The witness confirmed that the NHIF document at page 11 of the Claimants Bundle of Documents had neither a signatory or updating officer's signature nor the name and identity card number of the person it related to.
20. According to the witness, all Claimants were supposed to have similar statements and penalties although some of the Claimants such as Virginia Mbai, Janet Ndoli Muindi and Joswa Adanje had neither the NHIF nor the NSSF statements on unpaid dues.
21. On 31<sup>st</sup> May, 2015, when cross-examination of the witness continued, the witness confirmed that the claim had 79 Claimants only. The witness confirmed that the others, Stella Nyapara, witness who did not testify did not sign the Verifying Affidavit.
22. The witness confirmed that he was not among those who went to see the Deputy County Commissioner and was unaware of what transpired at the meeting.
23. The witness testified that employees of the Respondent joined the union but had no evidence of when, how many or evidence of membership.
24. He admitted that employees downed their tools on 10<sup>th</sup> May, 2019 and resumed on 23<sup>rd</sup> May, 2019 and salary for May was paid on 20<sup>th</sup> May, 2023.
25. The witness confirmed that workers placed stones at the entrance of the company's premises.
26. That although he testified that he attended the meeting at the Machakos Labour Office, his name was not among the attendees and was unaware why other attendees did not sign the letter dated 9<sup>th</sup> July, 2019.
27. The witness confirmed that he was paid a leave allowance, that he did not take leave and did not know whether Claimants were paid for leave days not taken.
28. The witness testified that the downing of tools was not preceded by a written notice.



29. CWII, Stellar Tebaluk Nyapara did not testify in court and although her statement on record was adopted by consent, the statement is neither signed nor dated and lacks evidential value. Relatedly, the witness did not sign the Verifying Affidavit.
30. The Respondent's witness did not testify in court.

### **Claimant's submissions**

31. Counsel isolated three issues for determination, namely;
  - i. Whether the Respondent is in breach of the terms of employment.
  - ii. Whether the Respondent is in breach of Sections 40, 41 and/or 45 of the *Employment Act*.
  - iii. Whether the Claimants are entitled to the reliefs sought.
32. On the 1<sup>st</sup> issue, counsel submitted that although the Claimants were employees of the Respondent from 2016 to 2019, the Respondent did not issue them with employment contracts and they had proved that their salaries were not paid from time to time. Reliance was made on the sentiments of the court in *Jackson M. Italakua & another v Kenya Farmers Association Limited* (2021) on the effect of non-payment of salary to an employee.
33. Counsel urged that the non-payment of salary to the Claimants was a fundamental breach of the contract of employment.
34. As regards breach of the *Employment Act*, 2007, counsel relied on the sentiments of the Court of Appeal in *CMC Aviation Ltd V Mohammed Nour* (2015) eKLR on unfair termination of employment as well as those in *Monica Wanza Mbavu V Roofspec & Allied Works Co. Ltd* (2021) eKLR.
35. Reliance was also made on the provisions of Section 43 of the *Employment Act*, 2007 on the burden of proof borne by the employer to urge that although the Respondent alleged that the Claimants absconded duty, it adduced no evidence of the efforts it made to reach out to them or a notice to show cause for the desertion.
36. As regards the reliefs sought, counsel submitted that the Claimants were entitled to salaries for the duration worked.
37. Counsel further urged that since the Claimants had proved that the termination of employment was unfair, they were entitled to compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act*, 2007.
38. Counsel urged that the Claimants were entitled to all the reliefs sought.

### **Respondent's Submissions**

39. Counsel addressed various issues including the fact that the Claimants did not disclose that they had filed another suit through the Kenya Plantation and Agricultural Workers Union (Union) but withdrew it owing to the evidential burden of establishing that the Claimants were indeed members of the union.
40. Counsel submitted that the fact of non-disclosure was an abuse of the court process and deprived the Claimants the reliefs prayed for.



41. On the joint authority to sue given to Simon Muhari Nderitu (1<sup>st</sup> Claimant) and Stellar Tebaluk Nyapara (2<sup>nd</sup> Claimant), counsel submitted that the following nine Claimants had not signed the authority and CWI admitted as much.

Claimant's Name Claimant's No.

1. Esther Katungu 24
  2. Silvester Kilonzo Kitheka 33
  3. Rosemary Kisuu Kakuthu 45
  4. Teresia Muthee Mwanzia 55
  5. Jane Ndoti Muinde 63
  6. Tirisa Muthoni Ndukanio 70
  7. Nancy Mutua 75
  8. Rose Mumbua Ndugu 91
  9. Elizabeth Muthoni Ngugi 93
42. Counsel urged that only 78 individuals had signed the authority to sue and are in the statement of claim.
43. Counsel further submitted that since the Letter of Authority was undated, the witness had not demonstrated that he had authority to sue when the suit was filed.
44. That since the two Claimants were appointed jointly and only one acted, the suit was incompetent.
45. According to counsel, CWI had no authority to act alone and the suit ought to be struck out.
46. Counsel cited no authority for the proposition.
47. Counsel further submitted that Mr. Joseph Mutiso Mutula's name appeared as the 8<sup>th</sup> and 80<sup>th</sup> Claimant, a fact CWI admitted on cross-examination.
48. On the reliefs, counsel submitted that as only 79 Claimants signed the authority, the claim for NSSF contributions ought to be based on the 79 Claimants only and only for the months of February, March and April 2019 as they were involved in sit-ins, go slow and strike in May 2019.
49. That the amount due would be Kshs.47,400/=.
50. However, counsel submitted that a letter from the NSSF-Thika dated 17<sup>th</sup> May, 2021 confirmed that all NSSF dues by the Respondent had been paid till April 2019 and a statement to that effect was attached.
51. Counsel urged that the NSSF statement provided by CWI dated 2<sup>nd</sup> October, 2019 was provisional and could not disprove the Respondent's evidence.
52. As regards NHIF refunds of Kshs.94,600/= or payment, counsel submitted based on 79 Claimants, the amount due was Kshs.47,400/= for the months of February, March and April 2019.
53. Counsel urged that most of the Claimants did not provide upto date NHIF statements, such as Stellar Tebaluk Nyapara, Virginia Muthoni Mbai, Joshua Andaje Maina and Jane Ndoti Maina.
54. That since the NHIF statements produced relate to the period up to 31<sup>st</sup> January, 2019 and the claim relates to February, March and April, the same had not been established for refund to ensue.



55. Counsel submitted that the severance pay of Kshs.1,142,350.50 claimed was unavailable as the Claimants were not declared redundant as was the claim for general damages for unfair termination of employment.
56. On leave not taken, Kshs.792,528.71, counsel submitted that CWI did not attend any of the meetings that took place in other forums in an endeavour to resolve the matter and the issue of pay in lieu of leave was neither discussed nor agreed upon in those forums.
57. According to counsel, the statement of claim contained hypothetical numbers of days for untaken leave and no period was assigned and no evidence was provided and CWI admitted had no information on days or payment.
58. As regards salary arrears, counsel submitted that none was due as the figures have no evidential support, all salaries were paid as confirmed by the letter from the Deputy County Commissioner to the Labour Office dated 27<sup>th</sup> June, 2019 that payment was made on 20<sup>th</sup> May, 2019, a fact the Claimants' witness admitted on cross-examination.
59. Counsel further submitted that the Memorandum of Agreement dated 9<sup>th</sup> July, 2019 between the Respondent and the union was not signed by the union and the Claimants could not rely on it to support their case as they tendered no evidence of membership.
60. That the Claimants had downed their tools in May 2019 as the agreement dated 22<sup>nd</sup> May, 2019 attests and did not work thereafter and the entire suit ought to be dismissed with costs to the Respondent.

### **Findings and Determination**

61. It is common ground that the Claimants or the majority of them were employees of the Respondent between 2016 and 2019.
62. Strangely, neither of the parties provided the specific dates of employment for all the Claimants.
63. It is also not in dispute that the Claimants served the Respondent in different departments from Quality Control, harvesting and security among many others and all was well until late 2018 when the Respondent's ability to pay salaries appear to have reduced and had to rely on borrowing to sustain operations and staff costs and the matter reached its crescendo in April/May when the Respondent failed to pay salaries and employees reacted by go-slows, strikes and sit-ins without notice.
64. The issues that commend themselves for determination are;
  - i. Whether the Claimants herein have a competent suit before the court.
  - ii. Whether the Claimants deserted or their employment was unfairly terminated by the Respondent.
  - iii. Whether the Claimants are entitled to the reliefs prayed for.
65. As to whether the Claimants have a competent suit, the Respondent's counsel argued that they did not as Mr. Simon Muhari Nderitu, 1<sup>st</sup> Claimant and Stellar Tebaluk Nyapara, 2<sup>nd</sup> Claimant were appointed jointly to sue and plead on behalf of themselves and other Claimants and only Mr. Simon Muhari Nderitu, 1<sup>st</sup> Claimant signed the Verifying Affidavit and testified in court.
66. Rule 9 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 provides that;
  1. A suit may be instituted by one party on behalf of other parties with a similar cause of action.



2. Where a suit is instituted by one person, that person shall in addition to the statement of claim file a letter of authority signed by all the other parties.  
Provided that in appropriate circumstances, the court may dispense with this requirement.
  3. The statement of claim shall be accompanied by a schedule of the names of the other Claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each Claimant.
67. The Respondent’s counsel faulted the authority on the premise that it was exercised by one person as opposed to the two appointees jointly.
  68. Although the Claimants who signed the Letter of Authority appointed two persons “to represent, negotiate, plead, act, take action and file a suit” on their behalf, there is no indication that the two had to act jointly or that one could not act in the absence of the other.
  69. If that was the intention, in the court’s view, the Claimants would have been that explicit in the wording of their Letter of Authority.
  70. Although Rule 9(1) cited above refers to one party, it does not exclude two or more persons being appointed to represent other members of the group with a similar case.
  71. In addition, Order 1 Rule 13(1) of the *Civil Procedure Rules*, 2010 expressly provides for the same.
  72. The court is not persuaded that the fact that Mr. Simon Nderitu Muhari acted alone in filing the suit, signing the Verifying Affidavit and Witness Statement and testifying in court vitiated the authority given by the Claimants, although it was not dated.
  73. In any case M/s Stellar Tebaluk Nyapara neither signed nor dated her statement on record and did not sign the Verifying Affidavit.
  74. Equally, the proviso of Rule 9(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 confer discretion on the court to dispense with the requirement of letter of authority in appropriate circumstances.
  75. Surprisingly, however, and as submitted by the Respondent’s counsel, not all the Claimants identified in the statement of claim signed the letter of authority.
  76. Rule 9(2) cited above is couched in mandatory terms and states that the letter of authority must be signed by all the other parties.
  77. In *Chalicha Farmers Co-operative Society Ltd v George Odhiambo & 9 others* (1987) eKLR, the Court of Appeal was categorical that where a person is appointed to represent another or others in a suit, the relevant procedure of appointment must be complied with.
  78. The court overruled the decision of the High Court which allowed a person to represent persons who had not signed a Letter of Authority.
  79. The foregoing is fortified by the sentiments of Gacheche J. in *Justo Ngoka & 255 others V Rai Ply Wood (K) Ltd & 2 others*, Eldoret HCCC No. 69 of 2001 as follows;

“There are 226 plaintiffs here, it is imperative that I point out, that first and foremost, at the time of filing the plaint, each of the 226 plaintiffs was a plaintiff in his own right and each should be treated individually.”



80. Similarly, in *Ndungu Mugoya & 473 others V Stephen Wang'ombe & 9 others* (2005) eKLR, Kimaru J. stated as follows;

“The option is not mandatory where such a plaintiff has opted to act or appear in his own behalf in the proceedings of a suit. But where he has opted to authorise another plaintiff, then it is mandatory that such a written authority be filed in court . . .”

81. (See also *Savala & another v Ndanyi* (2022) KEELC and *John Kariuki & 347 others v John Mungai Njoroge & 8 others* Nakuru HCCC No. 152 of 2003 among others.)

82. The foregoing sentiments and decisions are clear that for a party to purport to represent another or others in court, it must have written authority to do so, signed by the party authorising the other.

83. In the instant case, it is evident some of the Claimants did not authorise Mr. Simon Muhari Nderitu to sue or plead on their behalf and their suit against the Respondent remains unprosecuted.

84. Noteworthy, the fact that the Letter of Authority on record is undated does not, in the court's view vitiate it or render the suit incompetent as submitted by counsel for the Respondent. While the law insists on the signature, it is reticent on the date.

85. Arguably, the 1<sup>st</sup> Claimant prosecuted the suit of only those Claimants who had signed the Letter of Authority.

86. As regards termination of employment, while the Respondent contends that it did not terminate the Claimant's employment, that they left the place of work enmass at the end of May, the Claimant's counsel submitted that the termination of employment was substantively and procedurally unfair.

87. The law on termination of employment is contained in various provisions of the *Employment Act, 2007*.

88. The Act addresses both the substantive and procedural precepts of termination of employment such as notice, reason(s) for termination, proof of reason, category of reason, justification and procedure. (See *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR.)

89. In sum, the provisions of the *Employment Act, 2007* are unequivocal that for a termination of employment to pass muster, it must be substantively justifiable, in terms of the reason(s) and must have been conducted in accordance with a fair procedure as succinctly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.

90. Before delving into the fairness or otherwise of the termination of employment, it is essential to dispose of the issue as to whether the Claimants deserted the work place as alleged by the Respondent.

91. *Black's Law Dictionary*, 10<sup>th</sup> Edition defines desertion as

“The wilful and unjustified abandonment of a person's duties or obligations.”

92. In *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated;

“ . . . desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return.”



93. And as Ndolo J. held in *Ronald Nyambu Daudi v Tornado Carriers Ltd* (2019) eKLR;
- “Desertion of duty is a grave administrative offence which if proved, would render an employee liable to summary dismissal.”
94. The emerging jurisprudence of this court is that an employer who pleads desertion or abscondment by an employee is required to demonstrate the steps it took to contact the employee to resume duty and/or put him or her on notice that termination of employment was being considered on account of the desertion.
95. The decisions in *Felistas Acheba Ikatwa v Charles Otieno* (2018) eKLR, *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR, *Joseph Nzioka V Smart Coatings Ltd* (2017) eKLR and *Ronald Nyambu Daudi v Tornado Carriers Ltd* (*Supra*) are spot on.
96. In the instant suit, the Respondent’s witness testified that in May 2019, the Claimants engaged in unlawful picketing, strikes, go-slows and sit-ins and ultimately deserted the work place at the end of May 2019 vowing not to resume duty.
97. The witness states that the desertion came after the Claimants and the union stormed the Respondent’s office, harassed, threatened and intimidated the Chief Executive Officer on 28<sup>th</sup> May, 2019.
98. The witness attached pictures which showed the CEO seated on the ground without shoes surrounded by persons whose faces were not captured.
99. According to the witness, the desertion paralyzed the Respondent’s operations in totality.
100. Strangely, the Respondent tendered no evidence of the actions or steps it took in its endeavour to have the Claimants resume duty.
101. Evidently, it did not issue notices to show cause or any warning that the Claimants had not only participated in illegal go-slows, sit-ins, strikes and picket, but had deserted the workplace.
102. As held in *Ronald Nyambu Daudi v Tornado Carriers Ltd* (*Supra*), desertion must be proved and the burden of proof is borne by the employer, as he who alleges must prove.
103. In this case, the Respondent tendered no evidence of the alleged desertion of duty by the Claimants.
104. Finally, even if the Claimants left the place of work, it was the duty of the employer to dismiss them from employment and demonstrate that it subjected them to a fair disciplinary process under Section 41 of the *Employment Act*, 2007 as held in *Judith Atieno Owuor v Sameer Agriculture & Livestock Ltd* (2020) eKLR.
105. In the instant suit and as adverted to elsewhere in this judgement, the Respondent was grappling with serious financial challenges occasioned by low demand for cut flowers from late 2018 though the full impact was felt in early 2019.
106. The Claimants appear to have been aware of the challenges and approached the Deputy County Commissioner, Kithimani, the Kenya Plantation and Agricultural Workers Union and the Labour Office in an endeavour to have their salary arrears paid.
107. A letter by Deputy County Commissioner, Yatta, to the Machakos Labour Office dated 27<sup>th</sup> June, 2019 reveals that as early as 10<sup>th</sup> May, 2019, the Claimants had approached the office on account of their delayed salaries for April 2019 and an agreement was reached on 22<sup>nd</sup> May, 2019 when the parties signed a return to work formula.



108. Paragraph (vii) of the agreement dated 22<sup>nd</sup> May, 2019 states that;
- “ All employees return to workplace on 23<sup>rd</sup> May, 2023 7.30 am.”
109. Implicitly, the Claimants had abandoned the workplace before the agreement was arrived at, a fact admitted by CWI who testified that they downed their tools on 10<sup>th</sup> May, 2019.
110. CWI also confirmed on cross-examination that the Claimants resumed duty on 23<sup>rd</sup> May, 2019 and salary arrears were paid on 20<sup>th</sup> May, 2019.
111. Puzzlingly, the Memorandum of Agreement dated 9<sup>th</sup> July, 2019 allegedly between the Respondent and the Kenya Plantations Agricultural Workers Union makes reference to unpaid salary for April 2019.
112. The agreement makes reference to resumption of duty by employees and payment of salaries in future and there would be no victimization.
113. Regrettably, the union did not sign the agreement notwithstanding the fact that it had no Recognition Agreement with the Respondent at that time.
114. Strangely, while the Claimants witness testified that the Claimants continued working albeit intermittently in June, July and August, the Respondent’s witness was emphatic that the Respondent ceases operations in May 2019 and did not have the wherewithal to resume operations and has been closed since.
115. According to CWI, employees in production returned to work in June and July and were paid for June and July save for 2 weeks in July 2019.
116. From the Claimants’ witnesses’ evidence, it is decipherable that the Claimants did not resume duty after May 2019. He confirmed that he was not in the production department.
117. This is fortified by a letter dated 2<sup>nd</sup> July, 2019 by the union to the OCPD, Thika Sub-County informing the officer that members of the union would be demonstrating at the home of the owner of the Respondent company at Section 9 Estate demanding 2 months salary as the owner had closed the farm without due process.
118. This letter may have precipitated the meeting at the Machakos Labour Office where the Respondent’s Chairperson, Director and the Financial Controller were allegedly coerced to sign an Agreement but which the union did not sign. By that date, employees were not working.
119. Significantly, the Claimants witness made countless allegations with no supportive evidence or outright hearsay. A few examples will suffice.
- i. He testified that the Claimants had joined the union in May 2019 with no scintilla evidence of membership.
  - ii. He testified that Stellar Tebaluk Nyapara had signed a Verifying Affidavit yet she did not.
  - iii. That employees sought the intervention of the Deputy County Commissioner yet he was not involved and did not attend the meeting.
  - iv. It was his testimony that they sent representatives to the CEO yet he was not present and was unaware of what transpired.



- v. That the CEO had some employees arrested and charged in court yet he was not one of the persons arrested and had no evidence of the arrest or charges. He, however, admitted that the person seated without shoes surrounded by employees was the Respondent's CEO.
  - vi. That he attended the meeting at the Machakos Labour Office but had no evidence of having attended the meeting and attendees did not sign the agreement.
  - vii. The allegation that Mr. Kumar called a meeting on 17<sup>th</sup> August, 2019 and requested the Claimants to return to work, which they did. The witness tendered no evidence of the invitation to the meeting, attendees or what transpired to controvert the Respondent's assertion that the company ceased operations in May 2019. Evidence of payment of salary or other arrangement would have been sufficient.
120. From the cross-examination, it is clear that the witness had no personal knowledge of many facts and circumstances he alleged to have transpired.
121. One of the most glaring is the allegation that employees in the production department worked in June and July.
122. The Claimant confirmed that he was not in the Production department and had no evidence on the issue. He could not explain how many employees they were or their particulars.
123. However, to his credit, the witness testified and admitted that the Claimants downed their tools when their salaries for April and May were not paid.
124. From the foregoing, it is clear that the Respondent made no attempt to reach out to the Claimants after May 2019 until 9<sup>th</sup> July, 2019 when its representatives attended a meeting at the Labour Office at Machakos but no communication followed to the Claimants on separation or disciplinary proceedings for the alleged desertion.
125. Although the Claimants are not free from blame, the obligation to demonstrate that termination of employment was fair lay on the Respondent which failed to discharge the burden.
126. In sum, the Respondent tendered neither evidence of desertion nor fair termination of the employment relationship between the parties.
127. It is the finding of the court that the termination of the Claimants employment was unfair.

## Reliefs

### a. Declaration

128. Having found that the Respondent failed to prove that the Claimant deserted the workplace or their employment was terminated fairly, a declaration that the Respondent violated the provisions of the [Employment Act, 2007](#) is merited.

### b. Outstanding Salary Arrears Kshs.1,837,877.16

129. CWI, Mr. Simon Muhari Nderitu confirmed on cross-examination that salary for May 2019 was paid in May 2019 and the Respondent's Equity Bank statement for A/C No. 0390274191652 reveals that the sum of Kshs.2,916,465.00 was paid out as salaries on 22<sup>nd</sup> May, 2019.



130. Similarly, the statement reveals that the sum of Kshs.3,578,212.00 was paid out as salaries on 8<sup>th</sup> April, 2019.
131. The Respondent availed no evidence that it paid for the days worked in May 2019 as per the agreement dated 22<sup>nd</sup> May, 2019.
132. Having downed tools on 10<sup>th</sup> May, 2019 and resuming duty on 23<sup>rd</sup> May, 2019, the Claimants were at the workplace for only 15 days for which they are entitled to payment.
133. The Claimants witness availed no evidence that any salary for March, April, June, July and September 2019 was outstanding. If for instance the salary for March 2019 was outstanding, why was it not included to the Return to Work formula dated 22<sup>nd</sup> May, 2019 and who were these nameless employees who had been forgotten in the payment of salary?
134. The Claimants are awarded salary for 15 days in May 2019.

#### **c. Salary in lieu of Leave**

135. The Claimants' witness Mr. Simon Muhari Nderitu's written statement makes no reference to any outstanding leave days for any of the Claimants he was representing and tendered no oral evidence of the respective number of days outstanding, if any.
136. The schedule attached to the statement of claim dated 27<sup>th</sup> November, 2020 lacks supportive evidence. It was the duty of the Claimants witness to demonstrate that alleged leave days indeed existed and were unpaid. He tendered no scintilla of evidence even for the 8.75 days for which he was claiming payment.  
The prayer is dismissed.

#### **d. Refund or remission of NHIF and NSSF deductions for January, February, March and April 2020**

137. Strangely, majority of the Claimants filed neither the NHIF nor the NSSF statement to enable the court confirm the alleged non-payment of the contributions.
138. For the NSSF deductions, a letter from its Branch Manager-Thika, dated 17<sup>th</sup> May, 2021 confirms that all dues had been paid.
139. The contents of this letter were not disproved.
140. Needless to belabour, contributions to the National Health Insurance Fund are mandatory under the National Health Insurance Fund Act, 1998 which is administered by the NHIF Board.
141. The court has no jurisdiction to enforce the provisions of the Act.
142. The claim for refund or remission of NHIF and NSSF contributions is unsustainable and is dismissed.

#### **e. Severance Pay Kshs.1,442,350.50**

143. As correctly submitted by the Respondent's counsel, severance pay is only payable under Section 40(1) (g) of the *Employment Act*, 2007 as a benefit to employees who are declared redundant.
144. The Claimants in the instant suit were not declared redundant, are thus not entitled to severance pay.  
The prayer is dismissed.



## **f. General damages for Unfair Termination**

145. The Claimants tendered no evidence of entitlement to general damages for unfair termination of employment. However, having found that termination of their employment was unfair within the meaning of Section 45 of the *Employment Act*, 2007, they are entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.
146. In ascertaining the quantum of compensation, the court is guided by the following parameters;
- i. All the Claimants represented by Mr. Simon Muhari Nderitu served the Respondent for a fairly short time from 2016 to 2019, about 3 years.  
  
Intriguingly, the schedule of employees attached to the statement of claim has no date of employment.
  - ii. CWI admitted that the Claimants downed their tools at least twice without notice and subjected the Respondent's CEO to humiliation and harassment on 28<sup>th</sup> May, 2019 and thus contributed to the termination of employment.
  - iii. The Claimants did not express their wish to continue in the Respondent's employment.
147. In the circumstances, the court is satisfied that the equivalent of 2 months salary is fair.
148. In conclusion, judgement is entered in favour of the Claimants against the Respondent in the following terms;
- a. Declaration that termination of the Claimants employment was in violation of the provisions of the *Employment Act*, 2007.
  - b. Salary for 15 days for the month of May 2019.
  - c. Equivalent of 2 months salary.
  - d. Costs of this suit.
  - e. Interest at court rates from date hereof till payment in full.
149. For the avoidance of doubt, the foregoing reliefs are only applicable to those who authorised Mr. Simon Muhari Nderitu to represent them by signing the Letter of Authority on record.
- It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the {Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

