



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1889 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**SHEILA WIKASHEI WIKAMA**

**1<sup>ST</sup> CLAIMANT**

**VERAH ODEDO**

**2<sup>ND</sup> CLAIMANT**

**VERSUS**

**SUPER BROOM SERVICES LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Claimants initiated this claim by a statement of claim dated 9<sup>th</sup> September 2016 and filed on 14<sup>th</sup> September 2016 alleging that they were unfairly terminated by the Respondent on 26<sup>th</sup> and 27<sup>th</sup> April 2016 respectively. The Claimants prays for –

(a) The sum of Kshs.620,079.88 particularised in paragraph 16 of the statement of claim comprising one month's salary in lieu of notice, underpayment from 2012 to 2016 and 2015 to 2016 respectively, house allowance at 15%, overtime and 12 months' salary compensation for the termination.

(b) Certificate of service

(c) Costs of this suit.

(d) Interest on the amount awarded at Court rates.

2. The Respondent filed its response to the claim on 24<sup>th</sup> October 2016 praying for dismissal of the suit with costs.

**Claimant's Case**

3. The Claimant's case is pleaded as follows: That the 1<sup>st</sup> Claimant was employed by the Respondent on 1<sup>st</sup> August 2012 at Kshs.6,000 per month but the salary was increased to Kshs.7,000/- per month effective September 2012 and to Kshs.9,180/- from April 2015.

4. The 2<sup>nd</sup> Claimant was employed on 1<sup>st</sup> February 2015 at a monthly salary of Kshs.7,990/-.

5. It is averred that the Claimants worked from 6.30 am to 4.00 pm and were not paid overtime and the Respondent did not issue them with pay slips and contracts of employment. That they were diligent employees.

6. It is averred that on or about 1<sup>st</sup> and 2<sup>nd</sup> April 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Claimants respectively proceeded on annual leave and upon return on 26<sup>th</sup> and 27<sup>th</sup> April 2016, respectively they were notified that by Mrs. Mbogoli that the contract of service had ended and should go home to await further placement.

7. On subsequent inquiries, they were told to await contract by the Respondent.

8. The Claimants aver that they were not issued with formal contracts warning letter or notice of dismissal/termination or taken through disciplinary hearing and as a consequence suffered loss and damages.

**Respondent's Case**

9. The Respondent filed its response to the claim on 24<sup>th</sup> October 2016. It avers that the Claimants were aware that their contract of employment would lapse on expiry of the contract with its client. That the basic “*salary shown does not include statutory deductions such as NSSF, NHIF and other legal deductions as such erroneous. The Respondent used to pay consolidated wages*”.

10. That the Claimants used to report to work at 6.30 am and leave at 4 pm as alleged but had a tea break of 30 minutes and one (1) hour lunch break, a total of 45 hours per week and the claim for overtime had no basis.

11. That since the Claimants were on the Respondent’s payroll, and salaries were paid to their bank accounts, payslips were unnecessary.

12. That the Claimants proceeded on leave after expiry of the cleaning contract and were to report back to check whether they could be deployed somewhere else but they did not report back and were treated as having accepted the fact that their contract of employment with the Respondent had lapsed. That the Respondent subsequently received a letter from the Union on 28<sup>th</sup> June 2016 and responded accordingly.

13. The Respondent denies that it terminated the Claimants’ employment averring that they left after the Respondent’s cleaning contract with the client lapsed and may have been searching for jobs elsewhere as opposed to awaiting deployment. That there was no purpose for a disciplinary hearing since there was no termination anticipated and the Claimants could not have suffered any loss or damage or their families.

14. On the reliefs sought, the Respondent avers that the one month’s salary notice is not payable because the contract of employment lapsed with the contract on which it was dependent. That there was no underpayment since the amounts paid was net of all deductions. That the claim for overtime pay was unsustainable as was the 12 months’ compensation since the Claimants were not unfairly terminated.

15. That the Claimants were fully aware that their contracts were for a fixed term. Moreover, it would be uneconomical to retain staff who had no work to do.

16. Finally, the Respondent reiterates the averment that the Claimants’ contract of employment was not terminated and as such there was no unlawful or unfair termination.

#### **Evidence**

17. **CW1 SHEILA WIKASHEI** adopted the written statement which rehearses the contents of the memorandum of claim.

18. On cross examination, the CW1 confirmed that she was employed in 2012 but was not given any appointment letter. She stated that although the letter of appointment provided by the Respondent contains her identity card number, the signature was not hers. She however admitted that she had not protested the signature at any point. That she was a cleaner at the Nairobi Baptist Church and later at the NSSF Headquarters. That she was not informed that it was a contractual job.

19. She confirmed that the reporting time was 6.30 am and would retire at 4.00 pm with one (1) hour lunch break and 30 minutes tea break and worked for **9 hours**.

20. CW1 contended that she was underpaid by the Respondent. That she proceeded on leave twice for 21 days. That no notice of termination was given.

21. **CW2 VERAH ODEDO** adopted the witness statement and was cross examined. She confirmed that she was employed in February 2015. She confirmed that she was not given a copy of the appointment letter on record and did not contest its authenticity including her signature. That it was a term contract and that she worked at the NSSF Head Quarters and was unaware that her employment was dependent on the contract with a third party but was aware that NSSF Headquarters was not the Respondent’s office. That the identity card number on the appointment letter produced by the Respondent was hers but denied that the signature was hers.

22. The witness that she would report at 6.30 am and leave at 4 pm with one (1) hour lunch break and 30 minutes tea break and was a member of NSSF and NHIF.

23. **RW1 MR. JOSPEH MWANIKI MBOGORI** testified that the Respondent’s business is to provide cleaning services and sourced term contracts with organisations and concomitantly give similar contracts to employees. That when such a contract ends employment terminates too, unless the Respondent has another contract or the contract is renewed. He testified that the contract with the NSSF ran from 1<sup>st</sup> October 2013 to 30<sup>th</sup> September 2015 and employment was tied to the contract.

24. That each employee had a written contract. He stated that the contractual document was given to Vera Odedo who inserted her identity card number name and signature.

25. That all employees were invited to the office to sign the employment contract and code of conduct and were given a copy of the document. That Vera Odedo’s contract ended when the NSSF contract came to an end.

26. RW2 testified that information on how the company operated was communicated to all employees and that they worked for 8 hours per day. That the salary paid to employees was fixed.

27. The witness stated that the contract with the Nairobi Baptist Church commenced on 1<sup>st</sup> August 2011 and ended on 31<sup>st</sup> July 2014 and that CW1’s contract of employment was extended to NSSF.

28. On cross examination, the RW1 confirmed that CW1's contractual document had not been signed by the Respondent but was dependent on another contract whose credentials were not captured in the contract of employment. That CW1 was re-assigned to NSSF, Headquarters after the contract with the Nairobi Baptist Church ended in 2014.

29. That the salaries were determined by the human resource. That the contract indicated that salary was fixed and made no reference to house allowance. That it was consolidated at 15%.

30. On overtime, it was confirmed that the company had no record of reporting and exit times. That the Claimants were not terminated but their contracts of employment lapsed with the third party's contract.

31. RW1 further confirmed that the Claimants were aware of the extension of the contract by the Baptist Church. He testified that all employees had been invited to the office as the contract approached its but admitted he had no evidence of the extension of the contract. That the Claimants had proceeded on terminal leave when the NSSF contract lapsed and no notice of termination was given.

32. On re-examination, the witness stated that the Respondent used to communicate with the Claimants as employees from time to time and were not surprised when the contract lapsed and occasionally transferred an employee from one cleaning station to another. He confirmed that the employees worked for 8 hours only.

### Submissions

33. The Claimants identified six issues for determination namely; underpayment, house allowance, overtime pay, whether termination was lawful and fair, notice pay and costs of the suit.

34. On underpayment it was submitted the Respondent failed to issue itemised payslip contrary to Section 20 of the Employment Act, 20007. That the document would have clearly shown the exact amount payable and received by the Claimants. That the 1<sup>st</sup> Claimant had shown that on employment, her salary was Kshs.6,000/-and was raised in September 2012 to Kshs.7,000/- and to Kshs.9,180 in April 2015. This is supported by the contract to employment produced by the Respondent. The 1<sup>st</sup> Claimant's bank statement confirmed her salary.

35. It is contended that the 2<sup>nd</sup> Claimant's salary stood at Kshs.7,990/- at employment on 1<sup>st</sup> February 2015.

36. That the Respondent grossly underpaid the Claimants.

37. It is submitted that according to the basic minimum **Consolidated Wages General Wagers Order (Amendment) Order, June 2012**, the minimum wage rate for a cleaner in Nairobi was Kshs.8,580/- per month. In 2013 it was Kshs.9,780/- per month and as of May 2015 it was Kshs.10,954/-.

38. On house allowance, it is submitted that although the Respondent attempted to explain that the term fixed in the contracts on record meant consolidated salary, the same were not synonymous. That house allowance was a right under Section 31 of the Employment Act.

39. On overtime it is contended that the Claimants worked for 9½ hours and had an extra 1½ entitling them to overtime pay. That Section 74 of the Employment Act required an employer to keep records. It was for the Respondent to show that the employees worked for 8 hours.

40. On termination, it is contended that the termination was substantively and procedurally unfair. The decision in **David Gichana Omuya v Mombasa Maize Millers [2014] eKLR** is relied upon to demonstrate the duty of the employment under Section 43 of the Employment Act.

41. That the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were notified that their contracts had ended on 26<sup>th</sup> and 27<sup>th</sup> April 2016 respectively and the Respondent gave contradictory testimony on the reason for termination.

42. It is further submitted that the contracts on record make no reference to the contracts on which they were dependent and could not explain how the Claimants continued working even after the contracts had lapsed. The alleged extension of the contracts had not been established.

43. It is contended that the Respondent owed the Claimants a duty to inform them the reason(s) of termination.

44. It is submitted that the Respondent had no genuine reason to terminate the Claimants.

45. On procedural fairness it is submitted that the Claimants were not taken through any disciplinary process and no notice to show cause was issued. That the termination s procedurally unfair.

46. That the Claimants are entitled to one (1) month's salary in lieu of notice as none had been issued.

47. That the Respondent pays the costs of this suit for having received a demand letter dated 9<sup>th</sup> August 2016, union letter dated 28<sup>th</sup> June 2016 and did not respond to any.

48. The Respondent on the other hand submitted that the Claimants' employment was attached to the Respondent's contracts with the Nairobi Baptist Church and NSSF.

49. The Respondent identifies a total of five issues for determination namely whether the Claimants were unfairly terminated, whether the Claimants worked overtime, whether they deserve house allowance, whether they were underpaid and their entitlement to damages.

50. It is contended that the Claimants were not unfairly terminated because their employment was provided for by the contracts of employment on record and Section, 41, 43(a), 45(2) and 47(5) of the Employment Act could not apply since they left employment when their contracts lapsed.

51. It is submitted that their contracts were fixed term contracts and renewal was not automatic. Their contracts lapsed when the cleaning contracts for the station they were working lapsed and the same was not unlawful. The decision in **Rajab Barasa & Others v Kenya Meat Commission [2016] eKLR** is relied upon on the issue of renewal as is the decision in **George Onyango v Brand of Directors of Numerical Machining Limited & Others [2014] eKLR** and others to urge that fixed term contracts carry no expectation for renewal and the Claimants' contracts fell in that category and no notice was required since the contracts had an ascertained date of expiry. See **Stephen M. Kitheka v Kevita International Limited [2018] eKLR**.

52. Finally, it is submitted that termination of a contract by effluxion of time was not unlawful and no compensation is due.

53. As regards overtime, it is submitted that the Claimant would report at 6.30 am and leave at 4.00 pm and would have one and half hours for lunch and tea break and thus worked for 8 hours as provided and no overtime payment was due to them. Relatedly no evidence of the extra hours claimed has been led. The decision in **Daniel Otieno Ogonjo & 2 Others v Pendulum Entertainment Limited t/a Freehouse Club [2021] eKLR** is relied upon to buttress the submission.

54. As regards house allowance, it is contended that the Claimants were offered a fixed salary and they accepted the same and the salary was covered by Section 31 of the Employment Act which states that an employment contract may provide for consolidated salary. The employer chose one of the three options given by the provision. The decision in **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR** is cited in support of the submission.

55. On underpayment, it is submitted that since the minimum wage is a statutory issue, the Court is urged to rely on the legal regime in force to determine the issue one way or the other.

56. As regards, entitlement to damages, it is submitted that the 1<sup>st</sup> Claimant was employed on 1<sup>st</sup> August 2012 and was released when her term employment contract lapsed in March 2016 having served the Respondent for four years.

57. That the 2<sup>nd</sup> Claimant was employed on 2<sup>nd</sup> February 2015 and was released in March 2016 having served for a period of two years only.

58. It is submitted that since their term employment contracts terminated by reason of effluxion of time, they had no claim under Section 49 of the Employment Act.

### **Determination**

59. After careful consideration of the pleadings, evidence on record and submissions by the Counsel, the issues for determination are: -

- a) Whether the Claimants were unfairly terminated or their contracts with the Respondent lapsed;
- b) Whether the Claimants are entitled to the reliefs sought.

60. As to whether the Claimants were unfairly terminated by the Respondent or their employment contracts lapsed by effluxion of time, the starting point are the provisions of the Employment Act on termination of contracts of employment.

61. As repeatedly demonstrated by legions of decisions of this Court and the Court of Appeal Sections, 41, 43, 45 and 47(5) of the Employment Act provide the basic infrastructure on termination of employment, specifically what must be done and proved for a termination to pass as

lawful and fairness test.

62. The Court of Appeal decisions in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR**, **Kenafric Industries Limited v John Gitonga Njeru [2016] eKLR**, **CMC Aviation Limited v Mohammed Noor [2013] eKLR** and many others are explicit on the terrain for termination of employment contracts. These decisions have laid it bare that a termination must meet the thresholds for substantive justification and procedural fairness otherwise it will be unfair. This Court has steadfastly applied the relevant principles as demonstrated by the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR** and many others.

63. Collectively, these decisions establish that termination of an employment contract must religiously conform with the relevant provisions of the Employment Act or risk being declared unfair and unlawful.

64. On the other hand, the principles that govern fixed term contracts have been articulated by this Court and the Court of Appeal. Since employment contracts are basically contracts, the general law of contract as codified by the Employment Act and other statutes apply. Parties

to a contract of employment are at liberty to agree on the term of employment and are free to enter into a fixed term contract. See **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR** on the duty of courts to give effect to the intention of the parties as discerned from the contract between them. It was so held in **Damondar Jihabhai & Co Ltd & Another v Eustace Sisal Estates Ltd 1967 EA 153**.

65. As stated above, the Court of Appeal has expressed itself variously on the law relating to fixed term contracts. In **Francis Chire Chachi v Amatsi Water Services Company Limited, [2012] eKLR** the Court stated as follows: –

*“This Court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract.”*

66. These sentiments were echoed in **Oshwal Academy (Nairobi) & Another v Indu Vishwanath [2015] eKLR** where the Court cited with approval the words of Rika J. in **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR**, to underscore the point that an employer need not give reasons to an employee why a fixed term contract should not be renewed. In the words of the Learned Judge:

*“... The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”*

67. The issue was also addressed in **The Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys' Secondary School v Julius D. M. Baini [2017] eKLR** and **The Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR**, where the Court stated that: -

*“Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5<sup>th</sup> May, 2010. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”*

68. I now proceed to apply the foregoing propositions of law to the facts of the instant case. It is not in dispute that the Respondent employed the 1<sup>st</sup> Claimant as a Cleaner on 1<sup>st</sup> August 2012 and the 2<sup>nd</sup> Claimant on 1<sup>st</sup> February 2015 under similar contracts copies of which were provided.

69. The contract allegedly signed by the 1<sup>st</sup> Claimant is not signed

by the Respondent. The Claimant denied having signed the letter of employment but admitted by the Respondent. The Claimant denied having signed the letter of employment but admitted that the ID Card number on the letter was hers. On the other hand, the contract allegedly signed by the 2<sup>nd</sup> Claimant is signed by both parties. The 2<sup>nd</sup> Claimant denied having signed the document but admitted that the ID card number on it was her. Having seen the Claimants testify in Court, the Court is satisfied that they signed the contracts.

70. Both contracts provide for the work station, Baptist Church for the 1<sup>st</sup> Claimant and NSSF for the 2<sup>nd</sup> Claimant. The contract for the 1<sup>st</sup> Claimant provided that –

*“You will be appointed as a steward on a contract basis with effect from 1<sup>st</sup> August 22012 for a period of the contract term of the said contract.”*

71. The contract for the 2<sup>nd</sup> Claimant had a similar provision. It had a date of appointment, a probationary period of three months, salary and appointment after probation. On expiry, the contract provided that –

*“At the expiry of the contract, your service maybe terminated or renewed and moved to an existing contract but at the discretion of the company.”*

72. The contracts have no provision for termination by either party or leave allowances. The Respondent adverted to a code of conduct, a copy of which was not availed of perusal by the Court.

73. Both Claimants denied having been issued with copies of the said contract but RW1 testified that the 2<sup>nd</sup> Claimant was given a copy.

74. Intriguingly, the Respondent led no evidence that it provided copies of its contract with the third parties to the Claimants. The allegation that it explained the same to the employees by word of mouth is not supported by any evidence. With the Claimants' contract of employment dependent on another contract, it behoved the Respondent to at least educate its employees about the interdependency and ensure that they understood their nature of employment. But more significantly, the individual contracts should have tabulated the duration of employment as opposed to the Respondent shielding itself with contracts that the Claimants were not party to.

75. Although copies of the contracts with the third parties were produced for perusal by the Court, the same had not been given to the Claimants for them to appreciate the nature of their employment specifically its dependence on other contracts. Relatedly, although RW1

confirmed that the Claimants left when their contracts expired in April 2016 and that they were not terminated. It was submitted that their fixed term contracts lapsed and were not renewed and substantial case law to that effect cited. The Respondent led no evidence on which of its contract with the third parties on which the Claimants' employment contracts depended upon lapsed in April 2016. The Respondent testified that its contract with the Nairobi Baptist Church commenced on 1<sup>st</sup> August 2011 and lapsed on 31<sup>st</sup> July 2014 while its contract with the NSSF commenced on 1<sup>st</sup> October 2013 and lapsed on 30<sup>th</sup> September 2015.

76. The Claimants left employment seven months later. RW1 alleged that the contract with NSSF was extended and that the Claimants were aware of the extension. The allegation was neither substantiated nor supported by documentary evidence. Extension of any contract must be supported by documentary evidence. The Respondent provided none. The alleged extension was unproved.

77. It requires no belabouring that NSSF is a statutory corporation governed by the NSSF Act, 2013, State Corporations Act Cap 446 and other statutes including the Public Finance Management Act 2012 and the Public Procurement and Asset Disposal Act 2013 as well as government policies and guidelines, including Mwongozo.

78. Relatedly, the Respondent adduced no evidence to establish that the Claimants were transferred to another station after the contract with NSSF lapsed in September 2015.

79. From the evidence on record, the Respondent has not on a balance of probabilities established that Claimants were employed on a fixed term contract which lapsed, thereby discharging the parties.

80. The fact that the contracts had a commencement but no end date, copies of the agreements between the Respondent and the Baptist Church and NSSF were not brought to the Claimants' attention or at least incorporated in their individual contracts expressly or by reference and the Claimants lost employment seven months after expiry of the NSSF contract on record, considerably weakens the Respondent's evidence and submissions on fixed term contracts, the many relevant judicial authorities relied upon notwithstanding.

81. On the alleged termination, the Claimants testified that they proceeded on annual leave sometime in April 2016 and on their return on 26<sup>th</sup> and 27<sup>th</sup> April 2016 respectively, they were informed by Mrs Mbogoli that their employment had ended and advised to go home to await further placement.

82. RW1 testified the Claimants proceeded on leave because it was due and at any rate their contracts had lapsed. It is unclear which station they were serving before proceeding on leave since the NSSF contract had lapsed in 2015.

83. In his written statement dated 12<sup>th</sup> July 2019. RW1 states that the Claimants did not "*come back after their leave*". "*They instead chose to abscond duty and proceed to falsely accuse the company ...*" Needles to emphasise only a person who is in employment can abscond duty or desert the work place.

84. Regrettably, the Respondent led no evidence that it took reasonable steps to establish contact with its employees to understand why they had absconded duty and what else it did for purposes of closure of the issue of employment. See **Boniface Mwangi v B.O.G. Iyego Secondary School [2019] eKLR**, **Simon Mbithi Mbane v Intersecurity Services [2018] eKLR** and **Nzioka v Smart Coatings Limited [2017] eKLR** on the duties of an employer in the event an employee absconds duty.

85. For the foregoing reason, this Court finds and holds that the Respondent terminated the Claimants' contract of employment unfairly. No reason for termination was given as required by the Employment Act and the procedural requirements were not complied with.

86. The Court is in agreement with the Claimants' submission that their termination by the Respondent was substantively and procedurally unfair.

### **Appropriate Reliefs**

87. Having found and held that the termination of the Claimants' contracts of employment was unfair, the Claimants are entitled to appropriate reliefs as follows –

#### **(a) Underpayment**

88. The Claimants alleged that they were underpaid and submitted as much relying on the various general wages orders to demonstrate the fact of underpayment. The Respondent on the other hand submitted that the Court should be guided by the operative legal regime to make the determination. The regime was as follows:

(i) The consolidated minimum wage from June 2012 for a cleaner was Kshs.8,580/- per month.

(ii) Effective 1<sup>st</sup> May 2013 the basic minimum monthly wage (exclusive of house allowance) was Kshs.9.780/- **Regulation of Wages (General) (Amendment) Order 2013**.

(iii) Effective 1<sup>st</sup> May 2015 a cleaner's salary had risen to Kshs.10,954/- per month (exclusive of house allowance). **Regulation of Wages (General) (Amendment) Order 2015**.

89. The 1<sup>st</sup> Claimant was employed on 1<sup>st</sup> August 2012 at Kshs.6,000/- per month (August to October). From November 2012 to April 2015, it had risen to Kshs.7,000/- per month and from May 2015 to April 2016 it had risen to Kshs.9,180 per month.

90. The 2<sup>nd</sup> Claimant was employed on 1<sup>st</sup> February 2015 at a monthly salary of Kshs.7,990/- less than the minimum wage for cleaners and received no increment for the entire employment period.

91. It is the finding and holding of the Court that the Claimants were underpaid as follows –

1<sup>st</sup> Claimant **Kshs.79,048.20**

2<sup>nd</sup> Claimant **Kshs.26,864.25**

#### **(b) House allowance**

92. Whereas the Claimants testified that they were not paid house allowance, the Respondent testified and submitted their salary was fixed and thus included house allowance. The contract on record provides as follows –

*“During the probation period, you will be entitled to fixed salary of Kshs.6,000/- per month”.*

93. For the 2<sup>nd</sup> Claimant it provided that *“During the probation period, you will be entitled to fixed salary of Kshs.9,780.95 per month.”* The actual amount deposited in her account was Kshs.7,990/- effective February 2015.

94. The Respondent submitted that it offered a fixed salary consistent with Section 31(2) of the Employment Act which provides for consolidated pay.

95. According to the Respondent the terms fixed and consolidated were synonymous which undoubtedly is not the case. Consolidated salary means remuneration including all allowances attached to a particular post. Section 31 of the Employment Act makes no reference to fixed pay.

96. Implausibly, the Respondent never issued itemised pay slips or any to the Claimants and none was availed to the Court yet it avers that it paid the Claimants consolidated wages. The burden of proof was on the Respondent to establish the averment. It did not nor were its contracts explicit on this fact. By no stretch of imagination are the terms fixed and consolidated synonymous.

97. Section 31 of the Employment Act gives employers three options on matters house allowance. It may opt to either provide reasonable housing accommodation to the employee or pay a sufficient sum as rent in addition to the wages or salary to enable the employee obtain reasonable accommodation or the contract contains a provision which consolidates as part of the basic wage or salary of an employee an element intended to enable the employee to provide himself with housing accommodation.

98. The decision in **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu (supra)** cited by the Respondent is of nominal assistance because the contract in that case provided for payment of *“other benefits as required by law”*. In the instant case the contract does not expressly state that the salary included house allowance nor is there another clause on other benefits payable. In that case, the Court of Appeal computed house allowance at 15% of the salary.

99. In the circumstances, it is the finding and holding of the Court that the Claimants were entitled to house allowance as claimed and as provided by Section 31 of the Employment Act and are awarded as follows:

1<sup>st</sup> Claimant **Kshs.63,058.22**

2<sup>nd</sup> Claimant **Kshs.22,006.81**

#### **(c) Overtime**

100. As regards overtime pay, the Claimants allege that they used to work for 9½ hours contrary to the requirement of 8 hours, an extra 1½ hours. That they would report to the place of work at 6.30 am and leave at 4.00 pm, a fact they testified about and the Respondent did not deny.

101. However, on cross examination both CW1 and CW2 confirmed that they enjoyed a one (1) hour lunch break and 30 minutes, tea break and Saturdays they worked from 7.00 am to 12.00 noon making a total of 45 hours per week.

102. The Respondent submitted that the Claimants were not entitled to extra pay since they did not work extra hours. The Claimants adduced no evidence to show how they accrued an additional 1½ hours per day after enjoying a similar duration lunch and tea break.

103. It is the finding and holding of the Court that the Claimants **have not established entitlement for overtime pay. The claim is dismissed.**

**(d) Compensation for unfair termination**

104. Having found that the Claimants were unfairly terminated without notice, the discretionary reliefs under Section 49 of the Employment Act apply subject to compliance with Section 49(4) of the Act. The Court has taken into account the following –

- i) The 1<sup>st</sup> Claimant served for three years, eight months while the 2<sup>nd</sup> Claimant served for one year and two months.
- ii) The Claimants were aware that the Respondent's business was to provide cleaning services to other organisations as and when secured.
- iii) The Claimants wished to continue working for the Respondent.
- iv) The Claimants led no evidence on what transpired after their employment was terminated.

105. In the circumstances, the Claimants are awarded as follows:

- (i) Both Claimants are awarded one month's salary in lieu of notice **Kshs.9,780.95**.
- (ii) The 1<sup>st</sup> Claimant is awarded the equivalent of four (4) months' salary **Kshs.39,123.80** while the 2<sup>nd</sup> Claimant is awarded the equivalent of two (2) months' salary **Kshs.19,560.90**.

**(e) Certificate of service**

106. The Respondent is directed to issue the 1<sup>st</sup> and 2<sup>nd</sup> Claimant a certificate of service for the duration served.

**Conclusion**

107. In conclusion, judgment is entered in favour of the Claimants against the Respondent as follows:

**1<sup>ST</sup> CLAIMANT – SHEILA WIKASHEI WIKAMA**

- (i) Under payment Kshs.79,048.20
- (ii) House allowance Kshs.63,058.22
- (iii) Pay in lieu of notice Kshs.9,780.95
- (iv) Compensation for unfair termination Kshs.39,123.80

**Total Kshs.191,011.17**

**2<sup>ND</sup> CLAIMANT – VERA ODERO**

- (i) Under payment Kshs.26,864.25
- (ii) House allowance Kshs.22,006.81
- (iii) Pay in lieu of notice Kshs.9,780.95
- (iv) Compensation for unfair termination Kshs.19,561.90

**Total Kshs.78,213.91**

108. The Claimants are awarded costs of the suit.

109. Interest at Court rates from the date of judgment till payment in full.

110. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2022**

**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**