



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 146 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

JACKSON OYUGI MATOKE.....1ST CLAIMANT
JOHN IKANGU WABORO.....2ND CLAIMANT
GEOFFREY MWANZA SAMMY.....3RD CLAIMANT
PATRICK SHIYALO SHALILI.....4TH CLAIMANT
JOSEPH GACHIGI MWANGI.....5TH CLAIMANT
JAMES OMONDI BWIRE.....6TH CLAIMANT
VICTOR ISABOKE NYAKUNDI.....7TH CLAIMANT
ENOCK ORANGI.....8TH CLAIMANT
POLYCARP MACHUPA MKUNZA.....9TH CLAIMANT
STEPHEN KAMEMBA MUNGAI.....10TH CLAIMANT
JOHN MUTUA WAMBUA.....11TH CLAIMANT
PATRICK TEMU KAVOSA.....12TH CLAIMANT
HABERT ESHIKOBE MEJA.....13TH CLAIMANT
ZACHARY ONSANDO.....14TH CLAIMANT
EVANS NYAYIEMI NDEGE.....15TH CLAIMANT
ALEX MUTUKU MULWA.....16TH CLAIMANT

VERSUS

BIDCO AFRICA LIMITED.....RESPONDENT

JUDGMENT

1. By a statement of claim dated 4th February 2016 and filed on 5th February 2016, the 16 Claimants herein instituted proceedings against the Respondent alleging unfair dismissal from employment.

2. The Claimants pray for several reliefs including but not limited to one month's salary in lieu of notice, house allowance, leave allowance, leave travelling allowance, underpayment for four months and compensation for 12 months for unlawful dismissal. The individual claims are

outlined herein below –

JACKSON OYUGI MATOKE

a) One month's salary in lieu of notice Kshs.15,834.06

b) Salary for 13 days worked in August 2015 $(15,834.06/30 \times 13 \text{ days})$ Kshs.6,861.43

c) Unpaid salary for May, June and July 2015

$(15,834.06 \times 3 \text{ months})$ Kshs.47,502.18

d) House allowance

$(19\% \times 15,834.06 \times 223 \text{ months})$ Kshs.670,889.12

e) Annual Leave

$(15,834.06/30 \times 26 \text{ days} \times 223/12)$ Kshs.255,016.33

f) Leave travelling allowance

$(2,500 \times 2 \text{ years})$ Kshs.5,000.00

g) Underpayment for 2014

$(1,460.33 \times 7 \text{ months})$ Kshs.10,222.31

h) Underpayment for 2015

$(2,834.06 \times 4 \text{ months})$ Kshs.11,336.24

i) Compensation for unfair dismissal

$(15,834.06 \times 12 \text{ months})$ Kshs.190,008.72

TOTAL Kshs.1,212,670,39

JOHN IKANGU WABORO

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 $(13,851.75/30 \times 13 \text{ days})$ Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

$(13,851.75 \times 3 \text{ months})$ Kshs.41,555.25

d) House allowance

$(19\% \times 13,851.75 \times 213 \text{ months})$ Kshs.560,580.32

e) Annual Leave

$(13,851.75 \times 26 \text{ days} \times 213/12)$ Kshs.255,016.33

f) Leave travelling allowance

$(2,500 \times 2 \text{ years})$ Kshs.5,000.00

g) Underpayment for 2014

$(851.75 \times 7 \text{ months})$ Kshs.5,962.25

h) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

i) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.1,015,666.09

GEOFFREY MWANZA SAMMY

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 186 months) Kshs.489,520.85

e) Annual Leave

(13,851.75/30 x 26 days x 186/12) Kshs.186,075.18

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2014

(851.75 x 7 months) Kshs.5,962.25

h) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

i) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.917,595.71

PATRICK SHIYALO SHALILI

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 182 months) Kshs.478,993.52

e) Annual Leave

(13,851 x 26 days x 182/12) Kshs.182,073.56

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.903,051.44

JOSEPH GACHIGI MWANGI

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 161 months) Kshs.423,725.04

e) Annual Leave

(13,851.75/30 x 26 days x 161/12) Kshs.161,065.07

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.826,774.47

JAMES OMONDI BWIRE

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 132 months) Kshs.347,401.89

e) Annual Leave

(13,851.75/30 x 26 days x 132/12) Kshs. 132,053.35

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.718,032.60

VICTOR ISABOKE NYAKUNDI

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13, 851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 120 months) Kshs.315,819.90

e) Annual Leave

(13,851.75/30 x 24 days x 120/12) Kshs.110,814.00

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2014

(851.75 x 7 months) Kshs.5,962.25

h) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

i) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.917,595.71

ENOCK ORANGI

a) One month's salary in lieu of notice Kshs.15,834.06

b) Salary for 13 days worked in August 2015 (15,834.06/30 x 13 days) Kshs.6,861.43

c) Unpaid salary for May, June and July 2015

(15,834.06 x 3 months) Kshs.47,502.18

d) House allowance

(19% x 15,834.06 x 120 months) Kshs.361,016.57

e) Annual Leave

(15,834.06 x 24 days x 120/12) Kshs.126,672.48

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2014

(1,460.33 x 7 months) Kshs.10,222.31

h) Underpayment for 2015

(2,834.06 x 4 months) Kshs.11,336.24

i) Compensation for unfair dismissal

(15,834.06 x 12 months) Kshs.190,008.72

TOTAL Kshs.774,453.99

POLYCARP MACHUPA MKUNZA

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 104 months) Kshs.273,710.58

e) Annual Leave

(13,851.75/30 x 24 days x 104/12) Kshs.96,038.80

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.605,786.81

STEPHEN KAMEMBA MUNGAI

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 96 months) Kshs.252,655.92

e) Annual Leave

(13,851.75/30 x 24 days x 96/12) Kshs.88,651.20

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.577,344.55

JOHN MUTUA WAMBUA

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 96 months) Kshs.252,655.92

e) Annual Leave

(13,851.75/30 x 24 days x 96/12) Kshs.88,651.20

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.577,344.55

PATRICK TEMU KAVOSA

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 96 months) Kshs.252,655.92

e) Annual Leave

(13,851.75/30 x 24 days x 96/12) Kshs.88,651.20

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.577,344.55

HABERT ESHIKOBE MEJA

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 84 months) Kshs.221,073.93

e) Annual Leave

(13,851.75/30 x 24 days x 84/12) Kshs.77,569.80

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.534,681.16

ZACHARY ONSANDO

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 72 months) Kshs.189,491.94

e) Annual Leave

(13,851.75/30 x 24 days x 72/12) Kshs.66,488.40

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.492,017.77

EVANS NYAYIEMI NDEGE

a) One month's salary in lieu of notice Kshs.13,851.75

b) Salary for 13 days worked in August 2015 (13,851.75/30 x 13 days) Kshs.6,002.43

c) Unpaid salary for May, June and July 2015

(13,851.75 x 3 months) Kshs.41,555.25

d) House allowance

(19% x 13,851.75 x 24 months) Kshs.63,163.98

e) Annual Leave

(13,851.75/30 x 24 days x 24/12) Kshs.63,163.98

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Underpayment for 2015

(851.75 x 7 months) Kshs.3,407.00

h) Compensation for unfair dismissal

(13,851.75 x 12 months) Kshs.166,221.00

TOTAL Kshs.321,364.21

ALEX MUTUKU MULWA

a) One month's salary in lieu of notice Kshs.16,280.00

b) Salary for 2 days worked in August 2015

740 x 22 days) Kshs.16,280.00

c) Unpaid salary for May, June, July, August and September 2015 (16,280 x 5 months) Kshs.84,400.00

d) House allowance

(19% x 16,280.00 x 100 months) Kshs.309,320.00

e) Annual Leave

740 x 24 days x 100/12) Kshs.148,000.00

f) Leave travelling allowance

(2,500 x 2 years) Kshs.5,000.00

g) Compensation for unfair dismissal

(16,280.00 x 12 months) Kshs.195,360.00

TOTAL Kshs.771,640.00

Claimants' case

3. The Claimant's case is pleaded as follows:

4. That the Respondent employed the Claimants on diverse days between February 1997 and July 2013, in various capacities and in different departments and they served the Respondents with diligence and dedication. That the Claimants later joined the Kenya Chemical and Allied Workers Union and became members after payment of the requisite membership fees.

5. It is averred that sometime between 10th March 2015 and 23rd April 2015, the Claimants lodged verbal complaints and/or concerns about unpaid dues and general conditions of work at the Respondent's premises. The Respondent consequently issued an inter-office memo dated 16th April 2015 which created a frosty relationship between the Claimants and the Respondent. That the two sides held consultations with the Respondent on 13th May 2015 and were informed that their concerns would be addressed.

6. It is further averred that in a surprise turn of events, the Respondent orally suspended them from work from about 13th May 2015 and one Zipporah Mburu and other officials forcefully asked them to leave the precincts of the Respondent and would be called back once they had offered detailed explanations.

7. The Claimants aver that they later learnt from Union Representatives that a letter dated 14th May 2015 addressed to the Ministry of Labour, Social Security indicated that the consultations on 13th May 2015 regarding the concerns they had raised were deemed to have been an unprotected strike and gross misconduct.

8. It is averred that as a consequence, the Claimants engaged the law firm of Rakoro and Company Advocates to voice their concerns. The law firm wrote a demand letter dated 19th May 2015 giving the Respondent seven (7) days or face court action. The letter sought clarification on the status of the listed Claimants as well as the disciplinary action to be taken since that they had been locked out or unfairly terminated.

9. The Respondent responded on 25th May 2015 by letter from Oraro and Company Advocates denying that it had locked out the Claimants from its premises. That the Respondent issued show cause letters to the Claimants dated 19th May 2015. The letters were dispatched to Rakoro and Company Advocates and all Claimants responded by a standardised letter dated 2nd June 2015. The show cause letters stated that the Claimants had participated in an unprotected strike on 13th May 2015 and had wilfully absented themselves from their places of work and committed acts of breach of peace and lawlessness.

10. That thereafter no communication was forthcoming from the Respondent. That on 14th August 2015 the Claimants wrote to their Advocate through their representatives enquiring about their status with the Respondent.

11. The Claimants further aver that it is only then that they learnt that notices of disciplinary hearing dated 13th July 2015 had been dispatched to their Advocate and that they had been summarily dismissed on 13th August 2015.

12. That as a consequence the Claimants wrote to the Respondent on 14th August 2015 copied to their Advocate indicating that –

i) They had received notices of disciplinary hearing late and requested for fresh hearing.

ii) Henceforth any communication to the Claimants be through Mr. Stephen Kamemba Mungai of 0704 614 568.

iii) They had lost confidence in their Advocate.

iv) Pleaded for the quashing of the dismissal letters.

13. It is also averred that the Respondent did not respond to the Claimants' letter dated 14th August 2015 and they were not paid for the months of May, June, July, August and September.

14. That for the entire duration of employment they were not allowed to proceed on leave, were not paid house allowance and were under paid contrary to the CBA between the Union and the Respondent.

15. That sometime in September 2015, the Claimants withdrew instructions from Rakoro and Company Advocates. That the 16th Claimant wrote to the Respondent on 22nd October 2015 enquiring about his status but no response was forthcoming.

16. Finally, it is averred that by letter dated 26th October 2015, 29th October 2015 and 18th November 2015, the Claimants demanded terminal dues but the Respondent did not honour their demands.

17. Overall, the Claimants pray for –

i) A declaration that their termination from employment was unfair.

ii) An order directing the Respondent to pay the Claimants the calculated sums as particularised in the statement of claim with interest.

iii) An order directing the Respondent to issue certificates of service to the Claimants.

iv) Costs of this suit with interest and court rates.

Respondent's Case

18. The Respondent filed its memorandum of reply on 3rd February 2020. The response proceeds as follows:

19. The Respondent states that there has been a similar class action **ELRC No. 1936 of 2015 Martin Wamae & 295 others v Bidco Africa Limited [2019] eKLR**.

20. The Respondent avers that the 1st to 15th Claimants worked as general workers on the Respondent's shop floor in production at a daily wage of Kshs.484 inclusive of house allowance and were paid depending on the number of days worked. Any extra time worked was also paid as overtime and during gazetted public holidays they were paid twice the daily rate.

21. That the 16th Claimant was skilled general worker paid a daily rate of Kshs.638.40 inclusive of house allowance and was paid under the same conditions as a general worker in relations to extra work and public holidays.

22. It is averred that the Claimants participated in an unprotected strike on 10th and 24th April 2015, 27th April 2015 and 13th May 2015 occasioning the Respondent huge losses of production and finance.

23. That in the instances cited above, the Claimants did not notify the Respondent of the intended stoppage of work. The stoppage on 10th March 2015 was reported to the Labour Office by letter dated 16th March 2015. That by an internal memo dated 23rd March 2015, the Respondent informed the Claimants that their concerns had been received and requested for eight weeks to resolve them but the Claimants issued a notice with more demands by casual employees.

24. The Respondent avers that the good will on its part notwithstanding, the Claimants participated in another stoppage of work on 24th March 2015. It is averred that the casual employees were chanting at the gate while armed with stones, sticks and pieces of metal. That in the course of throwing stones, they injured the security supervisor Mr. Mutinda Mweu causing grievous bodily harm and his admission to hospital.

25. It is averred that discussions with the County Labour Office yielded positive results. The Respondent agreed to pay house allowance, service and leave pay. That on 27th April 2015, the Respondent, County Labour Office representatives Union representatives and Daily Workers Representatives discussed the grievances and agreed on a return-to-work formula and work resumed on 28th April 2015.

26. The Respondent further avers that on 13th May 2015, the 1st to 15th Claimants reported on duty but at around 8.15 am, stopped their machines mobilised a group of about 73 daily workers and assembled in front of the administration offices. Attempts by the Human Resource, Labour officer and Union officials to assuage the workers were unsuccessful. The Claimants were advised to resume work and visit the Human Resource Office in case of any inquiry but they refused and were suspended immediately. That the Human Resource Manager Ms Zipporah Mburu summoned security personnel.

27. It is averred that the 16th Claimant left work on 8th My 2016 on his own violation.

28. It is contended that that Respondent gave all Claimants notice of the scheduled disciplinary hearing but they did not attend. That their Advocates demand dated 19th May 2015 for terminal dues was premature but the Respondent responded through its Advocates on record.

29. That the Claimants were issued with notices to show cause dated 19th May 2015 and they responded. That the Respondent did not receive the Claimants letter dated 14th August 2015 and a decision had already been made since the Claimants did not attend the disciplinary hearings.

30. In response to paragraph 17 of the statement of claim, the Respondent avers that through its advocate it received the Claimants' Advocate's letter dated 20th August 2015 intimating that the Claimant was following up the process on behalf of the Claimants and was aware that the last batch of Claimants were scheduled appear on 7th August 2015. The Advocate requested for the decisions made by the Disciplinary Committee.

31. That the Claimants were summarily dismissed on 13th August 2015 for having committed acts of gross misconduct for which they were found guilty by the disciplinary committee.

32. It is further averred that the Claimants were general workers and were paid daily and their dues were paid in full to the last date.

33. Finally, it is averred that the Respondent paid –

(a) Accrued annual leave on 23rd April 2015.

(b) Paid a consolidated daily wage inclusive of house allowance.

34. That the Collective Bargaining Agreement (CBA) became operational on 22nd September 2015.

Evidence

35. CW1 who had authority to plead on behalf of the Claimants adopted the witness statement and was cross examined. The witness testified that on 13th May 2015, the Claimants refused to work and were eventually chased out of the company premises. He admitted that they received the disciplinary hearing letters late owing to the inaction of their advocate and that they sought another hearing date from the Respondent but to no avail.

36. On cross examination CW1 confirmed that the Claimants were members of the Union and produced payment receipts belonging to four of the Claimants excluding himself. the receipts belonged to Victor Nyakundi dated 6th December 2012 for Kshs.50, Stephen Mungai dated 31st November 2012 for Kshs.50, John Ikangu dated 6th December 2012 for Kshs.50 and Patrick Temu dated 30th November 2012 for Kshs.50. The witness confirmed that they used to pay in cash and the Respondent was not part of the arrangement.

37. He admitted that they had outstanding issues from 10th March 2015 up to 23rd April 2015 which culminated in the internal memo dated 16th April 2015 on leave pay, house allowance and other issues. That a payslip of one Oyugi showed that he had been paid for leave.

38. The witness confirmed that the Claimants received show cause letters and responded but received the notices for disciplinary hearing late. That the letter had been sent to their Advocate at the time and none of the Claimants attended the hearing. That they subsequently withdrew instructions from the said advocate.

39. On re-examination the witness stated that the Respondent was not issuing payslip but used to pay them on a weekly basis for the days worked.

40. RW1, ZIPPORAH MBURU, the Human Resource Manager of the Respondent testified on its behalf. The witness adopted the written statement and was cross examined. The written statement rehashed the contents of the memorandum of reply. The witness testified that the Respondent and the alleged union had relationship in relation to permanent staff. It was recognised in 2015 and had a check off system where members' dues were deducted by the Respondent as source and remitted. The claims were not in the check off system.

41. That the union was involved in trying to resolve the issues affecting the casual workers and participated in the meeting of 27th April 2015 which brokered a return-to-work formula after the second strike. The meeting discussed house allowances, service pay, leave allowance, where the Labour Office gave a formula for payment of leave days, review of working hours by adding a third shift in place of two, reducing casual workers and the Respondent promised to address the issue to determine the optimal number of employees.

42. The witness testified that the daily wage for general workers included house allowance.

43. That the Respondent had an integrated payment system which printed payslips and wages were deposited in the respective bank accounts. That it was difficult to print payslips on a weekly basis for about 1,100 employees.

44. That accrued leave was paid on 24th April 2015.

45. On cross examination, the witness confirmed that the Claimants were not denied access to the premises at any point since the supervisors would pack them at the gate for purposes of clocking in to work on a daily basis.

46. That it was the Claimants who requested the Respondent to be paying them on a weekly basis as opposed to daily. That leave days was paid in arrears for three years based on the aggregate number of days worked.

47. The witness further confirmed that the notices to show cause letters were sent to the Advocate the Claimants had hired and they all responded but did not attend the disciplinary hearing and were subsequently dismissed.

48. That the Claimants were not paid from May to September 2015 because they had not worked.

49. On re-examination, RW1 testified that the Claimants were daily workers and did not report to work every day as work sheets on record demonstrate. That the notices to show cause and invitation to the disciplinary hearing were sent to the Claimants' advocate on record and he accepted service.

Submissions for the 1ST, 2ND, 4TH, 5TH, 9TH, 11TH, 12TH, 13TH, 14TH and 15TH Claimants

50. The Claimants submit that what was in contention was whether the Claimants were dismissed from work or locked out fairly and procedurally.

51. It is their submission that while over 1,000 employees downed their tools the Claimant chose to only place 16 employees on suspension while the rest were asked to reply for jobs and were absorbed back and those who did not were locked out of the business premises prompting them to seek redress in court.

52. They submit that the Respondents failed to handle their employees' grievances leading to the issuance of a strike notice.

53. The Claimants submit they were not given an opportunity to explain themselves as they received both letters inviting them for disciplinary hearing and letters of termination at a date later than the date set for the hearing.

54. They further submit that they were not subjected to a disciplinary hearing hence the dismissal was wrongful and un-procedural.

55. The Claimants further contend they were treated in a differential and discriminatory manner as they were selectively targeted for disciplinary action and the Respondent referred to them as inciters and ring leaders.

56. The decision in **Kenya Plantation and Agricultural Workers Union v Carzan Flowers [2013] eKLR** is relied upon in support of the submission.

57. It is submitted that the process followed in dismissing the Claimants was flawed and unprocedural and no lawful reason for termination was given. They rely on the provision in Section 41 of the Employment Act, 2007.

58. The Claimants rely on Section 44(c) of the Employment Act which provides *inter alia* that "subject to the provisions of this Act, an employer may dismiss an employee summarily when an employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service."

59. The Claimants submit that the Respondent failed to tender any evidence to prove that the Claimants had acted in a way to warrant termination. That the threshold for summary dismissal had not been met.

60. It is submitted that the Respondent did not abide by the provisions of Section 54(5) and Section 49(1) of the Employment Act.

61. It is further submitted that since the termination was unfair the Claimants should be compensated. Reliance is made on the decision in the holding in **Banking Insurance and Finance Union Kenya v Consolidated Bank of Kenya Limited [2014] eKLR** where the Judge held –

"The terms and conditions of employment prescribed in individual and collective employment agreements must be consistent with the employment Act 2007. Employees have the right to be heard before termination regardless of the nature of termination notice."

62. The Claimants submit that they had served the Respondent for a lengthy period of time yet the Respondent continued to deem them as casuals and when they agitated for better terms, they were suspended and dismissed.

63. The Claimants submit that they seek compensation for unfair termination, house allowance and leave days which are statutory requirements.

64. The Claimants further submit that having been employees on a month-on-month contract they were entitled to a months' notice prior to termination as provided under Section 49(1) of the Employment Act 2007.

65. The Claimants further pray for salary for the months of May, June, July and August 2015 when they were on un-procedural suspension.

Submissions of the 4th, 6th, 7th, 8th, 9th and 16th Claimants

66. The Claimants submit that their employment with the Respondent was based on an oral contract of service and their dismissal was triggered by demands for unpaid salary arrears and better working conditions.

67. The Claimants submit that despite responding to the notice to show cause the Respondent dismissed them without an explanation which

is contrary to Article 47 of the Constitution of Kenya 2010.

68. It is submitted the Respondents failure to adhere to the Constitution, the Employment Act and applicable CBA amounted to unfair labour practices.

69. It is further submitted that the Respondent did not prove the reason(s) for termination contrary to the provisions under Section 45 of the Employment Act. That the decision arrived to terminate the them was not only an unfair labour practice but an unfair administrative action contrary to Articles 41(1) and 47 of the Constitution of Kenya.

70. The Claimants further submit that the court should find the Claimants termination unfair in terms of Section 45 of the Employment Act 2007. The holding in **Geoffrey Mwakio v Kenya Broadcasting Corporation [2015] eKLR** is relied upon to buttress the point that where the employer is unable to prove fair reasons for terminating an employee's employment, such termination will be deemed unfair, hence unlawful.

71. Reliance is also made on the decisions in **George Njenga Kinyua v China Road and Bridge Corporation 2021, eKLR Okumu Aziz Ramadhan v China Roads and Bridge Corporation (Kenya) 2021 eKLR** and **Simon Papa Imo v Athi River Shalom Community Hospital [2021] eKLR** where this Court found termination of a Claimants employment unfair and unlawful and awarded compensation.

72. Finally, it is submitted that since the Respondents and having established that the Respondent failed to comply with the law in terminating the Claimants, they are entitled to the reliefs sought.

Respondent's Submissions

73. The Respondent submit that the Claimants incited one another and participated in an unlawful and unprotected strike. That the Claimants did not follow the grievance procedure in the memorandum of agreement between the Respondent and the union.

74. The Respondent submits that an employee who participates in unlawful strike becomes liable to disciplinary action as ordained by the provisions of the Labour Relations Act, 2007, Section 80 which provides –

(1) An employee who takes part in, call, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employees contract and

(a) Is liable for disciplinary Action

(b) Is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike

75. Reliance is made on the holding in **Federation of Kenya Employers v Universities Academic staff union & 5 others [2018] eKLR**.

76. The Respondent submits that it issued the Claimants with notice to show cause letters through their Advocates **M/S Rakoro & Company** and the responses were received. That thereafter it issued disciplinary hearing letters through the same law firm and was not privy to any delay in the delivery of the said letters to the Claimants.

77. The Respondent relies on the decision in **Peter Karanja Ndungu & 35 others v Bidco Oil Refineries Limited [2020] eKLR** in support of the submissions.

78. It is further submitted that by the time the Claimants were withdrawing instructions from the firm of **M/S Rakoro** and company Advocates the disciplinary process had been concluded and the dismissal letters dispatched to the law firm.

79. Finally, the Respondent submit that the Claimants have failed to prove that they were unlawfully dismissed from employment and are therefore are not entitled to the reliefs sought. Reliance is made on the holding in **Zelpha Khagoitsi Lugalia v Aga Khan University Hospital [2019] eKLR**.

80. The Respondent urges the court to dismiss the claim with costs to the Respondents.

Analysis and Determination

81. After careful consideration of the pleadings, documentary and oral evidence, submissions and the law, the issues for determination are whether:

(i) The Claimants participated or engaged or were involved in an unprotected/unlawful strike on 13th May 2015 or there was a lock out;

(ii) The Claimants' termination of employment by the Respondent was unfair;

(iii) The claimants are entitled to the remedies sought.

82. The case turns on whether the Claimants participated in a strike on 13th May 2015 and whether their termination by the Respondent was unfair. Intriguingly, the Claimants did not state the capacity in which they were employed or the particular departments they worked in.

83. As to whether the Claimants were involved in or participated or engaged in an unprotected strike, the first point of call are the relevant articles of the Constitution of Kenya 2010, provisions of the Employment Act, 2007 as well as the Labour Relations Act, 2007.

84. To begin with, Section 2 of the Labour Relations Act and Section 2 of the Employment Act, 2007 provide that **“strike” means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employees or an employer organisation of which their employer is a member to accede to any demand in respect of a trade dispute.**

85. Article 41(2)(d) of the Constitution of Kenya 2010 provides that *“every worker has the right to go on strike”*.

86. The right of an employee or worker to go on strike though constitutionally mandated is circumscribed by the provisions of the Labour Relations Act, specifically Sections 76 and 79 which deal with protected strikes and lockouts and the effects of participating in unprotected strikes and lock outs respectively.

87. From the provisions of Section 76 and 79 of the Labour Relations Act, it is beyond per adventure that the right to go on strike must be exercised in accordance with prescriptions of the law.

88. Section 76 of the Act provides that

A person may participate in a strike or lock-out if—

(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

(b) the trade dispute is unresolved after conciliation—

(i) under this Act; or

(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and

(c) seven days written notice of the strike or lock-

out has been given to the other parties and to the Minister by the authorised representative of—

(i) the trade union, in the case of a strike;

(ii) the employer, group of employers of employers’ organisation, in the case of a lock-out.

89. Section 79 of the Labour Relations Act provides that: -

(1) In this Part, a “protected strike” means a strike that complies with the provisions of this Part and “protected lock-out” means a lock-out that complies with the provisions of this Part.

(2) A person does not commit a breach of contract or a tort by taking part in—

(a) a protected strike or a protected lock-out; or

(b) any lawful conduct in contemplation or furtherance of a protected strike or a protected lock-out.

(3) An employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

(4) Civil proceedings may not be instituted against any person for—

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in furtherance of a protected strike or protected lock-out.

(5) Subsections (2), (3) and (4) do not apply to any action that constitutes an offence.

(6) An employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.

90. In **Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others [2016] eKLR**, the Court of Appeal expressed itself as follows

“As can be appreciated the above requirements are in three sequential stages, with the first being to ensure that the trade dispute concerns the terms and conditions of employment or recognition of a trade union (as the case may be). In this case, it is common ground that the root of the dispute was the Respondents’ working hours and remuneration. Thus, it qualifies as a dispute concerning terms and conditions of employment. Having satisfied the first requirement, the second hurdle is whether there was a failed conciliation process. On the evidence on record, the parties never got past this stage as no conciliator was appointed whether under Section 65 of the Labour Relations Act or the collective bargaining agreement (if any). The last stage is the issuance of a strike notice in writing to the employer and or adverse party.”

91. The Court is bound by these sentiments.

92. In the instant case, the Respondent avers and submits that the Claimants were suspended and eventually terminated from employment for participating in a strike on 13th May 2015. The Claimants on their part allege that during a consultative meeting on 13th May 2015 they were unexpectedly and orally suspended from work and forcefully asked to get out of the company precincts by one Zipporah Mburu from the personnel office in the company of other officials. However, in their evidence through Jason Oyugi, the Claimants were emphatic that “on 13th May 2015, we refused to render services to the company and we were chased by the company.” The response to the notice to show cause states that “no strike took place. All I did was to demand my weekly ending salary for 23rd April 2015 and it was a consultative meeting (dialogue).” The response does not indicate where and to whom the demand was addressed. The response further states that “I did not leave my working place since the job allocation had not been assigned ... The only thing I know was a dialogue meeting at the assembly point where we had dialogue with the HR and we returned back to our departments ...” It is evident that duties for the day had been allocated before the alleged meeting took place. This statement which is relied upon by all the Claimants contradict the Claimant’s evidence and the averments in the statement of claim, that they were unexpectedly suspended from work

93. The Respondent on the other hand aver and submit that the Claimants participated in an unprotected strike on 13th May 2015. That they stopped all the Respondent’s machines and mobilised a group of 73 workers to strike, that they downed their tools and stopped production in the packing department, internal material management department and the soap department and attempts to speak to them to return to work fell on deaf ears.

94. The Respondent testified that the Claimants disobeyed a lawful command to return to work, that they blatantly declined thereby being insubordinate to lawful authority. That pleas from the Labour Officers and Union Officials did not assuage the Claimants to resume work.

95. Intriguingly, at no time did the Claimants allege that they notified the union the challenges they were facing for its intervention yet they alleged to be members. All notices to the Union were from the Respondent.

96. The evidence on record shows that the Claimants participated in stoppage of work on 10th March 2015 and on 24th April 2015 agitating for the same issues. The gravamen of the strikes was house allowance, service pay, working hours, leave pay and reduction of the number of casual employees.

97. By a memo dated 23rd March 2015, the Respondent acknowledged receipt of the concerns raised by the Claimants and sought **eight weeks** effective 20th March to 11th May 2015 to resolve all the matters raised amicably and conclusively but the strike of 24th April 2015 appears to have caught the Respondent off guard. It is noteworthy that the Respondent notified the District Labour Office and the National General Secretary of the Union of the stoppage of work on 10th March and 24th April 2015.

98. It is common ground that the Labour Officer, Union representatives and the management team of the Respondent under the leadership of Zipporah Mburu, the Human Resource Manager, addressed the Claimants on 13th May 2015 and requested them to resume duty but they declined. The Claimants admit that they were forcefully asked to leave by Zipporah Mburu and other company officials and would be told when to return to work. The Claimants make no reference to where they were when the instructions were given, whether they were oral or in writing and whether they were given to the group or as individuals since their standardised responses to the notice to show cause state that no strike took place and nothing happened until they were evicted from their places of work by company security personnel under the leadership of Mr. Isaac Mwangi and other officers of the Respondent. The Claimant’s evidence makes no reference to security officers evicting the Claimants from their places of work or employees having returned to their work pales. It does appear that the Claimants had left their places of work to agitate their entitlements.

99. In sum, although the dispute in question is a trade dispute within the meaning of Section 2 of the Labour Relations Act, the other two conditions articulated by the Court of Appeal in **Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others (supra)** have not been fulfilled for the strike to be deemed protected by law.

100. From the Claimant’s testimony, it is not in dispute that they did not render services to the Respondent on 13th May 2015, they ceased to work and were acting in combination and refused to return to work when asked to do so and were therefore on strike as defined by Section 2 of the Employment Act and Labour Relations Act, 2007. Needless to emphasise the Claimants had not complied with the prescriptions of law for the strike to be deemed as protected nor had they invoked the grievance handling mechanism in paragraph 18 of the memorandum of agreement between Bidco Africa Limited and the Kenya Chemical and Allied Workers Union for the period 1st June 2014 to 31st May 2016.

The Claimant testified that he and other colleagues were members of the Union and produced payment receipts of four Claimants excluding the 1st Claimant for some time in 2012 and provided no other evidence of membership.

101. Relatedly, the Claimants did not comply with paragraph 13 of the Respondent's Human Resource Policies and Procedures Manual, 2013 which prescribes the complaint and grievance handling procedure. In a nutshell the Claimants were involved in or engaged in an unprotected strike on 13th May 2015.

102. For the foregoing reasons, the Court is satisfied that the Respondent has on a balance of probabilities demonstrated that the Claimants and their colleagues participated or were involved or engaged in an unprotected strike on 13th May 2015. Letters and minutes of meetings show that the Claimants had engaged in stoppage of work on 10th March 2015 and 24th April 2015.

103. As indicated the Respondent had agreed to look into and address the issues raised by the Claimants and some of the less weighty such as leave pay and reduction of working hours had been agreed upon with the Labour Office. Those with far reaching consequences or required substantial changes to the operations or policies or systems such as reduction of the number of casuals, house allowance required more time to implement were pending but the Claimants appear to have been impatient.

104. For service pay for instance, the Claimants were members of the NSSF, an exception in Section 35(6)(d) of the Employment Act. On house allowance, the daily wage was inclusive of house allowance as per the Regulation of Wages Order, 2013 and 2015. A change in policy necessitated a review of the Respondent's policy on casual workers as well as financial adjustments to accommodate the cost. It would also impact on the taxation system among others.

Termination

105. As to whether the termination of the Claimants' employment was fair, the standard letter of summary dismissal dated 13th August 2015 stated *inter alia* –

“As you are well aware, we invited you for a disciplinary hearing meeting through our letter under Ref. No. BAL/HRD/DH/2015/39 dated 13th July 2013 wherein we advised you that you were required to appear before the disciplinary committee on 30th July 2015 at 4.00 pm for hearing of your case in respect of your conduct on the 13th day of May 2015. We also did advise you vide our said letter that if you fail to attend the said hearing, the hearing would proceed in your absence You failed and/or refused attend the hearing without apology.

Notwithstanding your absence without apology at the hearing we wish to advise that the hearing proceeded as scheduled in your absence. Based on our investigations and the evidence, the committee found you conducted yourself in the manner under listed: -

1. You participated in unprotected/unlawful strike.

2. Without leave of your supervisor, you absented yourself from the place appointed to you by your said supervisor for the performance of your assigned duties and wilfully neglecting to perform work which was your duty to perform.

3. Your said absenteeism without leave from your supervisor slopped production which has caused the company financial losses and inconveniences.

4. In the company of other employees, you tried to unlawfully force other employees of the company to join you in the unprotected strike and process disrupting work within the premises.

7. You were insubordinate to the lawful authority.

8. In defiance thereof, and with a lot of insolence you continued to commit a breach of peace in the premises. You were disorderly and were deliberately promoting unruliness and lawlessness.

10. You chose not to return to work.

The Committee concluded that you committed acts amounting to gross misconduct under the Employment Act, 2007 Section 44(4) (a, c, e & g). The Committee also concluded that you did not give notice of the strike you participated in on the 13th day of May 2015 and therefore prohibited under Section 78(1)a and b of the Labour Relation Act, 2007. You also breached Company Rules and Regulations Part Company Rules IV (V, VIII & IX) which is grave misconduct.

In light of the foregoing conduct on your part and the evidence adduced before the committee, the committee has made a unanimous decision and has found you guilty of gross misconduct and hereby summarily dismisses you forthwith from employment under

section 44(1) of the Employment Act 2007. Kindly do return any company property in your possession within seven (7) days from the date of this letter. You have a right to appeal to committee, within fourteen (14) days from the date of this letter.

Signed”

106. The termination letter catalogues in detail what transpired on 13th May 2015 they did not work and the actions the Respondent took to save the situation as well as the intransigence of the Claimants.

107. The Claimants submit that they were terminated unfairly because there was no sufficient basis for the dismissal and the same was wrongful, unprocedural and contrary to the law and there was no disciplinary hearing and the Claimants were collectively punished for engaging in a lawful strike.

108. The decisions in **Martin Wamae & 295 others v Bidco Africa Limited [2018] eKLR** and **Kenya Plantation and Agricultural Workers Union v Carzan Flowers [2013] eKLR** are relied upon in support of the submission.

109. The submission on collective punishment is lacking in particulars. The Claimants led no evidence on how they were picked for suspension or dismissal and did not plead discrimination in the termination.

110. Similarly, Sections 43, 44 (4)(g), 45(5) and 47(5) are relied upon to urge that the Respondent had not tendered evidence to prove on a balance of probabilities that the Claimants had acted in a manner to warrant dismissal from employment.

111. The Court is urged to rely on the decisions in **Banking, Insurance and Finance Union, Kenya v Consolidated Bank of Kenya [2014] eKLR**, **Fredrick Were v MK Jeffreys Hauliers [2013] eKLR**, **Geoffrey Mwakio v Kenya Broadcasting Corporation [2015] eKLR**, **Kenfreight (EA) Ltd v Benson K. Nguti 2016] eKLR** and other persuasive decisions to find and hold that the Claimants were unfairly terminated and are entitled to the reliefs sought.

112. The Respondent on the other hand relies on Section 41 of the Employment Act, 2007 as well as the decision in **Peter Karanja Ndungu & 35 others v Bidco Oil Refineries Limited [2020] eKLR** to urge that the termination of employment by the Respondent was not unfair.

113. The law on termination of employment contracts is clearly spelt out by the provisions of the Employment Act and courts have diligently and tenaciously enforced the provisions.

114. In simple legal parlance for a termination of employment to be deemed fair, it must pass the tests for substantive and procedural fairness as ordained by Sections 41, 43, 44, 45 and 47 of the Employment Act, 2007.

115. Under Section 45(1) of the Act, the employer must prove that it had a valid and fair reason and employed a fair procedure in the conduct of the termination.

116. The essence of substantive and procedural fairness in termination of employment contracts has been underscored in legions of decisions of this Court and the Court of Appeal. In **CMC Aviation Limited v Mohammed Noor [2015] eKLR** the Court of Appeal held as follows –

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.”

117. Other decisions include **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** and **Standard Group Limited v Jenny Luesby [2018] eKLR**.

118. In **Kenafic Industries Limited v John Gitonga Njeru (supra)** the Court of Appeal stated that –

“It should be remembered that Section 43 of the Act makes it mandatory that where such termination is contested, the employer must prove that valid reason(s) in support of the termination exists; a position reiterated under Section 45(2). In addition, even where the termination is on account of misconduct, Section 41 requires the communication of these reasons to the worker, coupled with giving him an opportunity to be heard in response thereto prior to termination of his engagement.”

119. Similar sentiments were expressed in **Naima Khamis v Oxford University Press (E.A) Ltd [2017] eKLR** where the Court was unequivocal that –

“A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

Reason

120. In the instant case, CW1 admitted in evidence that on 13th May 2015 and were chased away. The evidence on record demonstrates that on 13th May 2015, the Claimants and other daily employees of the Respondent downed their tools to agitate for better working conditions by inciting other employees and refused to heed the pleas of the Labour Officer, union officials/representatives and management. As already

found the Claimants participated or engaged in or were involved in an unlawful strike.

121. The Court finds and holds that the Respondent had a valid and fair reason to terminate the Claimant's employment on 13th August 2015.

Procedure

122. In **CMC Aviation Limited v Mohammed Noor (supra)** the Court of Appeal stated that –

“In KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS V MERU NORTH FARMERS SACCO LIMITED, [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal.”

123. Section 41 of the Employment Act provides that –

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

124. In **Pius Machafu Isindu v Lavington Security Guards Limited (supra)**, the Court of Appeal stated that –

“A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

125. In **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**, Radido J. itemised the specific fact was situations the employer is required to demonstrate under Section 41 of the Employment Act as follows: -

(i) Explanation to the employee in a language the employee

understood the reasons termination is being considered.

(ii) A representative of the employee, being either a fellow employee or a shop floor representative to be present during the explanation.

(iii) The employer heard and considered the representations or explanations by employee or the representative.

126. In the instant case, it is not in dispute that the Claimants were suspended by word of mouth on 13th May 2015 after they refused to return to work after pleas from the management, union representatives and the Labour Office. They thereafter sought legal assistance from the firm of Rakoro and Company Advocates who wrote a letter dated 19th May 2015, alleging that the Claimants had been locked out and unfairly terminated. The Respondent's Counsel responded to the letter. The show cause letters dated 19th May 2015 were served upon the Claimants through the firm of Rakoro and Company Advocates. The letter itemised the allegations made against the Claimants especially, participation in unprotected/unlawful strike, absenteeism without leave and disobedience of lawful authority among others. The letter required a response within ten (10) days from 19th May 2015. The Claimants responded by letter dated 2nd June 2015. The standardised response denied that a strike had taken place on 13th May 2015 but admitted demanding their weekly salaries *“and it was a dialogue”*.

127. The Respondent received the responses to the notice to show cause and subsequently issued invitations to disciplinary hearing by letter dated 13th July 2015. Analogous to the notice to show cause, the invitation to the disciplinary hearing itemised the alleged infractions. The Claimants were invited on different dates between 22nd July and 7th August 2015 at 4.00 pm. The letters informed the Claimants that they were at liberty to be accompanied by a fellow employee at the hearing and that the hearing would proceed their absence notwithstanding. The letters were sent through the firm of Rakoro and Company Advocates.

128. For unexplained reason, none of the Claimants attended the disciplinary hearings.

129. Although CW1 testified that they received the letters in August, it is unclear whether the law firm delivered the letter to its clients.

130. The Respondent summarily dismissed the Claimants by letters dated 13th August 2015. As mentioned elsewhere in the judgment the dismissal letter stated *inter alia*

“You have a right to appeal to committee within fourteen (14) days from the date of this letter.”

131. There is no evidence on record that any of the Claimants appealed the decision of the committee as advised. A copy of a letter dated 14th August 2015 by Mr. Stephen Kamemba Mungai addressed to the Human Resource Department of the Respondent and copied to the firm of Rakoro and Company Advocates under the reference. Request for audience and withdrawal of their advocate. The letter states that the Claimants had lost confidence in their Counsel on record, that the Claimants received the invitations for the disciplinary hearing and dismissal letters on 14th August 2015 and were pleading for a fresh hearing date as well as the withdrawal of dismissal letters.

132. The Claimants led no evidence that the letter was dispatched and received by the Respondent.

133. Instructively, the Claimants do not blame the Respondent for their failure to appear for the disciplinary hearings. They blame their advocate. As submitted, the Respondent discharged its duty when it dispatched the letters to the Claimants' advocate for onward transmission to the Claimants. The Claimants had instructed the law firm to act on their behalf as their agent and are thus bound by their choice as encapsulated by the maxim *qui facit per alium facit per se* "he who acts through another acts himself".

134. It is also worth noting that in their letter dated 20th August 2015 addressed to the Respondent's Counsel, Rakoro and Company Advocates states as follows: "The last batch of the said employees were supposed to be seen on 7th August 2015. Kindly let us have the decision made by the employer (your client) to enable us seek further instructions from our clients, in any case within 7 days of service of this letter". Evidently the law firm had received the hearing notices for onward transmission to its clients.

135. In **Peter Karanja Ndungu & 35 others v Bidco Oil Refineries Limited [2020] eKLR** the Court expressed itself as follows:

"Second, the Court returns that the termination of the claimants' employment by way of the respective letters of summary dismissal was not unfair or unlawful in substance or procedure. Each claimant was served with a show-cause notice through their Advocate; each replied through the Advocate; each was given chance to attend the disciplinary hearing and subsequently the letter of summary dismissal issued. The Court returns that the due process of a notice and hearing as per section 41 of the Act was complied with."

136. The Court is in agreement with these sentiments.

137. As the termination letter dated 13th August 2015 stated, the disciplinary hearings proceeded notwithstanding the absence of the Claimants. According to the notice of the disciplinary hearing dated 13th July 2015, one Matoke Jason Oyugi, the 1st Claimant, was scheduled to appear before the committee "on 6th August 2015 at 4.00 pm in the afternoon or soon thereafter".

138. The minutes of the hearing of the Claimant's case are dated 6th August 2015 and signed by Secretary and another person. The record show that nine (9) persons constituted the committee including the Human Resource Manager who testified in Court. Agenda item no. 3 is entitled "Hearing of the case in respect of Matoke Jason Oyugi". The allegations against the employee are detailed in paragraph 3 of the letter and the committees' decision in paragraph 4. The committee unanimously found that the said Matoke Jason Oyugi committed acts amounting to gross misconduct under the Employment Act, 2007. Section 44(4)(a), (c), (e) and (g) and had not given notice of the strike.

139. Documents on record demonstrate that a similar process was undertaken with respect to Meja Habert Eshikobe, the 13th Claimant on 23rd July 2015 and all the Claimants in the case.

140. This documentary evidence was neither controverted nor faulted by the Claimants in any respect. As the letter dated 14th August 2015 attests, the Claimants were seeking another chance to appear for the disciplinary hearings but still had the opportunity to appeal. For unexplained reason(s), the Claimants did not exercise to their right of appeal.

141. For the foregoing reasons, the Court finds that the summary dismissal of the Claimants from employment on 13th August 2015 was procedurally fair and thus lawful. The evidence is clear that the Respondent gave the Claimants notices to show cause why disciplinary action should not be taken against them and all responded and the Respondent considered the responses. Subsequently, the Respondent invited the Claimants for disciplinary hearing and informed them that they were at liberty to be accompanied by a fellow employee to the hearing.

142. The Court is satisfied that the procedure employed by the Respondent in effecting the dismissal was consistent with the provisions of Section 41 and 45(2)(c) of the Employment Act, 2007 and thus met the threshold for procedural fairness.

143. The Court is thus satisfied that the summary dismissal of the Claimants was neither substantively nor procedurally unfair as submitted by Counsels for the Claimants.

144. The Court is guided by the sentiments of Ongaya J. in **Grace Gacheri Muriithi v Kenya Literature Bureau [2012] eKLR** as follows:

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. ..."

145. In the instance case, the Respondent had a grievance management procedure and engaged the Claimants on the demands they were making on the terms and working conditions and as adverted to elsewhere in this judgment, had sought the indulgence of the Claimants to address the issues via memo dated 23rd March 2015.

146. Similarly, the Respondent kept the Labour Office and the Union apprised of the occurrences at its premises and involved them in addressing the issues at hand and an agreement had been reached on leave allowance bearing in mind that the Claimants were daily workers and appear to have been impatient as evidenced by the reported incidences of cessation of work by the Claimants. Within a duration of two (2) months, three incidences were reported. Among the demands was service pay notwithstanding the fact that the Claimants were members of the National Social Security Fund (NSSF). They also demanded house allowance and reduction of casual employees.

147. The Court finds that in as much as employers are obligated to address deficiencies and issues brought to its attention by employees, it behoves the employees to accord the employer reasonable time to address the deficiencies and issues to the satisfaction of all parties. Acting bona fide and keeping the channels of communication open is the key, coupled with the engagement of the Labour Office and unions as applicable.

148. In this case, the Respondent's memo dated 16th April 2015 which appear to have infuriated the Claimants was a status update on the issues. Although the Respondent appeared adamant on service pay and house allowance, it was still bound by its internal memo dated 23rd March 2015 by which it sought eight weeks to resolve the issues though interrupted by the stoppage of work on 24th April 2015. It promised to implement a third shift in the month of May 2015. It also promised to review the number of casual workers to improve processes and leave pay would be deposited in their bank accounts on 23rd April 2015.

149. It is unclear what provoked the stoppage of work on 13th May 2015, fifteen days after a return-to-work formula had been signed on 27th April 2015.

150. The Court finds that demanding drastic changes in systems and policies by employees and their immediate implementation is unreasonable, as was in the instant case.

151. In sum, the Court is satisfied that the Claimants have on a balance of probabilities not demonstrated that their summary dismissal by the Respondent was unfair or unlawful.

152. As regards reliefs, the Court finds as follows:

(a) A declaration that the termination of the Claimants' employment was unfair

153. Having found that the summary dismissal was neither unfair nor unlawful, the declaration sought is **declined**.

(b) Payment of months of May, June, July and 13 days in August 2015

154. As regards payment for the months of May, June, July and 13 days in August 2015, the Court is guided by the sentiments of Ongaya J. in **Grace Gacheri Muriithi v Kenya Literature Bureau (supra)** where the Learned Judge expressed himself as follows:

“The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case ... The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

155. The claim is **declined**.

(c) One month's salary in lieu of notice

156. As regards one month's salary in lieu of notice, the Claimants tendered no evidence of their entitlement to the sum claimed and being a summary dismissal, the employer was not obligated to give notice.

(d) House allowance

157. On house allowance the Respondent averred and testified that since the Claimants were daily workers and were remunerated in accordance with the Regulation of Wages Order 2013 and the daily wage was inclusive of house allowance at KShs.432 per day. Under the Schedule to the Regulation of Wages (General) Amendment) Order, 2013, the minimum daily wage for towns and/or cites other than Nairobi, Mombasa and Kisumu was KShs.432.40 as averred by the Respondent. The 2015 Order effective 1st May 2015 raised the daily wage to KShs.484.30. The Respondent's witness testified that the Claimants did not report to work every day as the worksheets on record show. For instance, between 2nd February 2015 and 12th February 2015, Habert Eshikobe Meja reported to work on 2nd, 3rd, 4th, 5th, 6th, 7th and 9th. Similarly, Jason Oyugi Matoke reported to work on 6th, 7th, 9th and 11th only.

158. The 16th Claimant's daily wage was KShs.638.40. RW1 testified that overtime work and gazetted public holidays were remunerated accordingly, the latter at twice the daily rate. Granted that the daily wage is inclusive of

house allowance and the Claimants did not aver that they were permanent employees or adduce evidence to that effect, the claim is **denied**.

(e) Leave Allowance

159. As regards leave allowance, RW1 testified that no leave days had accrued but the Respondent agreed to pay following the meeting on 27th April 2015 after the stoppage of work on 24th April 2015. The meeting culminated in a tripartite agreement between the Labour Office, Respondent and the workers. The Union participated but did not sign the compromise. The Labour Officer gave a formula on payment for accrued leave and the Respondent undertook to pay. As no leave had accrued by 13th May 2015, **none is payable**.

(f) Leave transport allowance

160. This issue has not arisen in any of the issues or minutes of meetings or grievances on record. It was not among the five grievances raised at the meeting of 27th April 2015, held at the Labour Office or the inter office memo from the management dated 16th April 2015. More significantly, the Claimants adduced no entitlement to it. The prayer is **declined**.

(g) Underpayment in 2014 and 2015

161. The Claimants led no evidence of underpayment in 2014 or 2015. RW1 testified that the Respondent used the Regulation of Wages Order, 2012 and the Claimants adduced no evidence to controvert the testimony. The Claimants did not provide a copy of the CBA alleged or their membership of the Union. It is unclear how the Kshs.851 relied upon by the Claimants was arrived at in light of the Regulation of Wages Order 2013 effective 1st May 2013 and Regulation Wages Order, 2015 effective 1st May 2015.

162. The only amount due is Kshs.51.90 per day for the 12 days worked in May 2015 **if and only if** the Respondent did not adjust the daily wage from Kshs.432.40 to Kshs,484.30.

(h) Compensation for unfair dismissal

163. Having found that the summary dismissal of the Claimants by the Respondent was neither unfair nor unlawful, the provisions of Section 49 of the Employment Act are not applicable. The claim is **denied**.

(i) Certificate of Service

164. The Court finds that each of the Claimants is entitled to a certificate of service as provided by the provisions of the Employment Act 2007.

165. In the final analysis, judgment is entered for the Claimants against the Respondent for: -

(i) Amount due to each Claimant for underpayment, for number of days worked in May 2015. For the avoidance of doubt, compensation for underpayment is only payable if the daily wage was not adjusted from Kshs.432.40 to Kshs.484.30 on 1st May 2015.

(ii) The Respondent to issue a certificate of service to each Claimant within 30 days from the date of this judgment.

(iii) The Claimants are awarded 50% of the costs.

166. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH 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 15th March 2020 and subsequent directions of 21st 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