



**Rotich & 2 others v New Kenya Cooperative Creameries Limited (Cause 4, 5 & 8 of 2020 (Consolidated)) [2022] KEELRC 143 (KLR) (28 April 2022) (Judgment)**  
*Jerusha Chepwogen Rotich & 2 others v New Kenya Cooperative Creameries Limited [2022] eKLR*

Neutral citation: [2022] KEELRC 143 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**  
**CAUSE 4, 5 & 8 OF 2020 (CONSOLIDATED)**

**ON MAKAU, J**

**APRIL 28, 2022**

**BETWEEN**

**JERUSHA CHEPWOGEN ROTICH ..... 1<sup>ST</sup> CLAIMANT**

**SAMMY CHERUIYOT KORIR ..... 2<sup>ND</sup> CLAIMANT**

**LEONARD KIPNGENO CHIRCHIR ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**NEW KENYA COOPERATIVE CREAMERIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This judgment relates to the said three suits which were filed separately on 31<sup>st</sup> December, 2020 but later consolidated on 4<sup>th</sup> November, 2021 by consent of the parties. All the three suits have similar facts and they seek similar reliefs. Therefore, in this judgment I have treated Jerusha Chepwogen Rotich as the 1<sup>st</sup> claimant, Sammy Cheruiyot Korir as the 2<sup>nd</sup> claimant and Leonard Kipyegon Chirchir as the 3<sup>rd</sup> claimant for ease of reference.
2. The claimants were employed by the respondent on diverse dates but they were all dismissed on 22<sup>nd</sup> March 2018 for the same offence of negligence of duty between January and June 2017 that led to loss of funds to the employer. According to the claimants, the termination was unfair and they sought the following reliefs: -

**1<sup>st</sup> Claimant**

- a) A Declaration that the termination of Claimant from service was unlawful, unfair, un-procedural and a fundamental violation of the rights of the Claimant;
- b) The terminal dues as tabulated as below:



- (i) Three months' salary in lieu of notice kshs 295,200.
  - (ii) Twelve months' salary compensation for unfair termination Kshs. 1,180,800
  - (iii) Leave for 20152016 Kshs. 98,400
  - (iv) Salary for March 2018 Kshs. 98,400
  - (v) Salary for the suspension period 15112017 to 2232018 Kshs. 492,000  
Total Kshs. 2,164,800
- c) A Certificate of Service as per Section 51 of the *Employment Act*;
  - d) Costs and interest of this Suit:
  - e) Any other award as the honorable court deems fit to grant in the circumstance of this case.

### **2<sup>nd</sup> Claimant**

- a) A Declaration that the termination of Claimant from service was unlawful, unfair, un-procedural and a fundamental violation of the rights of the Claimant;
- b) The terminal dues as tabulated as below:
  - (i) Three months' salary in lieu of notice kshs 295,200.
  - (ii) Twelve months' salary compensation for unfair termination Kshs. 1,180,800
  - (iii) Leave for 20152016 Kshs. 98,400
  - (iv) Salary for March 2018 Kshs. 98,400
  - (v) Salary for the suspension period 15112017 to 2232018 Kshs. 492,000  
Total Kshs. 2,164,800
- c) A Certificate of Service as per Section 51 of the *Employment Act*;
- d) Costs and interest of this Suit:
- e) Any other award as the honorable court deems fit to grant in the circumstance of this case.

### **3<sup>rd</sup> claimant**

- a) A Declaration that the termination of Claimant from service was unlawful, unfair, un-procedural and a fundamental violation of the rights of the Claimant;
- b) The terminal dues as tabulated as below:
  - (i) Three months' salary in lieu of notice kshs 341,39.
  - (ii) Twelve months' salary compensation



- for unfair termination Kshs. 1,365,564.
- (iii) Leave for 2015/2016 Kshs. 55,063.06
- (iv) Salary for the suspension period  
15/11/2017 to 22/3/2018 Kshs. 568,985  
Total Kshs. 1,989,612
- c) A Certificate of Service as per Section 51 of the *Employment Act*;
- d) Costs and interest of this Suit:
- e) Any other award as the honorable court deems fit to grant in the circumstance of this case.

### **Factual Background**

3. The 1<sup>st</sup> claimant was employed on the 12<sup>th</sup> March, 2012, the 2<sup>nd</sup> claimant on the 21<sup>st</sup> November, 2011 and the 3<sup>rd</sup> claimant was employed on the 1<sup>st</sup> September, 1981 as Production Trainees but later were all promoted on various dates to the position of Production Supervisors earning a gross salary of Kshs 98,400 for the 1<sup>st</sup> and 2<sup>nd</sup> claimant while the 3<sup>rd</sup> claimant earned a gross salary of Kshs. 113,797.
4. The circumstances leading to their termination is that the Respondent carried out an audit which was captured in a report dated 24<sup>th</sup> July, 2017. The report revealed that between January and June, 2017, the 1<sup>st</sup> claimant in line of production lost 9,679 litres amounting to Kshs. 406,518, the 2<sup>nd</sup> claimant lost 29,649.15 litres amounting to Kshs. 1,245,264.30 while the 3<sup>rd</sup> claimant lost 19,584.50 litres amounting to Kshs 822,549.
5. The basis of the alleged loss was the entries made in Form 5, Form 4C and Form 4D were not tallying with the actual figures or amount of milk allegedly received and physically in the factory. In their defence, the claimants stated that the said forms were filled in different departments and that the only form they filled was Form 4C. Further they stated that the variance in quantities resulted from the processes that the milk goes through during production at the factory which depends on laboratory tests.
6. The claimants maintained that they performed their duties diligently and denied any wrong doing in their work. They further averred that the reason for the termination was not valid as the alleged Audit report and Forms 5, 4C & 4D were not shown to them before the termination or produced as exhibits in this suit.
7. The claimants also took issue with the way the disciplinary hearing was carried out and argued that the hearing was done with a pre-determined outcome of terminating their services. They averred that the termination of their services was procedurally unfair and violated their rights under Articles 41 and 47 of *the Constitution of Kenya*.
8. In response the Respondent filed separate Statements of Defence in the respective suits on the 7<sup>th</sup> June, 2021. In brief, Respondent admitted that it employed the claimants but stated that they were under a duty to perform their duties diligently as Production Supervisors at Sotik Factory. Therefore it averred that the said loss of milk was purely attributed to them.
9. It is the respondent's case that the claimants deliberately manipulated and kept inaccurate records, between January and June 2017, which records were not tallying with the actual milk figures in the factory. It is further defence case that vide an audit report dated 24<sup>th</sup> July, 2017, the respondent



discovered that the claimants deliberately manipulated the received quantities from pieces to liters by grossly understating the resultant quantity by huge margins thereby occasioning loss to the company. The respondent averred that the claimants alleged that the products were taken back to the factory for reprocessing when in actual sense the products were finding their way out of the factory. Therefore it contended that the procedure of production was abused by the claimants.

10. The respondent further averred that it followed a fair procedure before terminating the claimants' employment because it served them with a notice to show cause dated 12<sup>th</sup> September, 2017 and they all responded vide their various letters dated 14<sup>th</sup> September, 2017. It suspended the services of the claimants on 15<sup>th</sup> September, 2017 to pave way for further investigations and on 2<sup>nd</sup> January, 2018, the claimants were all invited for a disciplinary hearing scheduled for 8<sup>th</sup> January, 2018. It averred that the hearing was conducted as required by *Employment Act* but being dissatisfied with the claimants' explanation of the said loss, it terminated their services on the 22<sup>nd</sup> March, 2018.
11. It is the respondent's case that the termination was justified and it was done in accordance with the *Employment Act* and the claimants were paid all their terminal dues. Therefore it prayed the claimants' suit to be dismissed with costs.

### **Evidence.**

12. This matter proceeded for hearing on the 4<sup>th</sup> November, 2021 when the 1<sup>st</sup> claimant (CW-1) testified that she worked for the respondent together with the other claimants as Production Supervisors at the Sotik factory before their services were terminated. She testified that the reason for the termination was an alleged variance in form 4C, 4D and 5 with the actual milk in the factory. She explained that form 5 is filled by the Clerk in the Stores Department, form 4C is filled by the Production Supervisor in the Production Department or the Factory Manager, while form 4D is filled by the Factory Manager. Form 5 is a transfer document which information is transferred to form 4C but she emphasized that all the three forms must be approved by the factory manager.
13. CW-1 testified that, she was summoned to a disciplinary hearing together with her colleagues but that they were not served with the Audit report and the said forms 4D, 4C and 5. She indicates that when the issue of non-service of the said documents was raised during the disciplinary hearing, but they were told to go away and await for their verdict. She added that the questions posed by the committee were not to any single individual but to them collectively after which they were all dismissed.
14. CW-1 further testified that they were paid half salary during suspension period and that they were neither given any notice before the termination, nor were they paid for the notice period. Furthermore, they were not paid their terminal dues.
15. On cross-examination by Musau Advocate, CW-1 testified that she was the production supervisor together with the other claimants. That they were responsible for production and storage. She denied ever varying the forms and testified that she was in charge of form 4C alone which indicated the raw milk to finished products. She testified that form 4D was filled by the store manager while form 5 was an inter-departmental transfer form depending on who is dispatching milk and is used for both raw milk and finished products. Form 4C indicates the summary of milk handled in the factory. She added that they were tasked with verifying the information in the form against the actual milk in the factory before forwarding the same to the factory manager for further verification. Therefore, according to CW -1 it was not possible to vary the information in the said forms.
16. On further cross-examination, CW-1 testified that she was not served with the audit report nor the forms 4D, 4C and 45 in issue to enable her properly give an explanation. Upon her request for copies of the same she was directed to go outside and the case was closed. She maintains that she was not given



- a fair opportunity to defend herself of the charges because she was not served with the audit report or any other documents the disciplinary committee were relying upon.
17. She further testified that she took her annual leave when the factory was not too busy and in most occasions the respondent requested her to postpone her leave due to pressure of work.
  18. The 2<sup>nd</sup> claimant testified as CW-2 and adopted his witness statement dated 30.1.2020 which basically reiterated the facts of his claim summarized herein above and the evidence of CW-1.
  19. On cross-examination, CW-2 testified that he was one of the production supervisors who was in charge of milk production and that he was suspended on allegation of negligence of duty which occasioned the Respondent loss. He testified that he was in charge of form 4C alone which indicated the raw milk received and the amount of litres packaged or the processed milk which were in bulk. He stated that the loss of milk he was told to account for was on processed milk which was not within the scope of his duties.
  20. On further cross-examination, CW-2 testified that they were invited to disciplinary hearing as a group of 6 supervisors in the production department and upon requesting for documents to rely on, they were send away and their case was closed. He faulted the Respondent for the failure to supply them with Audit Report and the said form 4D, 4C and 5 during the disciplinary hearing. He then admitted to utilizing all his leave days save for the ones for 20162017 financial year.
  21. On re-examination, he stated that the information indicated in form 4C is obtained from the factory machine after which the factory manager is given to verify.
  22. The 3<sup>rd</sup> claimant testified as CW-3 and adopted his statement of 30.1.2020 which also reiterated the facts in his Statement of Claim summarized herein above claim. He also adopted the evidence of the CW-1in his case. On cross examination, he also stated that he was called to the hearing with his colleagues herein but they were not given a fair opportunity to defend themselves because they were not furnished with the alleged Audit Report and Form4D, 4C and 5. He also stated that when they asked for the said documents, they were told to leave since their case had been determined.
  23. He further testified that he served the respondent for 35 years and utilized all his leave days except for the last year of service. Like the other claimants he was being paid half salary during the suspension period.
  24. In re-examination, he contended that all the Form 4Cs he filled were accurate and they were all verified by the Factory Manager. He also stated that Form 4D was for finished goods and it was filled in the stores department.
  25. The respondent's case proceeded for hearing on the 20<sup>th</sup> January, 2022, when the Respondent's Industrial Relations manager, Mr. Michael Mukopias RW-1 testified that an internal audit was conducted and a report dated 24<sup>th</sup> July 2017 established that between January and June 2017, the claimants were manipulating records by indicating that milk was returned for reprocessing when in actual sense the milk was never returned to the factory.
  26. He further testified that the claimants were then issued with notice to show cause and after their response they were invited to disciplinary hearing where they were heard by a committee. However, their explanations were not unsatisfactory and their employment was terminated by the letter of 22.3.2018.
  27. On cross examination by Kirwa Advocate, he admitted that the termination of the claimants' employment was on the basis of an Audit Report dated 24.7.2017. He further admitted that the



report was not attached to the show cause letter and neither was it produced before this court. He also admitted that the claimants were never furnished with the alleged manipulated Forms 4C, 4D and 5. Again he admitted that none of the records showing how the milk was lost was filed in Court.

28. On further cross examination, the witness testified that there was no statement by Joseph Odhiambo, the overall security officers on the allegation of lost milk. Further there was no further investigation carried out when the claimants were suspended.
29. On the other hand, RW-1 stated that the claimants were paid their terminal dues as outlined in the Internal Memos dated 28<sup>th</sup> May 2018 save for the Staff Pension which is left for the employee to follow up with the Trustees. However, he could not explain why documents on the alleged payment of terminal dues were not filed in Court.
30. On re-examination, the witness testified that the notice to show cause had an extract of the audit report as such it was not necessary to serve the entire report on the claimants. He also testified that the book entries of lost milk were not a single event but a continuous manipulation. He maintained that the claimants were paid their terminal dues but they never went to collect their certificate of service which are ready for them to collect.

### **Claimants' Submissions.**

31. The claimants submitted from the onset that for termination to be considered lawful it must pass the test of procedural fairness and substantive justification as was held in the case of *Walter Ogal Onuro v Teachers Service Commission* [2013] eKLR. They argued that the reason informing the claimants' termination was never established by evidence. They maintained that the respondent did not table before this Court or the disciplinary hearing the alleged Audit report dated 24<sup>th</sup> July 2017 or form 4C, 4D and 5 which were the basis for the separation.
32. It was submitted that, the respondent is under a duty to give a valid reason for termination which it failed, and therefore the reason for termination herein was not justified in the circumstances. The claimant then relied on the case of *Mary Chemweno Kirui V Kenya Pipeline Company Limited* [2014] eKLR where the Court held that;-

“...before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*.”
33. On whether the termination, passed procedural test, it was submitted that section 41 of the *Employment Act* provides for the procedure to be followed before an employee is terminated. For emphasis they relied on the case of *Alphonse Machanga Mwachanya V Operations 680 Limited* [2013] eKLR. They then submitted that the termination did not satisfy the procedure given in the above case because the Notice to show cause was not accompanied by a detailed offense and documents the disciplinary committee was to rely upon.
34. Besides, even after requesting for the documents, the claimants were not furnished with the same during hearing and therefore they were unable to mount a proper defence for themselves, rendering the disciplinary hearing unfair. In support of their arguments the claimants relied on the case of Charles



Kinyua and another V Meru central Dairy cooperative Union Limited [2015] eKLR where the Court held that; -

“Further the minutes for the disciplinary hearing of 9.11.2011 filed for the respondent clearly show that the claimants were merely informed the allegations as levelled against them without their being heard in self defence or at all and the meeting found them culpable as alleged without considering whether the alleged misconduct had been established. The general manager who was the complaint was an active participant at that hearing and the claimants were not heard at all. In the opinion of the court, such casual and biased proceedings cannot be relied upon to show that at the time of the termination the respondent had a reasonable basis to believe that the claimants had engaged in the misconduct as was alleged by the respondent.”

35. In conclusion the claimants submitted that, in light of the foregoing, they were unfairly terminated and urged this Court to allow the claim as prayed.

### **Respondent's Submissions.**

36. The Respondent on the hand filed joint submissions for all the consolidated causes herein. The Respondent then submitted that the termination of the claimants' services was based on sound reason and followed the laid down procedure. It also relied on the case of Walter Ogal Onuro V Teachers Service Commission, Supra.
37. Accordingly, it was submitted that the claimants were the ones in charge of verifying the information entered in form 4C, 4D and 5, and therefore they were responsible for any loss that arose from the variation of the said forms. It was further submitted that the reason for the termination was indicted in the show cause letter and the suspension letter and as such it was not necessary for the claimants to be served with the entire audit report.
38. With regard to procedural fairness, it was submitted that the claimants were served with show cause letters which they responded to and then they were invited to as disciplinary hearing where they failed to exonerate themselves leading to the termination. They also relied on the case of Alphonse Machanga Mwachanya V Operations 680 Limited [2013] eKLR for emphasis.
39. It was then argued that the claimants were accorded a fair process to defend themselves, and their failure to exonerate themselves cannot be blamed on the Respondent. The Respondent then urged this Court to disallow the claim together with costs.

### **Analysis And Determination.**

40. I have carefully considered the pleadings, evidence and the rival submissions presented by both sides. There is no dispute that the claimants were employed by the respondent until 22<sup>nd</sup> March 2018 when their employment was terminated for alleged negligence of duty that led to loss of milk to the employer. The issues for determination are the following; -
- a) Whether the reason for the termination was valid and fair.
  - b) Whether a fair procedure was followed before the termination.
  - c) Whether the Claimants are entitled to the reliefs sought.



## Reason for termination.

41. Section 45 (1) and (2) of the *Employment Act* makes the following provisions regarding unfair termination of employment—

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee’s conduct, capacity or compatibility; or
    - SUBPARA (ii)  
based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

42. Section 43 of the *Employment Act* provides that:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

43. The above provisions of the law has been reinforced in various case laws including the case of Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

44. In the Court of Appeal case of Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR the Court of Appeal stated as follows;

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination dismissal (Section 43); prove reasons are valid and fair (Section 45)...among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

45. In the present case the termination letter dated 22<sup>nd</sup> March, 2018 gave the reason for termination as negligence of duty on the part of the claimants and manipulation of figures entered in form 4C, 4D and 5 which resulted to loss of the Respondent’s products.

46. Under section 43 and 45 of the *Employment Act*, the burden of proving that the above reasons were valid and fair rests with the employer. The Respondent argued that it has lost several litres of milk



during the period between January and June, 2017 which costed them a colossal sum of money. The figures were stated in the Suspension letter, notice to show cause letter and the termination letter. It was also indicated in the said letter that the claimants were responsible for the loss and that there was manipulation of forms 4D, 4C and 5.

47. The Claimants on the other hand maintain that they were not negligent in the performance of their duties and if there was any loss then the same occurred during the production process and not due to negligence or theft as alleged by the Respondent. Further, they contend that the respondent has not proved the validity of the said offence by documentary evidence.
48. Having carefully considered the evidence presented by the respondent I did not see the alleged Audit Report dated 24<sup>th</sup> July 2017 and the manipulated Forms 4C, 4D and 5. RW-1 also confirmed during cross examination that indeed the said documents were not filed as exhibits. The said documents were also not availed to the claimants before or during the disciplinary hearing after their request.
49. Without the benefit of the alleged manipulated Forms and or the audit report this court is unable to verify the negligence or manipulation pleaded by the Respondent as the reason for termination. Therefore, I find and hold that the respondent has not proved the reason for termination as required under section 43 and 45 of the *Employment Act*.

### **Procedure**

50. The claimants have all admitted to receiving a notice to show cause letters dated 12<sup>th</sup> September, 2017 which they responded to on the 14<sup>th</sup> September, 2017 and on 15<sup>th</sup> November, 2017, they were all suspended from employment. By a letter dated 2<sup>nd</sup> January, 2018, they were all invited for disciplinary hearing scheduled for 8<sup>th</sup> January, 2018.
51. The claimant took issue with the way the disciplinary hearing was conducted and argued that they were not served with the evidence the committee was relying upon before hearing and on requesting for the copies they were not furnished during the hearing. This position was affirmed by the Respondent's witness, one Michael Mukopi, claiming that the documents were confidential.
52. It was further argued that the claimants were not informed about their rights and given an opportunity to be accompanied by a representative or an employee of their choice; that they were called in as a group of 6 employees as opposed to individual hearing; and that their requested to be furnished with the audit report and the said Forms 4C, 4D and 5 to enable them mount a defence was declined even during the disciplinary hearing. Therefore, they argued that the disciplinary hearing did not meet the procedure provided for under section 41 of the *Employment Act*.
53. Section 41 of the *Employment Act* provides as follows:
  - “41. (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.”
54. In the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.



55. In a further case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing, is a sacrosanct right.
56. In the opinion of this court, an invitation to attend a hearing is not enough. The employer must demonstrate that indeed the employee made representation in response to the charges levelled against them at the hearing. To attend a disciplinary hearing and not get an opportunity to defend oneself is not a hearing per Section 41 of the *Employment Act, 2007*. The Respondent in this case ought to have at the very least allowed the claimants to defend themselves or adjourn the hearing to another day then furnish them with the evidence the committee was relying upon. The failure to hear the claimants' side of the story despite inviting them to a disciplinary meeting was unfair under section 45 of the *Employment Act*.
57. In this case the respondent suggests that it terminated the claimants' services by notice but opted to pay them salary in lieu of notice as provided in their contracts and section 38 of the *Employment Act*. However, the Court of Appeal has pronounced the legal position in relation to termination of employment by notice in the case of *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, where held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

58. Having considered the foregoing matters, I find that the procedure followed before dismissing the claimants from employment was not in accordance with justice and equity. Consequently, I hold that the employer has failed to prove that it followed a fair procedure as required by section 45 (2) (C) of the *Employment Act*.

#### **Whether the Claimant is entitled to the reliefs sought.**

59. In view of the finding above that the employer has failed to prove valid and fair reason for terminating claimants' employment and that a fair procedure was followed, I make declaration that the termination was unfair within the meaning of section 45 of the *Employment Act*.
60. Flowing from the foregoing declaration, the court finds that the claimants are entitled to damages under section 49 of the Act which includes salary in lieu of notice and compensation for unfair termination. The appointment letters for the claimants provide for a termination notice period of one month. The termination letters also offered to pay each claimant one month salary in lieu of notice but there is no evidence that they were paid. Consequently, I award each claimant one-month salary in lieu of notice not and the three months' salary they have sought.



61. As regards compensation for unfair termination, I have considered that the claimants have served the respondent a periods ranging between 6 years and 37 years. The respondent has also failed to prove that they caused the termination through misconduct. They have also not been able to secure alternative jobs. Therefore, I award the 1<sup>st</sup> and 2<sup>nd</sup> claimant 6 months' salary while the 3<sup>rd</sup> claimant is awarded 12 months' salary as compensation for unfair termination.
62. The 1<sup>st</sup> claimant prayed for 30 days leave for 2015/2016 and the employer acknowledged the same in the Memo dated 28<sup>th</sup> May 2018. Consequently, I award the claimant 30 days as prayed.
63. The 2<sup>nd</sup> claimant, on the other hand prayed for 30 days leave for 2016/2017 which was the last year before his suspension. The employer acknowledged in the Memo dated 28<sup>th</sup> May 2018 that the claimant had accrued leave of 26.5 days. However, the employer has not shown by leave records why the claimant is not entitled to 30 days leave as provided for in his appointment letter. Consequently, I award him 30 days leave as per the appointment letter.
64. The claimants have also prayed for payment of salary for the month of March, 2018 and half salary pay withheld when they were on suspension from 15<sup>th</sup> November, 2017 to February, 2018. The Respondent acknowledged the said entitlement in the Memos dated 28<sup>th</sup> May 2018 and 9<sup>th</sup> May 2018. Although the respondent claimed that it paid the said salaries, it tendered no evidence to prove the same. I will therefore grant the claimants 22 days pay for the month of March, 2018 and half pay salary withheld from 15<sup>th</sup> November, 2017 to 28<sup>th</sup> February, 2018.
65. The 1<sup>st</sup> and 2<sup>nd</sup> claimants are each awarded Kshs 244,360 as their salary arrears made up of Kshs. 24,600 for November, 2017, Kshs 49,200 for December, 2017 to February 2018 amounting to Kshs. 147,600 and Kshs. 72,160 for the 22 days worked in March, 2018. The 3<sup>rd</sup> claimant is awarded Kshs 275,009.42 as his salary arrears made up of Kshs. 28, 449.25 for November, 2017, Kshs 56,898.50 for each month from December,2017 to February 2018 equaling 170,695.50 and Kshs. 75,864.67 for 22 days of March, 2018.
66. In conclusion I enter Judgment for the Claimants and against the Respondent in the following terms: -

**1<sup>st</sup> Claimant - Jerusha Chepwogen Rotich**

Notice Kshs. 98,400

Salary arrears Kshs. 244,360

Compensation for unfair termination Kshs. 590,400

Total Kshs.933,160

**2<sup>nd</sup> Claimant - Sammy Cheruiyot Korir.**

Notice Kshs. 98,400

Salary arrears Kshs. 244,360

Compensation for unfair termination Kshs. 590,400

Total Kshs.933,160

**3<sup>rd</sup> Claimant - Leonard Kipyegon Chirchir.**

Notice Kshs. 113,797

Salary arrears Kshs. 275,009



Compensation for unfair termination Kshs. 1,365,564

Total Kshs.1,754,370

67. In addition, each claimant is granted the prayer for a Certificate of Service which shall be issued to them forthwith. Each claimant is also awarded costs of their respective suit plus interest at court rates from the date of this judgment until payment in full. However the sums awarded is subject to statutory deductions. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**ONESMUS N. MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

