



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Wambua & 15 others v W.E Tilley (Muthaiga) Limited (Cause  
441 of 2016) [2022] KEELRC 1246 (KLR) (19 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1246 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 441 OF 2016**

**JK GAKERI, J**

**JULY 19, 2022**

**BETWEEN**

**BERNARD KITHUKU WAMBUA ..... 1<sup>ST</sup> CLAIMANT**  
**HARRISON KIKUVI ..... 2<sup>ND</sup> CLAIMANT**  
**PETER NJOROGE KIMANI ..... 3<sup>RD</sup> CLAIMANT**  
**PENUS LENKAL PATEL ..... 4<sup>TH</sup> CLAIMANT**  
**BERNARD CHEGE KIHIGI ..... 5<sup>TH</sup> CLAIMANT**  
**SAMUEL KIPYEGON KOKOO ..... 6<sup>TH</sup> CLAIMANT**  
**SAMUEL MWANGI GACHIGUA ..... 7<sup>TH</sup> CLAIMANT**  
**SIMON KAGWI GITHIRI ..... 8<sup>TH</sup> CLAIMANT**  
**CHARLES GATHUNGU NJIRIRI ..... 9<sup>TH</sup> CLAIMANT**  
**FREDRICK KISUKO MWANGO ..... 10<sup>TH</sup> CLAIMANT**  
**JONES MUSYOKA ..... 11<sup>TH</sup> CLAIMANT**  
**JOHN NJUGUNA KAMENJU ..... 12<sup>TH</sup> CLAIMANT**  
**JAMES KARIUKI GICHU ..... 13<sup>TH</sup> CLAIMANT**  
**ZIPHORA MAKUMI ..... 14<sup>TH</sup> CLAIMANT**  
**ONESMUS MBITHI KIKUVI ..... 15<sup>TH</sup> CLAIMANT**  
**PETER NDIBA THARIKI ..... 16<sup>TH</sup> CLAIMANT**

**AND**

**W.E TILLEY (MUTHAIGA) LIMITED ..... RESPONDENT**



## JUDGMENT

1. The Claimants commenced this suit by a statement of claim dated March 16, 2016 and filed on March 22, 2016 alleging that they were employees of the respondent working as drivers except the 16<sup>th</sup> Claimant who was working as a General Operator.
2. That they did not receive their salaries in the month of November 2015.
3. That the respondent had by a circular dated October 30, 2015 informed them that operations of the business had been ceased by a court order in HCC No. 522 of 2015 and that if they had any claims, they were free to write to the respondent for onward transmission to the lawyers and all Claimants made their claims for November 2015 in writing.
4. That they continued working for the month of December despite not having been paid for November 2015 but were not paid either and were subsequently barred from accessing the premises and with no communication and as such considered themselves as having been terminated from employment unlawful as no notice was given or hearing conducted.
5. The Claimants prays for;
  - a. A declaration that the Claimants employment contract with the respondent was unfairly, unlawfully and/or illegally terminated.
  - b. Issuance of Certificate of Service
  - c. Special damages as follows;  
Year of employment
    - i. Bernard K. Wambua (2000) Kshs.695,034/=
    - ii. Harrison Kikuvi (2000) Kshs.725,820/=
    - iii. Peter N. Kimani (2001) Kshs.609,246/=
    - iv. Penus L. Patel (2004) Kshs.524,280/=
    - v. C. Kihigi (2004) Kshs.761,400/=
    - vi. Samuel K. Kokoo (2009) Kshs.431,154/=
    - vii. Samuel M. Gachigua (2009) Kshs.599,400/=
    - viii. Simon K. Githiri (2003) Kshs.646,556/=
    - ix. Charles G. Njiriri (2000) Kshs.525,711.00
    - x. Fredrick K. Mwangi (2007) Kshs.510,318/=
    - xi. Jones Musyoka (2005) Kshs.593,880/=
    - xii. John N. Kamenju (2007) Kshs.602,676/=
    - xiii. James K. Gichu (2004) Kshs.639,345/=
    - xiv. ZIpporah Makumi (2000) Kshs.533,682/=



xv. Onesmus M. Kikuvi (2009) Kshs.333,000/=

xvi. Peter N. Thariki (2005) Kshs.418,629/=

6. The Claimants itemised claims include prayers for;
  - i. Salary for December and January
  - ii. One Month's salary in lieu of notice
  - iii. Unpaid leave days.
  - iv. Damages for unfair/constructive dismissal
  - v. Service pay
  - vi. Welfare
  - vii. NSSF/NHIF contributions for October, November, December and January.
- d. Costs of this suit.
- e. Interest at commercial rates from November 30, 2015 until payment in full.

### **Respondent's Case**

7. The respondent filed a response to memorandum of claim on May 6, 2016 denying that the 16<sup>th</sup> Claimant was not working as a General Operator as alleged but as a machine attendant.
8. The respondent avers that it paid the Claimants salary for November 2015 in full and acted bonafide as it notified the Claimants of the freezing order by HCCC No. 522 of 2015 within reasonable time and invited them for dialogue.
9. The respondent denies that the Claimants worked for the months of December 2015 and January 2016 and at no time did it refuse to pay salaries, that it accounts were frozen by the court and the Claimants employment was never terminated. That they absconded duty.
10. It is the respondent's case that the claims as tabulated is erroneous and wrongfully tabulated.
11. The respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

12. The Claimants authorised one John Njuguna Kamenju to appear, plead and/or act on their behalf and executed documents as necessary in the suit.
13. In his written statement, the Claimant stated that he was employed in 2007 as a driver at Kshs.22,000/= per month.
14. That in November, 2015 the Claimants did not receive their salaries for the month. That by a circular dated October 30, 2015, the management informed staff that the respondents operations had been stopped by court order in HCCC No. 522 of 2015.
15. On cross-examination, the witness stated all Claimants would receive salaries at an ATM machine located within the respondent's premises. It was his testimony that the Claimants employment was terminated by the letter dated October 30, 2015, that he was unaware of HCCC No. 522 of 2015 but they met the management on the issue on December 3, 2015 and were notified of the court order.



16. That the notice was displayed at the entrance on December 7, 2015 and they understood that the employer's accounts were frozen.
17. The witness confirmed that after the response to the letter of October 30, 2015, security was instructed not to permit entry into the premises.
18. The witness further confirmed that they continued working but could not recall when the guards were directed not to allow access.
19. That he wrote the letter dated December 7, 2015 but the others signed the handwritten copy not on record.
20. It was his testimony that he worked every day including Sundays depending on the task at hand. The witness could not recall when he left employment but went to the airport in 2015 but did not drive any vehicle after December 4, 2015 but they used to report and stay at the gate.
21. It was confirmed that the last salary was paid in October, 2015.
22. The witness confirmed that he was not working in December, 2015 and January, 2016. That he did not proceed on leave and was claiming leave for 252 days and had not claimed the same previously.
23. That they did not return the ATM cards given by the respondent.
24. The witness could not recall when any of the other Claimants was employed and had no evidence whether Mr. Harrison Kikuvi worked in January, 2016 or December, 2015 but was a driver like him.
25. The witness was emphatic that none of the Claimants worked after December 7, 2015 upto 2017, that they all left employment together but one Kikuvi was recalled to resume duty.
26. It was his testimony that Zippora Makumi was a store keeper and Peter Ndiba was in maintenance and the store was open from Monday to Saturday.
27. The witness further confirmed that he was unaware whether Zippora Makumi and Peter Ndiba worked in December, 2015 and January, 2016.
28. The witness testified that by December 4<sup>th</sup>, the Claimants had not been paid for the months of October, November 2015 but had not claimed for pay for the two months.
29. As regards the prayer for welfare, the witness stated that he was not a member of the welfare and had no claim. That Zipporah Makumi was a member and used to make contributions.
30. On NHIF contributions, the witness stated that he had no statement to exhibit but told the court that the contribution is remitted to the NHIF.
31. On re-examination, the witness stated that he had no letter of employment or termination and had not signed any document with the respondent and used to receive allowances for tasks out of the City of Nairobi.

### **Respondent's Evidence**

32. RWI Mr. Nassir Jessa adopted the written statement and testified that the respondents operations ceased in 2015 when the High Court froze its accounts in HCCC No. 522 of 2015. That Imperial Bank Ltd sued the respondent alleging that money had been defrauded and seized all its assets and the story was covered in the media. That after the Order, the respondent paid the October salaries. It was



his testimony that HCCC 522 of 2015 was still pending in court and the respondent has no capacity to fulfil its financial obligations due to freezing of its accounts.

33. That the respondent issued certificate of service for onward transmission to the Claimants.
34. On cross-examination, the witness confirmed that all the Claimants were its employees but could not recall how they were engaged by the respondent. His guess was that agreements were issued showing that they were permanent employees and the contracts were terminable by notice. The witness testified that the Claimants employment was not terminated as such but the court order paralyzed the operations of the respondent by freezing its accounts.
35. That all accounts of the respondent were frozen but had not provided statements of the respondent's accounts. The witness confirmed that the respondent filed a response in HCCC No. 522 of 2015 and the Claimants as employees were entitled to payments for the claims made if found deserving.
36. The witness testified that the respondent's operations were frozen on 27<sup>th</sup> October, 2015 and notice was given on October 30, 2015. That he met the Claimants on October 30, 2015 and Human Resource ought to have taken minutes at the meeting. The witness stated that there was no person(s) in the respondent's offices and he was unaware of the amount in the frozen accounts.
37. The witness confirmed that the respondent had a contract with its employees as well as with Imperial Bank Limited with attendant's obligations which the respondent could not fulfil owing to the freezing of its accounts and not even access the office.
38. The witness further confirmed that the Receiver Manager of Imperial Bank Ltd locked the offices on October 27, 2015. That he could not confirm that the Claimants were in the office until December, 2015 as the records are in the office.
39. The witness further testified that the certificates of service were sent to the respondent's advocates as ordered by the court and had not been collected.
40. That the respondent had over 150 employees with an Operational Human Resource Department.
41. On re-examination, the witness testified that none of the Claimants had complained for lack of a contract of employment.
42. The witness further testified that attempts to access the respondent's bank accounts had fallen through.
43. Finally, the witness testified that he was unaware why the respondent was sued in HCCC No. 522 of 2015.

#### **Claimant's Submissions**

44. The Claimant identifies five issues for determination including costs, interest and certificate of service.
  - i. Whether termination of the Claimants employment contract by the respondent was unfair, unlawful and or illegal.
  - ii. Whether the Claimants are entitled to the reliefs sought.
45. On the 1<sup>st</sup> issue, it is submitted that the barring of the Claimants from the respondents premises from December 7, 2015, which the respondent did not controvert, and the display of the notice dated October 30, 2015 demonstrated the unwillingness of the respondent to discharge its contractual obligations as contracted with the Claimants. That since CWI and RWI gave conflicting testimonies, the court had to resolve the issue whether the respondent closed its operations and barred Claimants from accessing the work place which would suggest constructive dismissal.



46. It is the Claimants submission that the respondent was blowing hot and cold. The court is invited to determine whether the claimants' employment was terminated or not.
47. It is contended that the evidence on record showed that the respondent terminated the Claimants employment on December 7, 2015 with no lawful or justifiable cause.
48. That the salary for December and January is proved on a balance of probability.
49. As regards the reliefs prayed for, the Claimants submits that they are entitled to certificate of service by dint of Section 51(1) of the *Employment Act*. The decision in *Angela Wokabi V Tribe Hotel Ltd* ELRC Cause No. 1712 of 2014 is relied upon to reinforce the submission.
50. On leave days, it is urged that the onus was on the respondent to affirm or rebut the Claimant's prayers.
51. On service pay, it is submitted that the claim is not disputed and no evidence was offered to rebut the claim.

### **Respondent's Submissions**

52. The respondent on the other hand isolates three issues for determination encompassing, salary entitlement, termination and payment of terminal dues.
53. As to whether the Claimants were unfairly or unlawfully terminated, it is submitted that the onus lay on the claimants to prove on a balance of probability that their employment was unlawfully terminated as required by Section 47(5) of the *Employment Act*, 2007. The decision in *Kipkebe Ltd V Peterson Ondieki Tai* (2016) eKLR, *Omar Ndaro Zuma V Modern Coast Express* (2019) eKLR and others are relied upon in support of the submission.
54. It is submitted that the respondent did not voluntarily terminate the claimants employment but their contracts were frustrated by the freezing of the respondent's bank accounts which grounded its operations, making it impossible for the employer to perform its part of the bargain. The decision of the Supreme Court of India in *Sabtyabrata Ghose V Mugeneeram Bangur & Co.* 1954 Scr 310 is relied upon to urge that the contract between the parties was frustrated by circumstances beyond the respondent's control.
55. Reliance is also made on the decisions in *Omwenga Joseph Chanai & 26 others V Jack and Jill Supermarket Ltd* (2019) eKLR where the respondent's premises were demolished by the City County Authorities and the court declined the prayers sought. The decision in *Joshua Nyagol Onyango & 4 others V Relief Missions Logistics Ltd* (2017) eKLR is also cited.
56. It is submitted that the respondent did nothing prejudicial to the claimants but for the court order.
57. As regards terminal dues, namely, salaries for December and January, one month's notice, unpaid leave days, service pay, welfare and NSSF and NHIF contributions, it is submitted that the claimants had not established entitlement to the salaries for December and January as the Claimants testimony was explicit that they did not work after November, 2015.
58. On salary in lieu of notice, it is urged that the November pay was tantamount to pay in lieu of notice since the Claimants did not work. The decision in *Paul Musina Chiedo V Ready Consultancy Co. Ltd* (2020) eKLR is relied upon to reinforce the submission.
59. As regards unpaid leave days, the respondent submits that the Claimants have not indicated when leave was earned and was not taken and why and the witness did not clarify the issue of leave days. The decision in *Evans Sagwa Rumura V Insignia Kenya Limited* (2022) eKLR and *Peter Ngunjiri*



- Kanuki V Management of Magumano Secondary School* (2022) eKLR are relied upon to urge that the Claimants did not adduce evidence in support for the prayer for unpaid leave.
60. The decision in *Rhoda Nyatoka Isena V Coptic Hospital* (2021) eKLR is also relied upon to buttress the submission.
61. As regards compensation, it is submitted that there was no unlawful termination and no compensation is due to the Claimants.
62. As regards service pay, it is submitted that Section 35(6) of the *Employment Act*, disentitles service pay to employees who are members of the National Social Security Fund (NSSF) and the Claimants were members of the Fund and are thus not entitled to the relief. The sentiments of Onyango J. in *Hassanath Wanjiku V Vanela House of Coffees* (2018) eKLR are relied upon to reinforce the submission.
63. On welfare, it is urged that the relief is not supported by any evidence and should be dismissed.
64. It is further urged that all statutory deductions were remitted to the relevant authorities as was the case in *Alice Wambui Adwordy V Casa Dei Bambini Ltd* (2022) eKLR.
65. The respondent prays for dismissal of the suit with costs.

### **Analysis and determination**

66. After consideration of the pleadings, evidence, submissions and the law, the issues for determination are;
- i. Whether the Claimants were constructively terminated or declared redundant.
  - ii. Whether the Claimants are entitled to the reliefs sought.
67. As to whether the Claimants were constructively dismissed or declared redundant by the respondent, the starting point are regards constructive dismissal are the celebrated sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) Q.B 761 on the meaning of constructive dismissal;
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct.
- He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.
- He will be regarded as having elected to affirm the contract.”
68. In *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR, the Court of Appeal addressed the principle of constructive dismissal in elaborate detail as follows;

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied.



The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay. This is the unreasonable test.

The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment. This is the contractual test. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd V Sharp (1978) ICR 222* adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal.

For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment . . .”

69. In addition, the court enunciated that the principles for ascertaining whether constructive dismissal has taken place, such as the fundamental or essential terms of the contract of employment, whether a repudiatory breach of the fundamental terms of the contract has been occasioned by the conduct of the employer, causal link between the termination and the employers conduct, burden of prove is by employee. The employee must not have accepted, waived, acquiesced or conduct him as to be estopped from asserting repudiatory breach.
70. As regards redundancy and its applicability to this case, the starting point is the definition of term redundancy in section 2 of the [Employment Act](#), 2007 which provide:

Redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”
71. Section 40 of the [Employment Act](#) provides the substantive and procedural requirements for a redundancy process to pass muster. These include notice to the trade union or the employee and the Labour officer, the criteria used by the employer ensuring fairness, payment of outstanding leave in cash and one month's salary in lieu of notice if none is given and severance pay at the rate of not less than 15 days for each completed year of service.
72. Typically, redundancies are initiated by the employer and may be justified on innumerable circumstances such as reorganization of business operations, restructuring, adoption of new technologies, right sizing or downsizing for purposes of efficiency and others.
73. In the instant case, the respondent made no indication that it was declaring the Claimants redundant. Although the discussions between the Claimants and the respondent's management on October 30, 2015 and December 7, 2015 are undocumented, none of the parties has indicated the issue of redundancy was discussed. The issue was perfunctorily referred to in a letter purportedly written by the Claimant's witness Mr. John Njuguna Kamenju dated 74<sup>th</sup> December, 2015 addressed to the management of the respondent. The letter has no authentication or any indication that it was forwarded to the respondent and whether it was responded to.
74. Even assuming that the respondent intended to declare the claimants redundant, which would have been a better option in light of the circumstances of this case, it did not comply with the relevant statutory provisions to give the process an aura of legality.



75. The court is guided by the sentiments of the Court of Appeal in *Barclays Bank of Kenya Ltd V Gladys Muthoni & 20 others* (2018) eKLR as follows;

“There is a heavy burden of proof placed upon the employer to justify any termination of employment.”

76. For the above stated reasons, it is the finding of the court that the Claimants were not declared redundant by the respondent. Even assuming that contract of employment was frustrated by intervening events as submitted by the respondent, it behooved the respondent to notify the employees and the Labour Officer its intention to declare redundancies in light of the circumstances, consult the employees and proceed as circumstance and the law permitted to bring the issue to closure. The respondent did not apply its mind to the consequences of its conduct.

77. On the other hand, the concept of constructive dismissal has been applied in legions of decisions such as *Joseph M. Kivilu V Kenya National Examination Council* (2021) eKLR.

78. The Claimants testified that they met the management of the respondent on December 3, 2015 when they were informed about the court order and a letter to all staff dated on even date was displayed at the entrance. The letter explained the inability of the respondent to service salaries for the employees as its bank accounts had been frozen.

79. Significantly, the letter directed that any claims against the company be made in writing and would be forwarded to the respondent’s counsel.

80. The Claimants further testified that after December 7, 2015, the respondent closed its gates to the Claimants without any communication about their employment contracts. Closure of the premises coupled with the respondent’s inability to service employees’ salaries and lack of a defined way forward was an essential constituent of the contract of employment and in the courts view amounted to a repudiatory breach of the contract of employment which entitled the Claimants to treat themselves as constructively dismissed and stopped reporting to the place of work as they had no access.

81. It is also unclear whether the respondent paid the salaries of October and November having expressed its inability to do so. Puzzlingly, although the Claimant testified that the salary for October and November 2015 was not paid, there is no prayer for its payment.

82. Finally, contrary to the RWI’s evidence that the Claimants were not dismissed, the respondent’s conduct of non-payment of salaries and closure of the gate at its premises coupled with its silence went to the root of the employment relationship between the parties and entitled the Claimants to treat themselves as constructively dismissed.

83. As regards the reliefs sought, the court proceeds as follows;

#### **i. Salary for December 2015 and January 2016**

84. CWI confirmed on cross-examination that none of the Claimants worked after December 7, 2015. He further testified that although he had not been paid for October and November, he did not claim for it.

From the evidence on record, it is clear that the Claimants did not render any service to the respondent after December 7, 2015. As a consequence, the prayer for the salaries for December 2015 and January 2016 is declined. However, the Claimants are awarded the salary for the 7 days worked in December, 2015.



## **ii. One month's salary in lieu of notice**

85. The respondent did not give the Claimants the requisite notice of termination of employment as required by Section 35 of the *Employment Act*, 2007 and are as a consequence awarded one month's salary in lieu of notice by dint of Section 36 of the Act.

## **iii. Unpaid leave**

86. Although all the Claimants have pleaded payment for outstanding leave days ranging from 21 to 733, the necessary particulars have not been furnished. The years when leave was not taken and why it was not taken is missing.
87. The court is being called upon to find and hold that leave was not taken for 15 or 10 years of employment without any indication of when the days accrued and what prevented the employee from proceeding on leave. But more importantly, the witness did not testify about the pending leave days. In his case, the witness is claiming payment for 252 days but did not explain how and when the days accrued. He who alleges must prove.

The prayer for unpaid leave days is declined.

## **iv. Damages for unfair dismissal and/or constructive dismissal**

88. Having found that the Claimants were constructively dismissed by the respondent, the Claimants are entitled to the discretionary relief provided by Section 49(1)(c) of the *Employment Act*.
89. In the determination of quantum of compensation, the court has taken into account the following parameters;
- i. The duration of employment.
  - ii. All the Claimants wished to continue in employment as demonstrated by their meetings with the management and reporting to work place until they were denied entry.
  - iii. The respondent tendered no evidence that any of the Claimants had disciplinary issues.
  - iv. The impact of the court order in HCCC No. 522 of 2015 which destabilized the respondent which matter is yet to be determined and the abrupt nature of the termination of employment.
  - v. The Claimant led no evidence on when each of the Claimants was employed except himself in 2007. However, the respondent produced no evidence to counter the alleged dates of employment. The dates indicated are taken as the dates of employment.
90. As a consequences, the Claimants are awarded as hereunder which the court considers fair;
- i. Those who had served for 14 and 15 years and above are awarded the equivalent of 7 months gross salary.
  - ii. Those who had served for 11 and 12 years are awarded the equivalent of 6 months gross salary.
  - iii. Claimants who served for 8 and 10 years are awarded the equivalent of 5 months' gross salary.
  - iv. Those who had served for 5 and 6 years are awarded the equivalent of 4 months' salary.



**(v) – Service pay.**

91. The Claimant's tendered no evidence to establish this prayer or demonstrate that they were not members of the NSSF.
92. In a similar vein, the prayer for contributions to the NSSF for the months of October, November, December and January would appear to suggest that the Claimants were members of the two funds and the only amount outstanding is for the months indicated.
93. Finally, documents on record show that the respondent was remitting the NSSF and NHIF contributions to the relevant bodies.

The prayer is declined.

**(vi) – Welfare**

94. The Claimant led no evidence on the particulars of this prayer nor indicate the amount due to each Claimant.

The claim is declined.

**(vii) – NSSF and NHIF contributions for the months of October, November, December and January**

95. The Claimant adduced no evidence that contributions to the NHIF and NSSF were not forwarded to the respective funds by the respondent. Relatedly, they did not furnish evidence of the amount owing.
96. More significantly, recovery of unremitted contributions is the duty of the boards of the National Health Insurance Fund and the National Social Security Funds.

The prayer is disallowed.

**(viii) Certificate of Service**

97. Although RWI testified that the respondent dispatched the certificates of service to its counsel on record for collection, they are yet to be received by the Claimants. This is a statutory entitlement by dint of Section 51(1) of the *Employment Act* as submitted by the Claimants.
98. In the final analysis, Judgement is entered for the Claimants against the respondent in the following terms;
  - a. Salary for 7 days in December, 2015
  - b. Compensation
    - i. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup> and 14<sup>th</sup> Claimant, equivalent of 7 month's salary.
    - ii. 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 13<sup>th</sup> Claimants, equivalent of 6 month's salary.
    - iii. 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 16<sup>th</sup> Claimant, equivalent of 5 month's salary.
    - iv. <sup>th</sup>, 7<sup>th</sup> and 15<sup>th</sup>, equivalent of 4 month's salary.
  - c. Certificate of service to be issued within 30 days of this judgement.
  - d. Costs of this suit.
  - e. Interest at court rates from the date of judgement till payment in full.



99. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JULY 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 March 15, 2020 and subsequent directions of April 21, 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**

