



**Omondi & 2 others v Hatari Security Guards Limited (Cause
2424 of 2017) [2022] KEELRC 1313 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2424 OF 2017**

JK GAKERI, J

JULY 14, 2022

BETWEEN

JOSEPH OMONDI 1ST CLAIMANT

BERNARD WALIAULA 2ND CLAIMANT

JAMES ODHIAMBO 3RD CLAIMANT

AND

HATARI SECURITY GUARDS LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim filed on 7th December 2017, the Claimants sued the respondent alleging unlawful termination of employment by the respondent as follows;

1st Claimant (Joseph Omondi)

- (i) 12 months compensation Kshs. 300,000
 - (ii) Salary in lieu of notice Kshs. 25,000
 - (iii) Unpaid salary for September 2017 Kshs. 25,000
 - (iv) Gratuity payment Kshs. 149,940
 - (v) Uniform allowance Kshs. 12,000
 - (vi) Unpaid leave Kshs. 74,958
 - (vii) Overtime, weekends and weekdays Kshs. 1,733,333
and Public holidays Kshs. 52,300
- Total Kshs.2,367,531



2nd Claimant (Bernard Waliaula)

- (i) 12 months salary Kshs. 240,000
 - (ii) Salary in lieu of notice Kshs. 20,000
 - (iii) Gratuity payment Kshs. 149,940
 - (iv) Uniform allowance Kshs. 11,400
 - (v) Unpaid leave Kshs. 74,958
 - (vi) Overtime, weekdays and weekends Kshs. 1,386,667
and Public holidays Kshs. 52,300
- Total Kshs.1,935,265

3rd Claimant (James Odhiambo)

- i. 12 months salary Kshs. 240,000
 - (ii) Salary in lieu of notice Kshs. 20,000
 - (iii) Gratuity payment Kshs. 149,940
 - (iv) Uniform allowance Kshs. 11,400
 - (v) Unpaid leave Kshs. 74,958
 - (vi) Overtime, weekdays and weekends Kshs. 1,386,667
and Public holidays Kshs. 52,300
- Total Kshs.1,935,265

The Claimants Prays for

- i A declaration that their dismissal from the respondent's employment was unprocedural, unfair and unlawful and unconstitutional.
- ii 1st Claimant Kshs.2,367,531
- iii 2nd Claimant Kshs.1,935,265
- iv 3rd Claimant Kshs.1,935,265
- v Costs of this suit.
- (vi) Certificate of service.

2. The Claimants aver that they were employed by the respondent as security guards in 2007 and as at termination, their monthly salaries were 1st Claimant Kshs.25,000/= while the 2nd and 3rd earned Kshs.20,000/= each. That they served the respondent for over 10 years.
3. It is alleged the 1st Claimant, while on duty as a night guard received fuel in a jerrycan near St. Georges allegedly siphoned from Motor Bike Reg. No. KMDG 036G which was discovered in his personal vehicle. That he aided a fraudulent activity. That he was never charged with theft of fuel. That he received a termination letter on 29th September, 2017.



4. The 2nd claimant avers that he received a termination notice on 29th September 2017. It is alleged that while on duty as a Supervisor, he met the 1st Claimant near St. Georges where he handed over fuel in a jerrycan allegedly siphoned from motor bike Reg. No. KMDG 036G. That his checklist for 26th & 27th September 2017 showed that he had forged the signatures of all the guards in his jurisdiction. That he was not charged for the offence of handling fuel.
5. The 3rd Claimant avers that he was suspended from employment on 11th November 2017 for no reason at all. That he was accused that between 1st August 2017 to 30th August 2017, he misappropriated the BV fuel cards for various companies entrusted to him to the tune of Kshs.115,000/=.
6. It was also alleged that the 3rd Claimant confronted the General Manager in his officer in an altercation. It is averred that the 3rd Claimant was scheduled to attend a disciplinary hearing on 14th November 2017 at 11.00, but when he arrived at 10.00 am and was given a termination letter. That he was never charged with an employment offence.
7. All the Claimants allege that they were not given an opportunity to be heard as required by law and were not paid in lieu of notice, gratuity, unpaid leave and overtime.
8. The respondent filed a response on 12th April, 2018 alleging that it dismissed the 1st and 2nd Claimants for the gross misconduct to safeguard its legitimate interests.
9. The respondent denies all the allegations made by the Claimants and prays for dismissal of the suit with costs.

Claimants' Evidence

10. CW I, Mr. Joseph Omondi confirmed on cross-examination that he signed a contract which was confirmed after 3 months and signed the same on his volition and did not resign.

On re-examination, the witness stated that he was given a termination letter dated 29th September 2017 and did not receive any other letter from the employer or an investigation report. That he was engaged in 2007 and had no previous record of warning or caution.
11. CW II, Mr. James Odhiambo stated that he signed a contract with the employer voluntarily and was not paid anything after dismissal and did not sign any other document. On re-examination, the witness confirmed that his termination letter was dated 14th November 2017 and had not been issued with a notice to show cause nor warning. It is his testimony that he was not invited for a disciplinary hearing and was not arrested by the police.
12. CW III, Mr. Bernard Waliaula confirmed on cross-examination that he had signed an employment contract with the respondent. He denied having been the custodian of Motor Bike No. KMDG 036G or being aware of it. He averred that he was on duty at Karen the entire night of 26th and 27th September 2017.

Respondent's Evidence

13. RW I, Mr. Steve Mwangi Kimani testified that the 1st Claimant was employed on 6th December 2007, 2nd Claimant on 17th April 2008 and 3rd Claimant on 5th May 2009 at Kshs.25,000/= and Kshs.20,000/= respectively.
14. That on 26th September 2017, the 1st Claimant met the 2nd Claimant at a location near St. Georges where the 1st Claimant received fuel in a jerrycan from the 2nd Claimant. It was his testimony that the



- fuel was siphoned from motor bike KMDG 036G and was later found in the 1st Claimant's personal vehicle.
15. RWI testified that the 2nd Claimant had forged signatures for all guards within the Lavington Area, in his checklist for 26th and 27th September 2017.
 16. That both Claimants appeared before the Deputy General Manager Mr. Mulu Kithingo and were given a chance to explain their case in light of the allegations against them. That evidence showed that they were guilty of gross misconduct and were terminated vide letter dated 27th September 2017 and were paid Kshs.78,350/= and Kshs.50,000/= on 17th November 2017 and 4th November 2017 respectively.
 17. RW I further testified that CW III's employment was terminated for insubordination that he verbally and physically assaulted the Deputy General Manager in his office and he had to be physically removed from the premises. That on 10th November 2017, he intercepted the Deputy General Manager outside the respondent's premises and threatened him in the public eye and the matter was reported to the Police under OB No. 17/11/11/2017. He was summarily dismissed but did not clear with the respondent so as to receive terminal dues.
 18. On cross-examination, RW I confirmed unawareness that James Odhiambo was suspended without pay from 11th November 2017 to 14th November 2014. The witness stated that the purpose was to facilitate internal investigations but the report was not filed in court.
 19. That although a disciplinary hearing was conducted, he had no minutes filed in court and the letter of dismissal made no reference to a hearing.
 20. The witness stated that the charges levelled against the 3rd Claimant were not set forth in the suspension letter, and the Deputy General Manager would not testify as a witness. That he had no copy of the OB in court.
 21. The witness confirmed that the 3rd Claimant was employed on 5th May 2007 and was a member of the NSSF.
 22. In respect of Joseph Omondi, RW I confirmed that his salary was Kshs.25,000/= per month and was a Night Duty Officer. That the respondent conducted an investigation of the alleged conduct of the two Claimants on the alleged siphoning of fuel. The witness however had no evidence of the jerrycan or Registration No. of the alleged CW I's vehicle or that the fuel was from Motorbike Reg. No. KMDG 036G.
 23. The witness confirmed that no notice to show cause was issued to the Claimants for the alleged misconduct and were not invited to a disciplinary hearing. That he had no evidence that leave days were paid. That the 1st Claimant had 3 years of pending leave.
 24. As regards, the 2nd Claimant, Benard Waliaula, RW I confirmed that he was terminated for having forged signatures on his checklists for 26th and 27th September 2017, but the checklist had not been produced as evidence and he had not seen the allegedly forged signatures and no guard had complained that their signature had been forged.
 25. Although RW I confirmed that he did not issue a notice to show cause, he testified that he invited the 2nd Claimant for a disciplinary hearing on 28th September 2017 but had no minutes of the proceedings.
 26. On re-examination RW I testified that Bernard Waliaula and Joseph Omondi cleared and were paid terminal dues.



Claimant's Submissions

27. As regards the 1st Claimant, it is submitted that since the Claimant disputed the reasons for termination, it behooved the respondent to furnish credible evidence to prove the allegations. That RW I had no evidence that CWI was on night duty on 26th September 2017 and had no time sheets. More significantly, the witness did not witness the siphoning of the fuel and was unaware of the registration number of the vehicle involved or connect the jerrycan to the fuel or the motor vehicle it was found in.
28. It is in the Claimants case that RWI was unhelpful to the court since he neither witnessed the siphoning or exchange of the jerrycan nor investigated the issue and no police report was made. That the allegations are mere hearsay.
29. As regards, the 2nd Claimant, it is submitted that the reasons relied upon by the respondent are not genuine in that;
 - (i) No evidence of siphoning of fuel by CWI or its exchange with CW2 had been provided by the respondent.
 - (ii) Relevant particulars were not provided, including the alleged forged signatures on the check list or the jerrycan or particulars of the interruptions alleged.
 - (iii) No complaint by any guard that signatures had been forged or report to the police.
30. With regard to the 3rd Claimant, it is submitted that the allegation of misappropriation of BV fuel cards is not one of the reasons for termination of employment.
31. That the officer who suspended the 3rd Claimant is the one who was assaulted and was not summoned as a witness since RWI did not witness the same.
32. It is submitted that the particulars of the threat were not given nor was any member of the public called to testify. It is further submitted that the existence of the OB No. not proved and no police report was availed. That the Claimant was not summoned to any police station or arrested for any criminal offence. The Claimants submit that although the 3rd Claimant was suspended for investigations to be conducted, none was conducted no report was filed in court.
33. On procedural fairness, it is submitted that the Claimants were not taken through a disciplinary process as ordained by section 41 of the Employment Act, 2007.
34. The decision in Alphonse Maghanga Mwaghanga V Operation 680 Ltd (2013) eKLR is relied upon to exemplify the requirements of Section 41 of the Act.
35. That the 1st and 2nd Claimants were neither charged nor required to respond to any allegations as no show cause letters were issued and minutes of the alleged meeting held on 28th September 2017 were not availed by the respondent. Moreover, the Claimants denied having attended any disciplinary hearing.
36. It is submitted that no minutes of a hearing were provided with respect to the 3rd Claimant and the dismissal letter makes no reference to a hearing.
37. As to whether the Claimants are entitled to compensation, it is submitted that they had worked for more than 10 years and no evidence of contribution to the dismissal was availed.
38. On the additional claims such as gratuity, reliance is made on Regulation of Wages (Protective Security Services) Order, 1998.



39. The claim for uniform allowance for the 3rd Claimant was not denied. On leave, it is submitted that the same is particularized in the statement of claim.
40. On overtime, it is submitted that the claimants were working 7 days a week including public holidays, for the entire duration of employment.
41. It is further submitted that the respondent was duty bound to produce the records as required by law. The decision in *Wycliffe Mwakha Murunga v Kenya Horticultural Exporters (1977) Ltd* (2019) eKLR is relied upon.
42. As regards the Certificate of Payment, it is submitted that the respondent had not tabulated the various heads of terminal benefits and RWI was unhelpful on the issue. It is further submitted that tabulation of the various payments is essential for a discharge agreement. That no evidence was provided that the Claimants had the necessary information before they signed the Certificate of Payment.
43. The decision in *Evans Zimbaso Indege & 8 Others V Africa Apparels (EPZ) Ltd* (2022) eKLR is relied upon to urge that the Claimants did not waive their right to pursue further claims against the respondent.

Respondent's Submissions

44. The respondent identifies two issues for determination;
 - i. Whether the Claimants were unfairly and unjustly terminated.
 - ii. Whether the Claimants are entitled to the remedies sought.
45. As regards, the termination of employment, it is submitted that the 1st and 2nd Claimants were dismissed on 29th September 2017 for gross misconduct related to the siphoning of fuel from Motorbike Reg. No. KMDG 036G on 26th September 2017 and the fuel was found hidden in a personal car and the 2nd Claimant checklists for 27th September 2017 had forged signatures of all guards in Lavington. That the two Claimants were heard by Mr. Mulu Kathingo who determined that their conduct amounted to gross misconduct and were accordingly dismissed.
46. It is the respondent's submission that it had sufficient reasons to dismiss the Claimants summarily under Section 44 (4) (g) of the *Employment Act* for having stolen and committed fraudulent activities on the night of 26th September 2017.
47. The decision in *Thomas Sila Nzivo v Bamburi Cement Ltd* (2014) eKLR is relied upon reinforce the submission on suspicion of the alleged activities.
48. On procedural fairness, the respondent submits that the 1st and 2nd Claimants were taken through a fair procedure as ordained by Section 41 of the Act.
49. Reliance is made on the decision in *Alphonse Maghanga Mwachanya V Operation (680) Ltd* (Supra) to urge that the respondent followed the prescribed steps. That the respondent wrote to the Kenya Private Security Workers Union on 9th November 2017 and the 1st Claimant had a warning letter dated 16th December 2015. These two documents are not in the court file.
50. As regards the 3rd Claimant, it is submitted that he was dismissed for insubordination as well as verbal and physical assault of the Deputy General Manager, Mr. Mulu Kathingo among other forms of misconduct. That the respondent has sufficient grounds to terminate his employment under section 44 (4) (d) and (g) of the *Employment Act*. That he attended a disciplinary hearing on 14th November 2017 and was subsequently dismissed.



51. As regards the reliefs prayed for, it is submitted that the 1st and 2nd Claimants were paid Kshs.78,350/= and Kshs.50,900/= respectively and acknowledged receipt as evidenced by the Certificates of Payment and signed the same with no protest and thus waived their right to bring further claims against the respondent.
52. Finally, it is submitted that the 3rd Claimant failed to report to the Police Station for purposes of recording a statement and is thus to blame for non-payment of terminal dues.
53. The decision in *Kennedy Maina Mirewa v Barclays Bank of Kenya Ltd* (2018) eKLR is relied upon to urge that the claimants have not adduced adequate evidence to establish their claims.

Analysis and determination

54. The issues for determination are;
 - i. Whether termination of the Claimants employment was fair.
 - ii. Effect of the Certificate of Payment executed by the 1st and 2nd Claimants.
 - iii. Whether the Claimants are entitled to the remedies sought.
55. As regards the termination of employment, there is no dispute that the three Claimants were employees of the respondent from diverse days in 2007, 2008 and 2009 respectively, until September and November, 2017 in the case of the 3rd claimant when their employment was terminated allegedly for various reasons. Section 45(2) of the *Employment Act* provides that for a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason(s) to terminate the employment and did so in accordance with a fair procedure. The termination of employment must meet the substantive and procedural fairness test. See *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *Naima Khamis v Oxford University (EA) Ltd* (2017) eKLR.

Reasons for termination

56. The 1st and 2nd Claimants are alleged to have handled fuel in a jerrycan, allegedly siphoned from Motor Bike No. KMDG 036G on the night of 26th and 27th September 2017. The Claimants denied the allegations. The 2nd Claimant had an additional allegation of having forged signatures of all guards within his jurisdiction and also occasioned undue interruption of critical operations and failed as a Supervisor.
57. Regrettably, RWI led no evidence on the investigations conducted by the respondent to ascertain the facts relied upon. The witness had no evidence of who witnessed the alleged siphoning of fuel from the motorcycle or how the activity was discovered. The alleged Jerrycan found in the 1st Claimant's private motor vehicle was not provided nor the registration number of the motor vehicle involved.
58. RWI led no evidence of the alleged forged signatures on the 2nd Claimants checklist and none were availed for perusal by the court. The respondent adduced no evidence of how the forgeries were discovered and who had complained about their signatures having been forged by the 2nd Claimant.
59. Similarly, the respondent led no evidence on who and how the Claimants were traced to a place near St. Georges, the venue of the alleged exchange of the jerrycan. In sum, the respondent adduced no credible evidence of how it ascertained that the 1st and 2nd Claimants were guilty of gross misconduct to warrant their dismissal. The essential evidence is missing.



60. Although the standard of proof is on a balance of probability, it must be more probable that the alleged activity took place. If it is more improbable, the case is not established.
61. Section 43 (1) of the *Employment Act* requires the employers to prove the reason or reasons for termination of employment and the termination must be justifiable under section 47(5) of the Act.
62. The provisions of section 43(2) of the Act notwithstanding, the court is not persuaded that the respondent has adduced sufficient evidence to demonstrate that it had a justifiable reason to terminate the employment of the 1st and 2nd claimant before giving them an opportunity to explain in writing and/or by word of mouth what transpired on the night of 26th and 27th September 2017.
63. With regard to the 3rd Claimant, who was employed on 5th May 2009, the grounds of dismissal from employment are different as are the circumstances.
64. Records shows that the 3rd Claimant was suspended without pay from 11th November 2017 to 14th November 2017 allegedly for misappropriating BV fuel cards for various company vehicles entrusted to him and had confronted the Deputy General Manager in the office while the latter was carrying out the investigations. On 14th November 2017 when he was to be subjected to a disciplinary hearing, his employment was terminated allegedly for verbal and physical abuse of the Deputy General Manager and subsequent threats to the same person in a public place a matter reported under Police OB No. 17/11/11/2017.
65. Puzzlingly, the 3rd Claimant was not paid terminal dues allegedly because he did not clear with the respondent an allegation he did not deny. The allegation that the 3rd Claimant physically and verbally assaulted the Deputy General Manager on 9th November 2017 and intercepted him publicly the following day and issued threats and was reported to the police under OB No. 17/11/11/2017 sound credible in the courts view, OB numbers are real unless proved otherwise.
66. Contrary to the Claimants' counsel submission that the existence of the OB was not proved, the Claimants did not request for the particulars of the OB which is essentially the statement made by the complainant. The fact that the 3rd Claimant was not arrested is not sufficient ground that his conduct was not reported to the police as alleged. The OB No. is sufficient to access the statement and other particulars.
67. In light of the foregoing, the court is satisfied that the respondent has on a balance of probability shown that it had a valid and fair reason to terminate the 3rd Claimant's employment.
68. This finding is consistent with the provisions of section 43(2) of the *Employment Act* which provide; The reason or reasons for termination of a contract are the matters that the employer at the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

Procedure of termination

69. Needless to emphasize, for a termination of employment to pass the fairness test, it must have been conducted in accordance with fair procedure as ordained by Section 45(2)(c) of the *Employment Act*.
70. Section 41 of the Act on the other hand provides an elaborate and mandatory procedure to be followed, which include notification and hearing. See Pius Machafu Isindu V Lavington Security Guards (Supra).



71. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal elaborated the elements of Section 41 of the Act as follows:

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee.
- ii. the reasons for which the employer is considering termination.
- iii. entitlement of an employer to the presence of another employee of his choice when the explanation of grounds of termination is made.
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

72. In this case, RWI was categorical that no notices to show cause were issued and had no evidence of any disciplinary hearing was provided.

73. A meeting allegedly held on 28th September 2017 between the 1st and 2nd Claimant and the Deputy General Manager, Mr. Mulu Kathingo was not proven nor were its proceedings verifiable. Mr. Mulu Kathingo did not testify.

74. In the case of the 3rd Claimant, RWI was unambiguous that disciplinary hearing was conducted but he had no evidence of the minutes. More importantly, the letter of termination makes no reference to the alleged hearing contrary to the respondent’s submissions.

75. Neither of the Claimants was notified of the grounds on which the respondent was considering termination of employment and none was accorded the opportunity to rebut the allegations in the presence of a fellow employee of their choice.

76. In a nutshell, termination of the Claimants employment was conducted in total disregard of the provisions of the Section 41 of the *Employment Act*, 2007. It requires no gainsaying that there was no procedural fairness. The respondent made no attempt to comply with the procedural requirements provided by the *Employment Act*, thereby rendering the termination of the Claimants employment procedurally flawed and unlawful.

77. The second issue relates to the effect of the certificate of payment executed by the 1st and 2nd Claimant. It is not in dispute that Joseph Omondi Okongo and Bernard Waliaula Wekoyela signed a certificate of payment dated 17th November 2017 and 4th November 2017 respectively. The certificate states as follows;

“I Joseph Omondi Okongo of ID No. xxxx have today on 17th November 2017 received full and final terminal benefits amounting to Kshs.78,350/= (Seventy Eight Thousand Three Hundred and Fifty Only). I have also confirmed after this full payment I will not have any other claims against Hatari Security Guards Ltd.”

Recipient

Name: Joseph Omondi Okongo

Signature: Signed

Date: 17th November 2017



Witness 1

Name: Peter Mbicho

Signature: Signed

Date: 17th November 2017

Witness 2

Name: Paul Kilimo

Signature: Signed

Date: 17th November 2017

78. Although the respondent submits that the Claimants executed the documents willingly and freely, issue is whether they were seized of all the information necessary and in particular the waiver of right to further claims against the respondent.

79. The Court of Appeal has expressed itself variously on this issue as demonstrated below.

In *Trinity Prime Investment Ltd v Lion of Kenya Insurance Co. Ltd* (2015) eKLR, the court stated as follows;

“The execution of the discharge voucher, we agree with the learned judge constituted a complete contract. Even if payment by it was less than the total loss sum the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

80. Relatedly, in *Coastal Bottlers Ltd v Kimathi Mitbika* (2018) eKLR, the Court of Appeal expressed itself as follows;

“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the Contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time we executed the same. It did not matter that the amount there under would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.”

81. In this case, the Court paid particular attention to the tabulation of the terminal dues and the total sum due to the employee. In this Court’s view, the absence of the tabulation of the various items implies that the employee is denied the opportunity to appreciate the breadth of the offer or payment and ultimately whether it is worth being accepted or not.

82. Relatedly, setting out the particulars by the employer signifies good faith and transparency in the arrangement. It is trite law that an offer must be clear and definite in its terms.

83. In the instant case, it is doubtful whether the 1st and 2nd Claimant were seized with all the information they required to make an informed decision on the import of the Certificate of payment.



84. The Court is guided by the finding in *Evans Zimbazo Indege & 8 Others V Africa Apparels (EPZ) Ltd (Supra)* where the court held that a tabulation of the entitlements is an essential component of a discharge voucher or payment certificate. Its absence denies the employees essential information necessary for decision making.

85. For the above reasons, it is the finding of the court that certificate of payment signed by the 1st and 2nd Claimants did not waive their rights to pursue further claims against the respondent.

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

It is important to note that other than the prayer for 12 months salary compensation which is discretionary, the other prayers are species of special damages and must not only be pleaded but proved as well.

87. The Court is guided by the decision in *Coast Bus Services Ltd v Murunga & Others* CA No. 192 of 1992) where the Court of Appeal stated as follows;

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required we would cite those of *Kampala City Council v Nakaye* (1992) CA 446, *Ouma v Nairobi City Council* (1976) KLR 297 . . .”

(i) Pay in lieu of notice.

88. All the Claimants have prayed for pay in lieu of notice. From the findings above, it is clear that the respondent did not give the requisite notice to any of the Claimants. The prayer is awarded to all Claimants.

(ii) Unpaid Salary for September

89. The 1st Claimant Prays for the salary for September 2017. Neither the written nor the oral testimony make reference to any unpaid salary. The prayers is declined.

(iii) Gratuity Payment

90. The Claimants Pray for a gratuity payment of Kshs.149,940/=. The Court of Appeal has held that gratuity is an amount given to the employee by the employer in appreciation of the services rendered and is founded on the contract between the parties. Gratuity is not a statutory entitlement. The claimants led no evidence to establish their entitlement to gratuity. Relatedly, the essential particulars of the computation are unavailable. The prayers are declined.

(iv) Uniform Allowance

91. The Claimants Pray for uniform allowance of Kshs.12,000/=, Kshs.11,400/= and Kshs.11,400/= respectively. Neither of the Claimants provided a copy of the contract of employment to demonstrate entitlement to uniform allowance or the amount claimed.

In addition, neither of the Claimants testified about it or included it in the written statement.

The prayer is unproven and thus declined.



(v) Unpaid Leave

92. The Claimants have prayed for the sum of Kshs.74,958/= for unpaid leave. This item was pleaded by the Claimants and RWI confirmed that he had no evidence that leave days for the 1st Claimant had been paid for.

Regrettably, neither of the Claimants testified about the actual number of leave days pending. Claimants are awarded payment for the actual number of pending leave days since the prayer lacks the necessary particulars.

(vi) Overtime for Weekdays, Weekends and Public Holidays

93. This claim is not supported by any evidence and lacks the necessary particulars. The weekends, weekdays and public holidays are undefined in terms of numbers.

In the absence of any material on which to make a finding of entitlement to the prayer, the prayer is declined.

(vii) 12 Month's Salary Compensation

94. Having found that the termination of the Claimants employment was unfair and unlawful, the Claimants are entitled to the discretionary relief provided by section 49 (1) (c) of the [Employment Act](#) subject to observance of section 49 (4) of the Act.

95. In determining the quantum of compensation, the court has taken the following parameters into account;

(a) Duration of employment

1st Claimant 9 years 10 months

2nd Claimant 9 years 5 months

3rd Claimant 8 years 6 months

(b) None of the Claimants appealed the decision or demonstrated a wish to continue in the respondent's employment.

(c) The 3rd respondent substantially contributed to the termination of employment.

(d) None of the Claimants had previous warnings or disciplinary concerns.

96. In the circumstances, the court is satisfied that the equivalent of 4 months gross salary for the 1st and 2nd Claimants and 3 months for the 3rd Claimant is fair.

97. In conclusion, Judgement is entered for the Claimants against the respondent in the following terms;

a) A declaration hereby issues that the dismissal of the Claimants by the respondent was unfair and unlawful.

b) Payment in lieu of notice.

c) Payment of the actual number of pending leave days.

d) Equivalent of 4 months gross salary for the 1st and 2nd Claimant.

e) Equivalent of 3 months gross salary for the 3rd Claimant.



- f) Certificate of service
- g) All other Prayers are declined.
- h) Costs of this suit.
- i) Interest at Court rates from date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH 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 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

