



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

**CAUSE NO. 647 OF 2011**

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

**KENYA HOTEL AND ALLIED WORKERS' UNION.....CLAIMANT**

**VERSUS**

**KAREN BLIXEN CAMP LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this case by way of a memorandum of claim dated 28<sup>th</sup> April 2011 alleging that the grievants were unfairly and unlawfully terminated and refusal by the Respondent to pay their dues. The grievants pray for reliefs as follows: -

**KABERA PAUL MBUTHIA**

1. Pay in lieu of notice 1 x 17,500 Kshs.17,500
2. Days worked in December x 17,500 Kshs.8,750
3. Service charge for November and December 2010 4,750 x 2 Kshs.9,500
4. Public Holidays Kshs.38,500
5. Accumulated off days (71 days) Kshs.82,833
6. Accumulated Leave days (51 days) Kshs.59,500
7. Accumulated overtime 40 hrs per year Kshs.17,500
8. 12 months' salary compensation  
12 x 17,600 Kshs.210,000

9. Service gratuity x 4 x 17,500 Kshs.35,000

Total amount before tax **Kshs.479,083**

**CAROLYNE WAIHIGA WANJOHI**

1. Pay in lieu of notice 1 x 18,500 Kshs.18,500
2. Days worked in January 2011 (24 days) x 18,500 Kshs.14,800
3. Public Holidays Kshs.27,133

4. Accumulated Leave days (61 days) Kshs.75,233
  5. Service charge for December 2010 and January 2011 (4,500 x 2) Kshs.9,000
  6. Accumulated overtime 5 hrs per day Kshs 222,000
  7. 12 months' salary compensation  
12 x 18,500 Kshs.222,000
  8. Service gratuity x 4 x 18,500 Kshs.18,000
- Total amount before tax **Kshs.607,166**

**STEPHEN ENYANGALA KIDINGA**

1. Pay in lieu of notice 1 x 24,250 Kshs.24,250
  2. Days worked in January 2011 (24 days) x 24,250 Kshs.19,400
  3. Accumulated Leave days (56 days) Kshs.42,267
  4. Public Holidays Kshs.42,267
  5. Accumulated off days Kshs.103,467
  6. Service charge for December 2010 and January 2011 4,750 x 2 Kshs.9,500
  7. Bonus for 2009 (1 x 24,280) Kshs.24,250
  8. Accumulated overtime 4 hrs per day Kshs.349,200
  9. House Allowance  $\frac{1}{2}$  x 28,000 x 48 Kshs.67,200
  10. Service gratuity x 24,250 x 4 Kshs.48,500
  11. Twelve months' salary compensation  
12 x 24,250 Kshs.291,000
- Total Amount before tax **Kshs.1,040,467**

*THAT all costs of the suit be met by the Respondent.*

2. The Respondent filed the statement of defence on 29<sup>th</sup> June 2011 denying the contents of paragraphs 1.2, 1.3 and 1.4 of the memorandum of claim. It admitted that the three grievants were its former employees having been employed on diverse days between 26<sup>th</sup> January 2007 and 28<sup>th</sup> December 2009 setting out their gross salary and transport allowance of Kshs.1,500 and service charge. It further states that the grievants were lawfully terminated for gross misconduct and prays that the suit be dismissed with costs.

**Claimant's Case**

3. The Claimant avers that it has a recognition agreement with the Respondent. It avers that **Mr Kabera Paul Mbuthia** was employed on 11<sup>th</sup> November 2006 as Assistant Head of Maintenance, letter of appointment was issued on 26<sup>th</sup> August 2008 and had a clean record earning Kshs.23,750 as at the date of termination on 16<sup>th</sup> December 2010 allegedly for reporting to work under the influence of alcohol.

4. It further avers that **Carolyn Waihiga Wanjohi** was employed in December 2009 as an Assistant House Keeper, her last salary was Kshs.18,250 per month, had a clean record and was terminated on 25<sup>th</sup> January 2011 allegedly for sleeping while on duty.

5. The Claimant also avers that **Stephen Enyangala Kidinga** was employed on January 2007 as a Waiter, letter of appointment was issued on 26<sup>th</sup> August 2008 and had a clean record. His last salary was Kshs.24,250 per month and was terminated on 25<sup>th</sup> January 2011 allegedly for communicating on phone while on duty.

6. It further avers that the dispute was reported to the Minister for Labour who did not appoint a Conciliator. Finally it contends that the Respondent did not give the grievants a fair hearing before termination. That the termination be reduced to normal termination.

## 7. Grievant Kabera Paul Mbuthia has since withdrawn his claim and gave no evidence in Court.

### Respondent's Case

8. The Respondent's statement of defence dated 29<sup>th</sup> June 2011 and filed on 29<sup>th</sup> June 2011 was amended on 18<sup>th</sup> November 2019 and filed on 19<sup>th</sup> November 2019. It is unclear what actuated the amendment 8 years after the cause was initiated.

9. The Respondent avers that the recognition agreement between the parties to the suit was rendered void by operation of law when all its employees who had joined with the Claimant resigned from the Claimant and joined another Union, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) on or about 2017.

10. It further avers that Kabera Paul Mbuthia was its former employee since 3<sup>rd</sup> July 2007 when he was appointed as an Assistant Head of Maintenance and as at the date of termination his consolidated salary was Kshs.19,000 per month inclusive of transport allowance of Kshs.1,500 as well as service charge and that he was lawfully terminated summarily for acts of gross misconduct to wit becoming or being intoxicated during working hours and thus rendering him unwilling and/or incapable of performing his work properly.

11. It is further averred that the grievant was taken through a disciplinary hearing in the presence of a colleague of his choice but did not provide any justifiable reason for the conduct leading to his dismissal and did not appeal against the decision.

12. In regard to Carolyne Waihiga Wanjohi, the Respondent avers that she was employed on 28<sup>th</sup> December 2009, at a consolidated salary of Kshs.12,000 inclusive of travel allowance of Kshs.1,500 and service charge. That she was dismissed on 25<sup>th</sup> January 2011 for gross misconduct to wit, without leave or other lawful cause wilfully neglecting to perform her duties, in particular by sleeping in several hideouts during working hours. It is further averred that the acts of gross misconduct were duly explained to the grievant and was accorded an opportunity to respond to the allegations in the presence of a colleague of her choice but did not provide justifiable reasons for her conduct which led to dismissal. That the grievant did not appeal the decision.

13. Regarding Mr. Stephen Enyangala Kidinga, the Respondent avers that the grievant is its former employee, employed on 26<sup>th</sup> January 2007 as a Waiter and as at the date of termination his consolidated monthly salary stood at Kshs.18,000 inclusive of travel allowance of Kshs.1,500 and service charge.

14. It avers that the grievant was lawfully terminated for gross misconduct, to wit, failing or refusing to obey lawful command from the employer not to talk on his mobile phone during working hours and behaving in an insulting manner to his employer and the employer's guests by urinating in a public area visible to the Respondent's guest and Managers in breach of terms of employment.

15. It further avers that it explained the alleged acts of misconduct to the grievant who was accorded an opportunity to respond to the allegations in the presence of a colleague of his choice but he did not give justifiable reasons for the conduct which led to dismissal. That the grievant did not appeal the decision of the Respondent.

16. The Respondent denies that the grievants were unfairly or unlawfully terminated. It avers that termination of the three grievants was effected in accordance with all substantive and procedural safeguards. It also avers that since the grievants were summarily dismissed, the termination cannot be reduced to normal termination.

17. That the dues of the grievants are as tabulated in the termination letters annexed to the memorandum of claim as paid to them. That the tabulations in the memorandum of claim are grossly exaggerated. The Respondent tabulates the grievants dues as follows: -

#### **a. Kabera Paul Mbuthia;**

*i. Pay in lieu of notice: This being summary dismissal, pay in lieu of notice is not applicable.*

*ii. 15 Days worked in December 2010: The Claimant is entitled to pay for 15 days worked in December 2010. Kshs.8,750 payable.*

*iii. Service charge for November and December 2010: Full service charge of Kshs.4,750 payable for November 2010 and half service charge of Kshs.2,375 payable for 15 days worked in December 2010. Total service charge Kshs.7,125 payable.*

*iv. Accumulated public holidays, rest and off days: The employment contract caps accumulated public holidays, off and rest days an employee can claim per year at 26 days. Kshs.15,166 is thus payable for accumulated public holidays, rest and off days based on his salary.*

*v. Accumulated leave days: The employment contract caps accumulated leave days an employee can claim per year at 21 days. Kshs.12,250 is thus payable for accumulated leave days based on the salary.*

*vi. Accumulated overtime: Any overtime work must be requested/approved by management in writing before it takes place. The employee must also notify management in writing upon conclusion of overtime work. The Claimant did not do any overtime work. The Claimant has not annexed written approval of overtime work or written report upon conclusion of the overtime work. The employment contract is also clear that: gross salary is inclusive of any overtime work.*

*vii. Compensation: The Respondent avers that having terminated the Claimant's employment summarily in accordance with the law,*

the Claimant is not entitled to any compensation.

viii. Service gratuity: The Respondent avers that gratuity is payable for exemplary service. The Claimant's service was not exemplary. He acted in a manner inconsistent with the best interests of the employer and is therefore not entitled to gratuity.

Total amount Assessed as payable: Kshs.43,291

Less amount paid on termination Kshs.29,258

Amount Due/Payable: **Kshs.14,033**

**b. Carolyne Waihiga Wanjohi:**

i. Pay in lieu of notice: This being summary dismissal, pay in lieu of notice is not applicable.

ii. 24 Days worked in January 2011: The Claimant is entitled to pay for 24 days worked in December 2010. Her monthly gross salary being Kshs.10,500, her pay for the 24 days is Kshs.8,400.

iii. Accumulated public holidays, rest and off days: The employment contract caps accumulated public holidays, off and rest days an employee can claim per year at 26 days. Based on her gross monthly pay of Kshs.10,500 this Claimant is entitled to Kshs.9,100 for accumulated public holidays, rest and off days.

iv. Accumulated leave days: The employment contract caps accumulated leave days an employee can claim per year at 21 days. Based on her gross monthly pay of Kshs.10,500 this Claimant is entitled Kshs.7,350 for accumulated leave days.

v. Service charge for December 2010 and January 2011: Full service charge of Kshs.4,500 payable for December 2010 and Kshs.3,750 is payable for 25 days worked in January 2011. Total service charge Kshs.8,250 payable.

vi. Accumulated overtime: Any overtime work must be requested/approved by management in writing before it takes place. The employee must also notify management in writing upon conclusion of overtime work. The Claimant did not do any overtime work. The Claimant has not annexed written approval of overtime work or written report upon conclusion of the overtime work. The employment contract is also clear that gross salary is inclusive of any overtime work

vii. Compensation: The Respondent avers that having terminated the Claimant's employment summarily in accordance with the law, the Claimant is not entitled to any compensation.

viii. Service gratuity: The Respondent avers that gratuity is only payable for exemplary service. The Claimant's service was not exemplary. She acted in a manner inconsistent with the best interests of the employer and is therefore not entitled to gratuity.

Total amount Assessed as payable: Kshs.33,100

Less amount paid on termination Kshs.16,451

Amount Due/Payable: **Kshs.16,649**

**c. Stephen Enyangala Kidinga:**

i. Pay in lieu of notice: This being summary dismissal, pay in lieu of notice is not applicable.

ii. 24 Days worked in January 2011; The Claimant is entitled to pay for 24 days worked in December 2010. Her monthly gross salary being Kshs.16,500, her pay for the 24 days is Kshs.13,200.

iii. Accumulated leave days: The employment contract caps accumulated leave days an employee can claim per year at 21 days. Based on his gross monthly pay of Kshs.16,500 this Claimant is entitled Kshs.11,500 for accumulated leave days.

iv. Accumulated public holidays, rest and off days: The employment contract caps accumulated public holidays, off and rest days an employee can claim per year at 26 days. Based on his gross monthly pay of Kshs.16,500 this Claimant is entitled to Kshs.14,300 for accumulated public holidays, rest and off days.

v. Service charge December 2010 and January 2011: Full service charge of Kshs.4,750 is payable for December 2010 and Kshs.3,958 is payable for 25 days worked in January 2011. Total service charge Kshs.8,708 payable.

vi. Bonus for 2009: No bonus was payable to this Claimant under the contract.

vii. Accumulated overtime: Any overtime work must be requested/approved by management in writing before it takes place. The employee must also notify management in writing upon conclusion of overtime work. The Claimant did not do any overtime work. The Claimant has not annexed written approval of overtime work or written report upon conclusion of the overtime work. The

employment contract is also clear that gross salary is inclusive of any overtime work.

viii. *House allowance: In accordance with clause 6 of the employment contract, the Claimant's salary was consolidated, it was inclusive of housing allowance. He is therefore not entitled to any claim for housing allowance.*

ix. *Service gratuity: The Respondent avers that gratuity is payable for exemplary service. The Claimant's service was not exemplary. He acted in a manner inconsistent with the best interests of the employer and is therefore not entitled to gratuity.*

x. *Compensation: The Respondent avers that having terminated the Claimant's employment summarily in accordance with the law, the Claimant is not entitled to any compensation.*

*Total amount Assessed as payable: Kshs.47,708*

*Less amount paid on termination Kshs.7,838*

*Amount Due/Payable: **Kshs.39,870***

*The Respondent avers that tax and all statutory deductions are applicable to any amount found to be due by the Court.*

## **Evidence**

18. Two grievants testified at the hearing, Mr. Stephen Enyangala Kidinga testified on 28<sup>th</sup> November 2019 while Carolyne Waihiga Wanjohi testified on 20<sup>th</sup> September 2021.

19. CW1 Stephen Enyangala told the Court that he was a former employee of the Respondent and had abandoned the prayer for ex gratia payment for 14 months, that it was an error.

20. On cross examination, he confirmed that he was dismissed on 25<sup>th</sup> January 2011 for using a mobile phone during working hours. That he received the letter of termination is dated 27<sup>th</sup> January 2011. He further confirmed that he was also accused of urinating in a public area visible to guest but had not indicated this aspect in the memorandum of claim. He confirmed that before termination, the Manager summoned him to the office where he was with his wife. Only the three of them were in the office. He confirmed that the Manager did not accept his explanation and asked him to leave. He confirmed that he declined to acknowledge receipt of the termination letter when requested to do so. That his consolidated monthly salary was Kshs.18,000 at the time. He finally confirmed that as per clause 5 of the contract of employment overtime required written authority of the Manager.

21. In re-examination, he testified that he was neither issued with a show cause letter nor afforded the opportunity to be heard.

22. **CW1 Carolyne Waihiga Wanjohi** adopted her witness statement and was cross examined. She confirmed that she was a member of the Claimant and had authorised it to file the claim on her behalf. That Union officials had visited the Camp to recruit them as members. Although she indicated that she had handed over her letter of appointment to the Claimant, none is on record.

23. She confirmed that she was terminated on 25<sup>th</sup> January 2011 for sleeping the public area and at the SPA while on duty which she denied. She could not explain why her total claim in the memorandum of claim and witness statement were different.

24. On re-examination the witness stated that the Claimant had authority to file the claim and there was a recognition agreement between the Claimant and the Respondent and she was employed in 2009. She testified that she was terminated on the day she was found sleeping and was neither given a warning letter nor opportunity to respond to the allegations.

25. That she was not aware how the Claimant computed her claim. She denied that the termination was conducted in compliance with the law.

26. **RW1, Mr. Ronald Mutie** testified that the Respondent had no recognition agreement with the Claimant. That it had a relationship with KUDHEIHA but provided no evidence of the relationship. He testified that the agreement relating to recognition and negotiation procedure between the Claimant dated 26<sup>th</sup> October 2010 and the Respondent attached to the memorandum of claim did not come to fruition. The agreement is authenticated by both parties on every page and on the last page. He confirmed that Carolyne Waihiga Wanjohi was not paid the entire amount set forth in the letter of termination. The Respondent retained part of it. It is payable to the grievant on clearance with the Respondent.

27. On cross examination, the witness confirmed that there was no recognition agreement between the Respondent and the Claimant between 2010 and the filing of the claim. He in addition confirmed that there was a relationship between the Claimant and the three grievants and he had responded to the letter from the Secretary General of the Claimant in good faith.

28. That Carolyne Waihiga Wanjohi was found sleeping by Mr. Ruby the Camp General Manager. The witness insisted that Carolyne Wanjohi was employed at the front office not at the SPA as per her appointment letter. There is none on record for perusal by the Court.

## **Claimant's Submissions**

29. The Claimant isolated three issues for determination, namely:

- (i) Whether the Claimant is a registered trade union with locus standi to institute this claim;
- (ii) Whether the Claimant and Respondent have a valid recognition agreement;
- (iii) Whether Carolyne Waihiga Wanjohi and Stephen Enyangala Kidinga were unfairly and/or unlawfully terminated.

30. On the issue on registration of the Claimant as a trade union, the Claimant submitted that it is duly registered pursuant to a Court order in Appeal No. 10 of 1999 and as confirmed by E. K. Mukunya J. in **Kenya Hotels and Allied Workers Union v Tea Hotel Kericho & Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers, Cause No. 36 of 2005**. That the Claimant holds a certificate of registration No. TU/138 dated 3<sup>rd</sup> November 1999.

31. The Claimant relied on Section 73 of the Labour Relations Act, 2007 in support. It also submitted that the two grievants are its members and thus had locus standi to institute the claim on their behalf. The decision of Mumbi J. in **Fairmount, The Norfolk Hotel v The Industrial Court Kenya [2015] eKLR** was relied upon on the freedom of employees to choose the trade union to belong to.

32. On the recognition agreement, the Claimant submitted that it had a valid recognition agreement with the Respondent and the Respondent was bound by its terms. The Claimant makes reference to the Agreement Relating to Recognition and Negotiating Procedure between Karen Blixen Camp Limited and Kenya Hotels and Allied Workers Union attached to the memorandum of claim and marked as APP CI dated 26<sup>th</sup> October 2010. Reference is made to Clause 2(a) and 4 of the agreement. Whereas clause 2(a) provides that Karen Blixen Camp affords full recognition to the union ... to represent interests of workers, Clause 4 states that the Agreement shall come into force on 26<sup>th</sup> October 2010 and shall continue in force until amended or terminated. The agreement is signed by both parties.

33. It is submitted that although the Respondent's witness denied the existence of a recognition agreement between the Claimant and the Respondent stating that the Respondent had one with KUDHEIHA, he provided no evidence to substantiate the allegation. He, however admitted that the Respondent wrote to the Claimant on 15<sup>th</sup> February 2011. Finally the Claimant contends that it has a recognition agreement with the Respondent.

34. On termination of the grievants, the Claimant submits that it was common ground that the grievants were employees of the Respondent and were terminated on 25<sup>th</sup> January 2011 for misconduct and the Respondent refused to hold a meeting with the Claimant on the issue. That the Claimant wrote to the Ministry for Labour for help but to no avail.

35. The Claimant contends that the termination of Carolyne and Stephen was unfair and illegal since it was contrary to the Constitution of Kenya, 2010 and rules of natural justice. On the assertion by the Respondent's witness that the grievants were accorded an opportunity to respond to the allegations, it is submitted that since the witness was not an employee of the Respondent at the time, he could not testify on the issue and there was not corroboration.

36. The Claimant relies on Article 5 of the Constitution of Kenya, 2010 and Sections 43 and 45 of the Employment Act, 2007 on the right to a fair hearing and concludes that the Respondent failed to prove the reason(s) for termination of the grievants.

37. The Claimant urges the Court to find that the Respondent did not comply with the prescribed procedure in the dismissal of the grievants. Reliance is made on the Supreme Court decision in **Kenfright (E.A) Ltd v Benson K. Nguti [2019] eKLR** on summary dismissal. The Claimant concludes by urging the Court to find that the termination of Carolyne Waihiga and Stephen Enyangala was unfair, unlawful and contrary to the Constitution and the rules of natural justice and ward the sums of Kshs.607,166.00 and Kshs.1,040,467.00 respectively as pleaded in the memorandum of claim dated 28<sup>th</sup> April 2011.

### **Analysis and Determination**

38. Flowing from the pleadings, evidence and submissions, the issues for determination are:

- (a) Whether the Claimant had a recognition agreement with the Respondent;
- (b) Whether the termination of the Carolyne Waihiga Wanjohi and Stephen Enyangala Kidinga.

39. On the issue of recognition agreement, the Claimant submitted that the two had a valid recognition agreement dated 26<sup>th</sup> October 2010 which was signed by both parties. A copy was annexed to the memorandum of claim dated 28<sup>th</sup> April 2011. Although the Respondent's witness denied its existence and testified that the Respondent had a recognition agreement with KUDHEIHA. It provided no evidence to substantiate of the allegation.

40. It is unclear to the Court why the Respondent is denying the existence of a recognition agreement between itself and the Claimant yet there is a document on record authenticated by both parties on 26<sup>th</sup> October 2010, its commencement date. However, RW1 confirmed on cross examination that the grievants had a relationship with the Claimant. Based on the evidence on record, the Court is satisfied that there was a recognition agreement between the Claimant and the Respondent.

41. On termination, the Employment Act, 2007 has elaborate provisions on the substantive and procedural requirements for a termination to be deemed fair and lawful. Sections 35, 40, 41, 43, 44 and 45 provide the bulwark on termination.

42. Section 45(2) provides that –

**(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**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.**

43. Section 44 of the Act provides for summary dismissal which takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

44. Section 41 makes detailed provision on notification of the reason(s) for which the employer is considering termination, language to be used and the right of the employee to have a representative of his choice. In addition, the employer is required to hear and consider any representations made by the employee. This provision underpins the right to fair hearing.

45. Courts have robustly interpreted the provisions of the Employment Act on termination to underscore the indispensability of substantive and procedural fairness if a termination is to pass as lawful. The decision in **Walter Ogal Onuro v Teachers Service Commission [2013] eKLR** and others are routinely cited for the foregoing position.

46. In **Kenafri Industries Ltd v John Gitonga Njeru [2016] eKLR**, the Court of Appeal stated that –

*“It is trite law that where termination of employment is contested and alleged to be unfair, the burden of proving that unfairness rests on the employee while the burden of justifying the grounds of termination or dismissal rests with the employer (see. Kenya Airways case supra.) In the present case, it is not in dispute that the reason for the termination was communicated as being inter alia, “reorganization of the company to meet the vision 2020” as a result of which the respondent’s position was “identified for termination.” But was this a valid and fair reason?”*

47. On substantive fairness, the Respondent indicated that the grievants were dismissed for various reasons. In the case of Carolyn Waihiga Wanjohi, she had been found sleeping at specific places during working hours, thus neglecting her duties. Stephen Enyangala Kidinga was dismissed from refusing to obey a lawful command from the employer not to use his mobile phone during working hours as well as behaving in a disgraceful manner to his employer and urinating in a public area near a garden lunch table he was arranging for guests, visible to the employer’s guests and Managers.

48. The Respondent led evidence that Carolyn Waihiga was found sleeping at the SPA which was not her designated place of work. She was found by the General Manager of the Camp, Mr. Ruby. Her denial was simply that *“It is a lie. I was not sleeping.”* RW1 confirmed on cross examination that she was employed at the front office.

49. On cross examination Stephen Enyangala Kidinga stated that *“The reasons I was given for dismissal was that I was using a mobile phone contrary to instructions. Another reason is urinating in a public area visible to guest. I did not include the urinating in the memorandum of claim.”* He did not deny the allegations in emphatic terms.

50. In **Naima Khamisi v Oxford University press (EA) Ltd [2017] eKLR**, the Court of Appeal stated that –

*“It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract.*

*For example poor performance, insubordination and lack of loyalty or commitment are some of the grounds ...”*

(See Sections 43 and 47(5) of the Employment Act).

51. On procedural fairness, Section 41 of the Employment Act set out the conditions to be complied with by the employer for a termination to pass the procedural fairness test. The grievants testified that on the date they were dismissed, they were individually summoned to the office where they found the Manager with his wife and that the explanation given was not accepted by the Respondent.

52. RW1 testified that the dismissal was lawful and the grievants received their dues. None of the grievants was represented by a colleague or shop floor union representative at the hearing in the office on the date of dismissal nor had they been notified of the right to bring a representative.

53. In addition, the Respondent led no evidence to demonstrate that the grievants had been notified of their alleged misconduct, or their response to the allegations and how the Respondent considered them for purposes of decision making. The Respondent appears to have been

in a hurry to dismiss the grievants.

54. From the evidence on record, it is the finding of the Court that the procedure of termination employed by the Respondent in the dismissal of Carolyn Waihiga Wanjohi and Stephen Enyangala Kidinda did not meet the threshold prescribed by Section 41 of the Employment Act.

55. Consequently, termination of the grievants was procedurally improper and thus unfair.

56. Having found that the grievants termination was substantively justified but procedurally defective, I now turn to the reliefs sought.

**CAROLYNE WAIHIGA WANJOHI**

1. Pay in lieu of notice 1 x 18,500 Kshs.18,500
  2. Days worked in January 2011 (24 days)  
  
x 18,500 Kshs.14,800
  3. Public Holidays Kshs.27,133
  4. Accumulated Leave days (61 days) Kshs.75,233
  5. Service charge for December 2010 and January 2011 (4,500 x 2) Kshs.9,000
  6. Accumulated overtime 5 hours per day Kshs 222,000
  7. 12 months' salary compensation  
  
12 x 18,500 Kshs.222,000
  8. Service gratuity x 4 x 18,500 Kshs.18,000
- Total amount before tax **Kshs.607,166**

**STEPHEN ENYANGALA KIDINDA**

1. Pay in lieu of notice 1 x 24,250 Kshs.24,250
  2. Days worked in January 2011 (24 days) x 24,250 Kshs.19,400
  3. Accumulated Leave days (56 days)Kshs.42,267
  4. Public Holidays Kshs.42,267
  5. Accumulated off days Kshs.103,467
  6. Service charge for December 2010 and January 2011 4,750 x 2 Kshs.9,500
  7. Bonus for 2009 (1 x 24,280) Kshs.24,250
  8. Accumulated overtime 4 hrs per day Kshs.349,200
  9. House Allowance ½ x 28,000 x 48 Kshs.67,200
  10. Service gratuity x 24,250 x 4 Kshs.48,500
  11. Twelve months' salary compensation  
  
12 x 24,250 Kshs.291,000
- Total Amount before tax **Kshs.1,040,467**

*THAT all costs of the suit be met by the Respondent.*

57. The Respondent's amended statement of response to the specific claims made by the grievants. One of the notable change is the monthly

gross pay of the grievants. The Respondent uses Kshs.10,500 for Carolyne Waihiga and Kshs.16,500 of Stephen Enyangala and Kshs.16,500 which is not supported by any evidence on record. The Respondent through Mr. Nelson by letters dated 15<sup>th</sup> February 2011 to the Claimant stated that the salaries for Carolyne Waihiga and Stephen Enyangala stood at Kshs.18,250 and 24,250 respectively. The figures used in the defence are strange to the Court and thus unreliable for purposes of this judgment.

58. Nevertheless the Court agrees with the Respondent's case that there is no evidence on record that either grievant worked overtime and was not paid. Second, the claim for service gratuity is not supported by any evidence.

59. Third, since the Claimant led no evidence on accumulated leave days and public holidays, the Court will rely on the computations by the Respondent.

60. Fourth, the claim for house allowance by Stephen Enyangala is not sustainable since the Respondent paid a consolidated salary as evidenced by the contract of employment dated 3<sup>rd</sup> September 2008. This is one of the exceptions under Section 31(2) of the Employment Act. The claim is declined.

61. Fifth, the Claimant led no evidence of bonus entitlement by employees. The claim is declined.

62. Sixth, on accumulated overtime, Clause 5 of the letter of appointment states that "*any overtime MUST be approved by the Manager before it take place.*" The Claimant led no evidence to prove this claim. The claim is declined.

63. Seventh, the Claimant led no evidence on accumulated leave, public holidays and off duty days. However, the Respondent admitted that each grievant had 26 accumulated public holidays, rest and off duty day and 21 days leave days. The Court will rely on the admission in the computation of the claims.

64. Eighth, for service gratuity, the computation by the Respondent is exact while the Claimant assumes that the grievants served for the two months.

65. Finally, having found that the grievants were unfairly terminated they are entitled to the relief provided by Section 49(1)(c) of the Employment Act. In determining the quantum of compensation, the Court is guided by Section 49(4) of the Act. The Court has taken into account the following: -

(a) The termination was substantially justified

(b) The grievants contributed to their termination

(c) Whereas Carolyne Waihiga Wanjohi served for one (1) year, one (1) month, Stephen Enyangala Kidinga served for 3 years, 6 months and both wished to continue serving.

66. On the basis of the foregoing, the equivalent of one (1) month's salary for Carolyne Waihiga Wanjohi and two months' salary for Stephen Enyangala Kidinga is fair.

67. In the final analysis judgment is entered for the grievants as follows:

**CAROLYNE WAIHIGA WANJOHI**

1. Pay in lieu of notice Kshs.18,500

2. Days worked in January 2011 (24 days) Kshs.14,800

3. Public holidays, rest and off duty days

(26 days) Kshs.16,033

4. Accumulated Leave days (21 days) Kshs.12,950

5. Service charge for December 2010 and

January 2011 Kshs.8,250

6. Compensation for unfair termination

(one [1] month) Kshs.18,500

**Total Award Kshs.89,033**

**STEPHEN ENYANGALA KIDINGA**

1. Pay in lieu of notice Kshs.24,250
  2. Days worked in January 2011 (24 days) Kshs.19,400
  3. Accumulated Leave days (51 days) Kshs.16,995
  4. Accumulated public holidays, rest and off days
  5. (26 days Kshs.42,033
  6. Service charge Kshs.8,708
  7. Compensation for unfair termination  
(two [2] months) Kshs.48,500
- Total Award Kshs.159,866**

68. Since the Claimant is not recognised by the Advocates Remuneration Order but incurred expenses in this matter, the Court has determined that **Kshs.40,000/=** is reasonable.

69. Interest at court rates from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF NOVEMBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**