REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 846 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION...................................CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED...RESPONDENT

JUDGMENT

The Claimant is a trade union representing employees in the banking industry. The Respondent is a commercial bank registered under the Banking Act and has employed the Claimant's members.

The Grievants who were members of the claimant union were engaged by the Respondent on various dates as clerical officers, technical and subordinate staff. In 2013, the Respondent introduced a system of performance targets, performance improvement plans (PIP) and performance reviews. The Grievants were terminated on 30th April 2014 on account of poor performance.

Following the terminations, the Claimant instituted this claim by filing its Memorandum of Claim on 21st May 2014. The same was amended on 31st July 2015 and the Amended Memorandum filed on 1st August 2017 wherein the Claimant seeks the following reliefs-

a. That the Court do issue an order compelling the Respondents to stop the already envisaged arbitrary and unlawful terminations of the unionisable employees until the Claimant is fully involved in the introduction and implementation of theperformance improvement plans and performance reviews – 2013 into the parties CBA through the Joint Negotiating Council (JNC) process as required by the parties' recognition agreement.

b. That the Court should find and declare that the action of the Respondents of putting unionisable employees on PIP. Performance reviews – 2013 and exit notices is unfair, unlawful and therefore null and void.

c. That the Court do find and declare that the introduction of such PIP and performance reviews are a nullity since the introduction was not in tandem with the acceptable machinery of reviewing the parties' agreement as outlined in the recognition agreement, the CBA and the law until the reported trade disputes to the cabinet secretary are heard and determined.

d. That the Court do find and declare that the terminations of the twenty-five (20) (sic) employees as listed herein above were unfair, unlawful and invalid.

e. That the Court do order for reinstatements of all twenty (20) employees as listed hereinabove back to work in their former positions in the Respondents without any loss of employment benefits or seniority in service in the alternative and without prejudice to No. ix and x above.

f. That one months' salary in lieu of notice for each of the twenty (20) Grievants.

g. That payment in lieu of leave days balance by the time of termination.

h. That the Court do order for a compensation of twelve (12) months gross salaries to each of the twenty (20) employees for having suffered unfair and unlawful loss of employment.

i. That the Court do order for the payment of the salaries and allowances that the twenty (20) employees have lost as a result of

unfair and unlawful loss of employment, damages for opportunities and career lost.

j. That the computations of the terminal benefits as compensation for the unfair/unlawful termination of employment as an alternative if the Court declines to grant the Grievants' claim for reinstatement and or re-engagement are herein attached and marked "K".

k. That the Court do order for any other reliefs that the court may deem justifiable to grant.

l. That the Court to award costs in favour of the Grievants as foresaid.

The Claimant's Case

The Claimant avers that due process was not followed in terminating the grievants' employment and neither did the Respondent follow the laid down procedure in the parties' recognition agreement, before introducing the performance management system.

It is averred that the offence of "gross misconduct" is not amongst the disciplinary offences captured in clause A5 of the parties CBA regarding misconduct or serious neglect which may lead to dismissals or termination. It is further averred that the grievants were not subjected to a disciplinary hearing as required by section 41 of the Employment Act and that the reasons for termination were not valid thereby making the whole process unlawful.

The Claimant avers that on 29th October 2013, the Respondent re-aligned the roles of some of the grievants amongst them Esther Koskei Rono, and assigned them clerical duties from subordinate staff to business banking consultant and then to customer service enquiries executives on 7th April 2014 without salary reviews or any employment benefits.

It is averred that the Respondent relied on clause 4.7.2 of the Performance Management Policy to terminate the Claimant's employment on account of unacceptable performance on their end of year performance reviews.

The Claimant avers that the grievants' properties are at a danger of being repossessed on account of the loans they owe the Respondent and which they have been unable to service regularly as a result of unemployment. It is the claimant's position that such action is premature because of the nature of the prayers sought that might reinstate the grievants' employment thus prejudicing them.

The Claimant avers that the performance improvement plan was not an impetus to the rest of the employees since those who were termed non-performers were denied bonuses, promotions, merit awards and staff loans.

FAITH HELLEN AKINYI ONYIMBO, testified on the grievants' behalf as CW1. It was her testimony that she had worked for the Respondent for 2½ years. She stated that her employment was terminated on account of poor performance because she received a rating of 1. It was her evidence that she had no set targets for loans but that they were to do 500,000,000 loans a month, 7 accounts per week, and 3 credit cards a month. It was her position that this was not achievable. She stated that she was not taken for any training on sales.

It was her evidence that PIP was not a tool for punishment tool and was to be agreed upon. That it was included in their improvement targets. She stated that she did not participate in the target setting and was instead told what was expected of her. It was her testimony that she had performed well. She stated that there was no clause in the CBA that dealt with PIP.

She denied having any knowledge of ratings, having discussions with her supervisor over her performance or being put on a PIP.

During cross examination, she stated that she became aware of the performance management policy after she had left employment. She admitted that her targets were communicated during a training and confirmed that she was aware that she was supposed to meet the same. However, she contended that she was not aware that the targets would be used to evaluate her. She denied participating in the evaluation evidenced in the bundle of documented annexed to the Respondent's Replying Affidavit. It was her evidence that the recommendation for the conciliation was that evaluation was the employer's role.

She conceded that she received a cheque for payment of 1 months' notice pay, leave pay and that she was paid full salary for the month of May 2014 yet she had only worked for 6 days. On the claim for salary arrears under the CBA on account of salary increment, she stated that it related to persons in employment whereas she was unemployed. She conceded that she had been out of employment for more than 3 years.

Upon re-examination, it was her testimony that Mr. Ngugi, the Head of National Sales had informed them that the PIP was not supposed to lead to loss of employment.

JOSEPH KAMAU MWANGI testified as CW2. It was his testimony that he was confirmed in employment on 14th May 1981. He received his termination letter on 16th May 2014. At the time of termination, he was earning a salary of Kshs.94,807.00 and had served the Respondent for 33 years. He denied being issued with any targets, being appraised or discussing his performance with his manager. He also denied being issued with a notice to show cause or being invited for a hearing. It was his testimony that he was surviving by doing casual jobs. He stated that he would settle for 12 months' compensation if there was to be no reinstatement.

During cross examination, it was his testimony that he was not paid performance bonus. He stated that when he made enquiries at the Human Resource concerning his termination, he was told to appeal. He stated that he was paid his full salary for May 2014 and some for June.

Upon re-examination he clarified that he appealed against his termination before reporting to the union.

TITUS ONGERI MATOKE testified as CW3. It was his testimony that he was confirmed in employment on 24th August 2009. He stated that his employment was terminated on 30th April 2014 and that by that time he had served the Respondent for 5 years. At the time of termination, he was earning a salary of Kshs.89,475.00. He stated that he was rated at 2 but denied having knowledge that his performance was under review. He also denied being put on PIP or that he had been informed that his work was poor.

It was his testimony that he never received any warning letters or notice to show cause and neither was he invited to a disciplinary hearing on account of his performance. He stated that he had been able to find alternative employment.

During cross examination, he stated that his letter of appointment indicated that he was subject to the general rules for staff in the bank. It was his testimony that he had indicated in his claim that his salary at the time of termination was Kshs.67,975.00 together with a house allowance of Kshs.11,000.00. It was his evidence that though he met with his supervisor daily to be assigned his roles for the day, they had never had a discussion about his roles. During his re-examination, he stated that the salary increase he got annually was as a result of CBA negotiations.

FAITH NELIMA MUSOKO testified as CW4. It was her testimony that she was employed on 1st November 2010 and her services terminated on 30th April 2014. She stated that she was deployed on 15th March 2013 to branch sales team but did not perform the duties stipulated in the letter. She requested to be reassigned to front office due to her health conditions. In 2013 she was assigned the job of personal banking consultant but communicated that she did not understand her new role. She avers that she still did sales until January 2014.

It was her testimony that she was appraised at one point and she met the performance standards. She denied being put on PIP or meeting her supervisor. She testified that she was appraised on sales, a job she had only served in for 3 months being November 2013 to January 2014.

It was her testimony that she was admitted on 6th February 2014 to 14th February 2014 and after her discharge she was on sick leave, a fact that the Respondent was aware of. She states that she was issued with her letter of termination on 5th May 2014 after a work meeting. The letter indicated that she had achieved a rating of 1. It was her testimony that she was not issued with any show cause letter or invited to a hearing. Further, that she appealed the termination on 8th May 2014 but the Respondent never responded. At the time of termination, she was earning a salary of Kshs.80,556.00.

During cross examination, it was her testimony that she was subject to the general rules, policies and procedures of the Respondent. She maintained that she was informed of the performance management process at the time of her termination. She stated that she took sick leave after her H2 review which was done when she was holding the position of sales. It was her evidence that her termination was based on the review done on the H2 period.

It was her testimony that during the time she was on sick leave her salary was paid by the Respondent. She admitted that she was paid her terminal dues of Kshs.23,835.60. She conceded that she was not an employee for the period she claimed salary arrears.

ESTHER KOSKEI RONO testified as CW5. She stated that she was employed on 21st May 1984 and served the Respondent until 30th April 2014 when her employment was terminated. Her role was reassigned to a customer service enquiries executive vide the letter of 14th April 2014. However, she did not do the work as there was another person already there. She continued making tea while selling bank services.

It was her testimony that she had been re-designated for 3 weeks and was given a rating of 2. She stated that she did not know what the rating meant and that she had never been assessed before. She admitted to signing the document at page 12 of the Respondent's list of documents, though she had been assisted to do it as she did not understand the contents.

During cross examination, it was her testimony that her salary was Kshs.80,000.00 which she was paid even after being re-designated. She admitted having discussions with her manager where she informed him that she never knew her work was to make tea as she was looking for customers. She testified that the money she was paid upon her termination was used to offset her debts.

Upon re-examination, she stated that she was not promoted from a tea girl as she never received a promotion letter.

FELIX JUMA ONYONI testified as CW6. It was his testimony that he was employed on 1st November 2010. He stated that a memo was issued in 2013 on performance restructuring. He admitted to signing his performance review contract. It was his testimony that he refused to sign performance targets for work he was not doing as he was not in the sales team. He denied being put on a performance plan.

It was his testimony that in October 2013, he received a letter informing him that he would be a personal banking consultant. However, he never moved from the sales team. It was his evidence that he was never issued with a notice to show cause prior to his termination. He stated that he had been unable to find alternative employment.

During cross examination, he admitted that his performance rating was 2. He further admitted that he went through the document and understood what it meant but contended that there was no discussion about sales performance. It was his testimony that he received his terminal dues. He conceded that his pay slip indicated that he was a personal banking consultant.

Upon re-examination, it was his testimony that he was paid salary up to 7th May 2014 when he received his termination letter. It was also his testimony that though he signed his job title as sales team in his performance appraisal, his job was a teller.

The Respondent's Case

In response to the claim, the Respondent filed its Memorandum of Reply on 6th December 2017. It is contended that the Performance Management Policy was put in place so as to promote and facilitate the attainment of the Respondent's objectives through effective management of the employee's performance. It is averred that the policy is applicable to all, except those employed as direct sales representatives or those on short term contracts.

The Respondent avers that during the performance review of 2013 employees whose performance was below the prescribed standard were identified and placed on a PIP. However, those whose ratings were unacceptable were dismissed on 30th April 2014. The Respondent further avers that the grievants voluntarily participated in the performance review process and that the grievants were aware of the existence of the policy document. However, none of the grievants improved in their performance thereby leaving the Respondent with no option but to issue them with letters of termination by dint of clause 4.7.2 of the policy.

It is the Respondent's position that due procedure was followed in the termination process. Further, that the PIP is participatory in nature hence the ratings were agreed upon by the employee and the supervisor. It is its contention that the re-alignment of roles constituted normal restructuring within the organization to ensure high quality and standardized services for its customers; and did not alter the grievants' terms and conditions of service.

It is contended that the contract for loan facilities is different from the employment contract. As such, the grievants were contractually bound to service their loans despite the termination of their employment.

The Respondent urged this court to dismiss this claim.

OBONG'O STEPHEN OPIYO testified as RW1. He stated that the relationship between the Respondent and its employees was governed by the CBA, the employment policies and regulations in force. He stated that the employees had been made aware of the performance management policy through section 4 of the Code of Conduct.

He testified that performance management was within the employer's management responsibilities. It was his testimony that where an employee fails to meet their target, the PIP support given. He testified that the Grievants were paid all their dues. that arrears arising from the CBA of 2014, 2015 and 2016 did not apply to them as they were not employees at the time of payment of the arrears.

During cross-examination, it was his evidence that where an employee's score is poor, they are put on PIP which takes anything from 3 months and could even take more than 6 months. He stated that the targets of an employee were based on their role. He conceded that he did not know the targets of Joseph Kamau hence could not confirm whether he was a driver. He also conceded to not having the targets of Matoke Kamau Mwangi, Jared Raburu, Faith Nelima and Kitau Mutu. It was his testimony that once CW4 was assigned a new role, she was supposed to be reviewed 6 months from 1st November 2013 which would have been May. However, he contended that the performance review of 2013 was for a full year and she was supposed to have been put on a PIP in January 2014 but did not have the PIP in Court.

It was his testimony that upon being re-assigned, CW5 was supposed to get new roles and new targets. However, he stated that he was unaware of whether she signed new targets in the new role. He admitted that once an employee's performance was deemed poor, the next step was termination. He conceded that the grievants ought to have been issued with a show cause letter and taken through a disciplinary hearing.

Upon re-examination, it was his evidence that an employee whose employment is terminated on poor performance could not be reinstated and that it was 5 years since the grievants' employment was terminated. He stated that the roles of CW4 and CW5 were the same though one was abbreviated. He contended that the PIP at page 16 of the Respondent's bundle of documents was evidence that CW1 was on PIP.

The Claimant's Submissions

In its submissions filed on 20th August 2019, the Claimant submits that the termination of the grievants employment was unlawful and unfair for violating the provisions of sections 41, 42, 43 and 45 of the Employment Act. The employees were not aware that their services were being terminated by 30th April 2014, there was no disciplinary hearing or the issuance of warning letters or notice to show cause.

The Claimant submits that some of the grievants who were terminated for poor performance like Ken Mutua, Titus Ongeri and Joseph Mwangi; were never taken through the performance management process. No evidence was adduced to prove that they had been taken through the process.

It is further submitted that some of the grievants like Faith Nelima and Martin Mutinda had a rating that met the performance standards yet their employment was terminated for poor performance.

Further, that the employment of Esther Rono was terminated on account of a poor performance in a position she had only held for 2 weeks. It is of the position that when the grievants' employment was realigned their performance management process was supposed to start afresh. The Claimant therefore submits that the Respondent did not have reasons to terminate the Claimant's employment.

The Claimant has relied on the cases of ***Anthony Njue John vs. National Bank of Kenya Limited*** **[2017] eKLR**, **Kenfreight (EA) Limited vs. Benson K. Nguti; Civil Appeal 31 of 2015** and **Naqvi Syed Qmar vs. Attorney General; Cause 346 of 2014** to support its case.

The Respondent's Submissions

The respondent submitted that the introduction of the performance management policy was in line with undertakings by both the Claimant

and the Respondent as contained in their Memorandum of Agreement of 4th October 2004. That the Claimant undertook not to interfere with the normal functions of management and the right to determine all matters connected to its business, by dint of clause 7(c). The Respondent therefore submits that performance management tools are a prerogative of the employer and which did not require the Claimant's interference. The Respondent relies on the case of ***Banking Insurance and Finance vs. Barclays Bank*** **[2016] eKLR** where the Court held that performance improvement plans were internal management prerogatives.

The Respondent submits that due procedure was followed in accordance to the CBA and the Respondent's policy while terminating the grievants' employment on grounds of poor performance. They were subjected to a performance review to enable them improve on their performance and they voluntarily participated in the process. They were aware of the importance of a performance improvement plan but still did not improve on their performance.

The Respondent relies on the case of ***Alphonce Machanga Mwanchanya vs. Operation 68 Limited*** **[2018] eKLR**, ***Liberata Njau Njioka vs. Magadi Soda Company Limited*** **[2011] eKLR** and ***Jane Samba Mukala vs. Oitukai Lodge Limited*** **[2010] LLR 225** where the court outlined the requirements that a termination on account of poor performance has to fulfil for it to be termed as fair. In light of the cited cases, the Respondent submits that the grievants were given ample time within which to improve their performance before their employment was terminated. It is submitted that the reasons for termination were valid hence the Respondent's actions do not fall under the definition of unfair termination.

The Respondent submits that the Grievants are not entitled to any damages or terminal dues as their employment was terminated on account of poor performance. It is further submitted that the grievants have not specifically pleaded or proved their case to warrant the damages sought. The Respondent further submits that the Grievants are not entitled to payment of salary in lieu of notice since it was paid to them.

The Respondent submits that the only compensation the grievants should be entitled to is 1 months' salary in lieu of notice which is reasonable and relies on the cases of ***Koki Muia vs. Samsung Electronics East Africa Limited*** **[2015] eKLR** and the Court of Appeal case of ***CMC Aviation vs. Captain Noor Mohamed*** **[2015] eKLR**. It is further submitted that the 12 months' compensation should only be awarded in exceptional circumstances and to deserving cases.

The Respondent submits that the grievants should not be awarded the payment of gross remuneration for the unserved period as they should not enjoy remuneration which they have not worked for. The respondent relied on the cases of ***Elizabeth Wakanyi Kibe vs. Telkom Kenya Limited*** **[2014] eKLR** and ***D.K. Njagi Marete vs. Teachers Service Commission*** **[2013] eKLR**.

On the claim for reinstatement, the Respondent submits that the Claimant has not indicated and proved the exceptional circumstances that would warrant the issuance of this order. The Respondent has cited the case of ***Parliamentary Service Commission vs. Christine Mwambua*** **[2018] eKLR** where the Court held that section 49 (4) of the Employment Act should be considered before granting the order to ensure the practicability of issuing such an order and that it is granted in very exceptional circumstances.

On the claim of accrued leave, the Respondent submits that the grievants were paid all their dues in accordance with the Employment Act and the CBA.

Determination

I have considered the pleadings filed by the parties, the evidence adduced before this Court and their written submissions and find that the following are the issues for determination-

a. Whether the Respondent ought to have involved the Claimant in the performance management process.

b. Whether termination of the grievants' employment on account of poor performance was lawful and fair.

c. Whether the Claimant is entitled to the reliefs sought.

From the outset it is important to clarify that this judgment is in respect of the grievants but with the exception of Phylis Nicole Okwiri, Peter Mutisya Musembi, Teresia Wairimu Karanja and Elizabeth Osicho Apwora who withdrew their claims herein having preferred individual claims against the respondent.

The Performance Management Process

It is the Claimant's case that it ought to have been involved in the process before the Respondent decided to terminate its employees for poor performance. On the other hand, the Respondent submits that management of the process is an employer's prerogative and ought not to be interfered with.

Under clause 7 (c) of the Memorandum of Agreement between the Claimant and the Kenya Bankers Association, at pages 1 to 16 of the Claimant's bundle of documents annexed to the claim, it was provided as follows-

> "*(c) The union on its part undertakes not to interfere with the normal functions of management which give the members of the association the sole right to conduct their businesses and manage their operations in such a manner as they shall think fit and to determine all other matters connected with their business.*"

Further clause 16 of the Agreement provides that the subjects set out in Appendix A shall be subject to negotiation. They are rates of pay and

overtime, lengths of leave and attendant conditions, hours of work, duration of individual contracts, principles of redundancy, uniforms and protective clothing, conditions in premises and medical schemes.

On the other hand, clause 17 provides that those set out in Appendix B shall not be subject to negotiation between the Association and the Claimant. They are social and sports activities, management methods, sickness benefits, pension and provident funds/gratuities.

As explained by the Respondent, performance management was introduced as a tool of measuring employee performance to enable the Respondent attain its objectives through effective management of their performance. This was introduced in the Respondent's policy which forms part of the terms and conditions that its employees must adhere to.

As such parties are agreed that as a management tool the Performance Appraisals, Review and Performance Improvement Plan are the prerogative of the employer and as agreed under the clause 17 of the Agreement, and forms part of the list of non-negotiable items. These were terms agreed upon way back in 2000 and the procedure to make any changes is well set out, which the Claimant has not addressed since. I find no merit to change what the parties have agreed as binding between themselves. As such, I find that the Respondent acted within its mandate under the Agreement to put its employees on a performance improvement plan. (See **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd & another [2016] eKLR**).

Termination

i. **Termination Procedure**

All the Claimant's witnesses examined at the trial, gave evidence that they had not been issued with any warning or show cause letters neither had they been subjected to a disciplinary process. Further, RW1 conceded to not knowing how the termination was commenced or whether they were accorded a hearing. He did not produce any documents to prove that the grievants had been taken through any disciplinary process.

This is a requirement of sections 41 and 44 (2) and 45 (1) of the Employment Act. The Respondent ought to have given the grievants an opportunity to present their case on account of their poor performance before they could terminate their services as is required by section 41 of the Act which was held to be a mandatory process in the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**. In light of the foregoing, I find that the termination was unprocedural hence unfair.

ii. **Reasons**

Section 43(1) of the Employment Act requires an employer to prove the reason(s) for the termination, and where they fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

The Court of Appeal in ***National Bank of Kenya vs. Anthony Njue John*** **[SUPRA]** held as follows on the issue of termination on account of poor performance-

"*The reason advanced by the Bank for terminating the respondent's employment was poor performance. In* ***Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)*** *(September, 2013) the court observed as follows;*

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to

address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

The grievants testified that they were never issued with warning letters or notice to show cause. Neither were they subjected to a disciplinary process on account of poor performance. The Respondent did not adduce evidence to controvert this position as this was also the evidence of RW1 on cross examination. As such, I find that the Respondent has failed to justify the reasons for terminating the grievants' employment as the reasons it avers were never tested through any disciplinary hearing. By dint of section 45 (2) (a), an employer must not only have a reason but the reason ought to be valid.

I therefore find the termination of the employment of the grievants unfair both procedurally and substantively.

Reliefs Sought

Prayers (a), (b) and (c) untenable. Further, the same have been overtaken by events.

I decline to find the termination of the grievants invalid as it would mean that the grievants would be entitled to reinstatement or re-engagement, yet more than 3 years have passed since their employment was terminated. Section 12 (3) (vii) gives this court the power to order reinstatement of an employee only within three years of dismissal. In the same breath, the claim for reinstatement of the grievants fails. However, I award all the grievants 12 months' termination for unfair and unlawful termination. In so doing I have taken into account the circumstances of the grievants as narrated to the court. They were put on performance improvement system that had been implemented in such a poor way that some were found not to have performed in positons they had not worked for even one month. All the grievants had not discussed targets with the respondent. Some of them had never taken up the positions against which they were assessed. And none of the grievants seemed to have been aware of the whole process of assessment as it was never introduced in a systematic manner. It is apparent from the evidence before the court that even the managers who were driving the process were not conversant with the same. It would appear as if the intention of the respondent was to reduce staff but rather than go by way of redundancy, it disguised the redundancy s a termination for poor performance.

In view of the fact that the grievants cannot be granted orders of reinstatement or re-engagement due to the lapse and changes that have taken place since their termination, and having found the termination of their employment unfair, I have further taken into account the callous manner in which the cases of these employees were handled. It would appear that the respondent with the intent of reducing staff, set out to use the performance appraisal system to achieve that objective. The system was thus abused to the detriment of the employees who were not at fault.

The payment of one month's salary in lieu of notice, payment in lieu of leave and the grievants' terminal dues fails. The RW1 testified that the grievants had been paid all their dues. This was admitted by the Claimant's witnesses. As such, the Claimant has failed to prove its case to warrant an award of these claims.

This Court shall not make a finding regarding the claims for arrears arising out of the salary increments from the CBA negotiations as the same was not prayed for in the amended memorandum of claim.

The claim for payment of salaries and allowances lost shall not be

awarded as the grievants cannot be awarded remuneration which they have not worked for. In this respect I rely on the decision of this court in similar matters including **Cause Number 611 [N] of 2009, Maina Kagai Ligaga v Coca Cola East and Central Africa Limited** and **D. K. Njagi Marete v Teachers Service Commission, Industrial Cause No. 379 of 2009.**

The costs of this suit are awarded to the Claimant, which I assess at Kshs.100,000 taking into account the November of grievants involved and the work and expenses that went into prosecution of the suit as well as the number of years it has taken from the date of filing to date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE