



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.132 OF 2015

[formerly Nairobi Cause No.2259 of 2014]

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS AND HOSPITAL WORKERSCLAIMANT**

VERSUS

COMBONI POLYTECHNIC..... RESPONDENT

JUDGEMENT

Issue in dispute – unlawful termination of employment on account of redundancy.

1. The claimant is a registered trade union under the provisions of Labour Relations Act, 2007 and representing employees in the domestic, hotels, educational institutions and hospitals. The respondent is an education institution registered under the Basic Education Act as Comboni Polytechnic under the Catholic Diocese of Nakuru.

2. The claimant has filed the claim for the grievants and seeking for judgement against the respondent for the payment of terminal dues following a redundancy;

- a. Notice pay;
- b. Severance pay;
- c. 12 months compensation for unfair termination of employment;
- d. Pay for annual leave not taken;
- e. House allowances from 2006 to 2009;
- f. Leave travelling allowance, 2006 to 2009;
- g. Underpayments from the year 2006 to date; and
- h. Costs.

Claim

3. The claimant made various amendments to the Memorandum of Claim and the substance of the case is that the grievants were all employed by the respondent on different dates, positions and continued in the service of the respondent until 31st December, 2014 where a redundancy was declared and they were laid off.

4. On 17th November, 2014 the respondent served the grievants with a letter dated 15th November, 2014 notifying them of the end of contract with effect from 31st December, 2014. Such notice was brought to the attention of the claimant who responded thereto vide letter dated 20th and 27th November, 2014 and requested for a meeting to discuss the same noting the CBA provisions and the law but the respondent

declined.

5. The claimant was forced to move the court and seek restraining orders. The court directed for a hearing of the main suit on priority.

6. The grievants had diligently served the respondent until the letter termination employment on a purported redundancy which was without reasons as required under section 43 and 45 of the Employment Act, 2007 (the Act). The reasons given were that the grievants' contracts were to end on 31st December, 2014 was not correct as such was only meant to defeat the cause of justice where the respondent had failed to address the CBA between the parties. This resulted in unfair labour practice and therefore the prayers made for the payment of notice, severance pay, compensation, untaken leave days, house allowances, leave travel allowances and underpayments resulting from the 2006 CBA arrears.

7. In evidence, the claimant called several witness.

8. Paul Monthe Matumo the 4th grievant testified that he was employed by the respondent as a mechanic and in the year 1983 became the head of department Mechanic and in the year 1995 he was issued with letter and job description as Mechanic and Storekeeping. In the year 1995 the grievant was confirmed in his employment with an upgrade and then got registered with the NSSF.

9. Mr Matumo also testified that he worked with all the grievants for the respondent as as shop steward. The grievants were issued with notice dated 15th November, 2014 where the respondent indicated that there was a redundancy and should sign new contracts. The employees wanted to know the fate of the previous contracts and the CBA.

10. Mr Matumo also testified that as a shop steward he had taken over from other officials of the claimant union who in the year 1995 and 2001 had commenced negotiations for a CBA and the payment of due salary arrears. Several meetings had been held and deductions effected but stopped. The then union officials were retrenched and the claimant lodged a dispute with the Minister and upon negotiations, there was no agreement. The claimant filed Nairobi **Cause No.24 of 2011** and where judgement was delivered on 17th October, 2012 directing the payment of salary arrears and the CBA be implemented. The respondent refused to implement the CBA and sought to consult with the Catholic Diocese of Nakuru who was disputing the CBA. On this basis the respondent started harassing the grievants.

11. Following the notices issued by the respondent on 15th November, 2014 the grievants who were pushing the respondent for the implementation of the CBA as directed by the court saw no need of signing new contracts as they were already in employment governed under a CBA. After the 31st December, 2014 the respondent only communicated with those who agreed and signed new contracts.

12. On 27th December, 2014 the human resource manager Mr Jimnah Kimani came to the respondent's premises and asked the employees to reapply for their positions but the grievants asked for the payment of their dues be paid before 31st December, 2014 to which Mr Kimani directed the grievants to address to the office.

13. Mr Matumo also testified that on 5th January, 2015 all the employees of the respondent assembled at the gate and wanted the human resource manager to make a clarification on the notice issued and the fate and payment of the salary arrears and terminal dues. there was nobody from the respondent to give answers.

14. The grievants opted not to attend work as the notice issued to them had lapsed on 31st December, 2014. New trainees had joined the respondent and only the director was in the office and who called the grievants one by one to sign the new contracts but the grievants refused.

15. Later the Board of Management held a meeting at the respondent's offices, they asked the claimant members to sign the contracts who refused to reapply for their positions or to sign new contracts until the owing dues were paid.

16. The respondent closed the meeting and left.

17. On 26th January, 2015 the respondent announced that the institution would close until further notice. On 20th February, 2015 the grievants were issued with eviction notices from the respondent residences for those with accommodation. The grievants complied and vacated. the allegations that there was rampage is not correct as new students had reported and were not being taught and when the notice to vacate the residences was issued the grievants complied and left. Where there was rampage and property destroyed is beyond the grievants' knowledge.

18. Mr Matumo also testified that some grievant paid union dues from the accounts office and some paid directly. Such payments were not consistent.

19. Cause No.160 of 2013 was filed by some grievants upon summary dismissal.

20. The CBA in issued under **Cause No.24 of 2012** was not registered.

21. The grievants were issued with accommodation and thus not paid a house allowance. The letter dated 15th November, 2014 invited the grievants to reapply for their positions which they refused to do by the close date of 31st December, 2014. Those who applied were taken and are still in employment with the respondent.

22. The claimant also called Philip Elim who testified that he is still in the employment of the respondent from the year 1993. He was issued with notice and letter dated 15th November, 2014 but did not reapply for his position but was called back to work to help secure and safeguard property as the watchman. He is in court to seek for the payment of his salary arrears from the year 2006.

23. The claimant also called David Kamichatha the 19th Grievant who testified that he was employed by the respondent as security guard in the year 1996 and was issued with notice dated 15th November, 2014 but decided not to sign the new contract or reapply for his position as salary arrears had not been paid. When all other employees left, only 3 security guards were left. The human resource manager called them and asked they remain to ensure security within the premises. On 11th March, 2015 the respondent alleged there was a break-in at the offices and the grievant was arrested and charged in court but later released on 31st November, 2016 for lack of evidence. He has not gone back to the respondent and is seeking payment of his dues.

Defence

24. In response, the respondent's case is that on the claims made are denied.

The letter dated 15th November, 2014 was not issued to Alfred Dimo Opiyo as he had previously been dismissed, Mary Nanguru was already deceased and Alexander Temesi Nabwaya was an intern. The other grievants were served with the letter notifying them that their contracts of employment would expire with effect from 31st December, 2014 and offered an option to reapply for renewal and while some grievants being Philip Elim Machesia, Richard Wachuli Makokha and Aggrey Eneyia Chegenye successfully reapplied and continued in employment, the others opted not to reapply and abscond duty. The resulting termination of employment was not due to a redundancy.

25. The defence is also that the alleged letters of the claimant dated 20th and 27th November, 2014 were not received and therefore could not attend at the proposed meeting. There is no proof of service.

26. All the employees including the grievants were issued with notice that their one (1) year contracts would lapse by 31st December, 2014 and were given sufficient time to reapply and sign new contracts. Termination of employment was lawful and procedural. Termination of employment was not due to the grievants membership with the claimant and despite not being members of any union; such was not the reason leading to the end of the one year contracts. There was lack of funds by the respondent.

27. The defence is also that there is no CBA which has been signed with the claimant and the Recognition Agreement attached to the claim is not binding to the respondent or where the grievants are concerned. The respondent had no knowledge that the grievants were members of the clamant.

28. The claim for severance pay is not available as none of the grievants was declared redundant. The offer to renew contract of employment was not taken and failure to reapply for employment ended the employment relationship.

29. All employees including the grievants went on annual leave for the months the respondent school was closed for holidays at the end of each term each year and hence not entitled to leave allowance.

30. Several grievants were housed by the respondent and thus not entitled to a house allowances. They include;

- a. Ann Achieng,
- b. Joseph Lokidor,
- c. Flora Wambui Mwangi,
- d. Martin Kingori Wangondu,
- e. Jackson Milaho Alluvisia,
- f. James Obiero,
- g. Susan Wangeci Mukinyo,
- h. Paul Monthe Matamu,
- i. Ancient Nthiwa Munyaka,
- j. John Kyalo Kimanzi,
- k. Peter Kamau Mwangi,
- l. Charles Rutere,

m. Francis Gachago, and

n. Titus Amusuma.

31. All others were paid a house allowance. The claim with regard to payment for a house allowances is not justified.

32. The defence is also that the respondent was willing to pay terminal dues to the employees who opted to renew contract but those who declined to renew failed to take the dues and instead filed suit. The claims made by each grievant are not justified. Dino Alfred Opiyo was paid his dues after he filed **Nairobi Cause No.2259 of 2014** and his claim(s) herein are *res judicata*.

33. The employees who reapplied and were retained by the respondent are;

a. Philip Elim Machesi,

b. Aggrey Eneyia Chengenye,

c. Vincent Omuse, and

d. David Kamichatha

34. These employees remained in the employment of the respondent save for David Kamichatha and Vincent Omuse who following gross negligence were later terminated in their employment with the respondent. Alexander Temesi was on internship and not an employee while James Mburu Mwai was in management and not a member of the claimant, and Mary Nanguru is deceased. She died before suit was filed and there is no capacity to file the claim for her estate.

35. The claimant had filed **Nakuru Cause No.160 of 2013(formerly Nairobi Cause No.1001 of 2010)** and which suit was dismissed and by raising similar claims herein is *res judicata* with regard to claims by Mary Ngaru and Alfred Dimo Opiyo.

36. The decree in **Nairobi Cause No.24 of 2011** is not applicable in this case to justify the claim for salary arrears over a CBA subject therein. The suit as it stands should be dismissed with costs.

37. In evidence the respondent called Fr. Bernard Nyaruiya, a Catholic Priest and Trustee of Catholic Diocese of Nakuru and who testified that the respondent is an entity under the Catholic Diocese of Nakuru and there is no CBA entered into with the claimant for the respondent. The CBA and Recognition Agreement produced in court by the claimant was not signed by the Catholic Diocese of Nakuru and the decree in **Nairobi Cause No.24 of 2011** was based on a decision that the church wanted to challenge on appeal but the subject file has been missing from the registry since.

38. There is no legal right for the respondent to enter into an agreement without the approval and consent of the Catholic Diocese of Nakuru. The CBA is not signed by the Arch Bishop or a person representing the Church. The Bishop Catholic Diocese of Eldoret is a different persona from the Catholic Diocese of Nakuru with different Certificates of incorporation.

39. The CBA attached to the Memorandum of Claim at page 15 is not signed by the respondent or the Catholic Diocese of Nakuru.

40. The respondent also called Jimnah Mwangi Kimani the human resource manager for the Catholic Diocese of Nakuru, the proprietor of the respondent and who testified that some of the grievants are former employees of the respondent and others are still employed by the respondent.

41. The grievants were in one year contracts with the respondent after being signed in the year 2008. In November, 2014 he held meetings with the employees and informed them about their contracts coming to an end and letters were issued to this effect. Some employees agreed to sign new contracts and were retained while others declined citing redundancy which was not the case. The respondent did not declare a redundancy.

42. Mr Kimani also testified that he held meetings with the employees on the computation of gratuity and upon payment, there was the option to renew contracts and continue in employment but some declined.

43. Alfred Opiyo Dimo is a former employee of the respondent who was dismissed in the year 2014. The claimant filed **Nakuru Cause No.160 of 2013** for him which claim was dismissed.

44. Several grievants retained by the respondent are Philip Elim, Richard Wechuli and David Muiga Kmichatha and Aggrey Chengenye who agreed and signed the contracts. Vincent Omuse and David Kamichetha later left employment for gross negligence. Alexander Temesi was an intern; Mary Nanguru was deceased while James Mburu had withdrawn his membership with the claimant.

45. The grievants were all given adequate notices from November, 2014 and noting there was no CBA between the parties the claim filed by the claimant should be dismissed.

46. Mr Kimani also testified that the employees who signed new contract remained at work and those who declined went on strike and refused to attend to work. The grievants would report to work and fail to teach. They would remain at the respondent's gate. The respondent noted it has various stakeholders particularly the students and those sponsored by the government who were not receiving classes. The

respondent got information that the students were being incited to go on the rampage which would have resulted into serious problems. A decision was taken to close down the institution.

47. Following the illegal strike by the respondent employees, there was a break-in at the offices and the grievants' files were stolen. The respondent decided to evict all the grievants from their allocated residences as they were no longer in employment. Some employees were arrested and charged in court. upon arrest, none came back to work.

48. The respondent computed gratuity payable to the grievants which is favourable and above the minimum agreed but they declined to accept.

49. Peter Waiganjo Muthee testified that he is an employee of the respondent as a Driver and in November, 2014 he was issued with letter and notice that his contract was coming to an end and he filed his application for a new contract. The respondent later held meetings with the employees with regard to the notice and the need to sign new contracts. Some declined and other applied for new contracts. He was unionised until the year 2013 when he resigned.

50. Both parties filed written submissions.

51. The claimant submits that the grievants were its members who paid dues directly or through the respondent. some had intermittent contributions as a result.

52. The claimant entered into a Recognition Agreement with the respondent through Specified Churches and Institutions signed on behalf of the Catholic Dioceses by the Kenya Catholic Secretariat following negotiations. The parties have several CBAs as a result of recognition.

53. The grievants were employed by the respondent, they paid union dues but some withdrew membership from 1st January, 2005 as evidenced by letter of James Mburu Mwaura the 14th grievant.

54. On 31st July, 2007 the respondent issued 15 employees with contract of one year and expiring on 31st July, 2008.

55. On 15th November, 2014 the respondent served all the grievants with letters for renewal of contract depending on continuity and availability of funds. The respondent acted contrary to court order issued in Nairobi Case No.24 of 2011 where the respondent was ordered to implement the CBA for the period of the years 2006 to 2009 and which required termination notices be issued to employees based on years of service.

56. The claimant also submits that the grievants were terminated in their employment following a redundancy and Clause 19 of the CBA was contravened when no severance pay was paid in accordance with the same.

57. The claimant has relied on the cases of **KUDHEIHA Workers versus St. Michael Boarding Primary School, Cause No.382 of 2010, and KUDHEIHA Workers versus Comboni Polytechnic Cause No.24 of 2011** and **KUDHEIHA Workers versus Egerton University Cause No.208 of 2013**

58. The respondent submits that the claims as framed by the claimant for the grievants cannot issue noting the orders sought seeking reinstatement and following issuance of notices ending contracts and the refusal to sign new contract. Claims by Dimo Alfred opiyo is spent under a different Cause and his case in *res judicata* while Mary Nanguru died before the year 2014 and there is no capacity to file the claim on behalf of the deceased. Alexander Temesi Nabwaya was not issued with notice dated 15th November, 2014 as he was an intern and not an employee.

59. Upon notice dated 15th November, 2014 the grievants failed to sign new contract save for Mr Machesia, Makokha and Chegenye who returned to work and was willing to pay terminal dues to the grievants who opted out as a sign of good faith but they declined to accept the payments.

60. The employees were on one year contracts which lapsed and upon notice. The respondent had housed several employees and those not with such benefits were paid a house allowance.

61. The respondent also submits that under the provisions of section 48 of the Labour Relations Act employees who are unionised have the liberty to pay union dues as a condition of membership and upon remittance of such dues section 50(7) of the Act requires the union to acknowledge receipt of such payments. In this case the claimant members in the employment of the respondent had intermittent remittances with others resigning, opting out and by the year 2005 such membership had depleted. The engagement of the claimant to issue demand notices to the respondent dated 20th and 27th November, 2014 was challenged as such letters were not acknowledged as issued and in any event the member representative within the employees was not proved.

62. Based on notices issued to the grievants dated 15th November, 2014 the respondent notified all that contracts would end as at 31st December, 2014. Such was not as a result of a redundancy but a lawful end to employment.

63. The respondent also submits that all grievants took their annual leave within the school calendar terms which provides for 3 months leave as an educational institution. None of the grievants had pending leave up to and until the 31st December, 2014.

64. The respondent also submits that judgement in **Cause No.24 of 2011** cannot be enforced in the instant case. Such matter is independent and separate from the cause herein. Execution of the subject decree must be within the matter it was issued under.

65. The claims made for underpayment, leave travelling allowances, house allowance are not justified and are time barred in terms of section 90 of the Employment Act as held in **Fred Mudave Gogo versus G4S Security Service (K) Ltd Cause No.846 of 2013, Beatrice Kahai Adagala versus The Postal Corporation of Kenya Civil Appeal No.28 of 2014**. Where these claims are premised on a decree issued in the year 2006 and the matter herein was filed 3 years after such became due, by operation of the law such claims are time barred.

66. Notice pay is not due as such notice was issued and served by the grievants.

The notice dated 15th November, 2014 is not contested as having been issued and received by the grievants who produced it as part of their pleadings.

67. Where the contracts of the grievants were not renewed, they reverted to one month contracts and termination notice issued in accordance with the law as held in **Kenya Plantation and Agricultural Workers union versus Fontana Limited Cause No.429 of 2013** and in **Grace Wangui Munyaka versus Nyeri Baptist High School Cause No.29 f 2013**.

Following the various amendments to the pleadings by the parties, the evidence and submissions, the issues which emerge for the court determination can be summarised as follows;

Whether there is a valid CBA regulating the parties in their relations;

Whether there was a redundancy within the respondent and if there was whether it was procedural and if not whether the grievants were unfairly terminated in their employment;

Whether there is a case of violation of rights; and

Whether the remedies sought are due.

68. The unionisation of the grievants came into question noting the intermittent payment of union dues and the admission by the claimant's witnesses that such dues were paid directly or through the office.

69. Whereas every employee has a constitutional right to unionise pursuant to the provisions of Article 41 of the Constitution, 2010 such rights are actualised under the Labour Relations Act, 2007 which provide the modalities for joining a trade union, the payment of union dues and regulation of membership.

70. In this regard, section 48 (1) of the Act which regulates membership of an employee into a trade union provides as follows; *48 (1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.*

71. Further to joining a trade union, the subject union is required under section 48(2) to notify the employer with the following details;

2. A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—

a. deduct trade union dues from the wages of its members; and

b. pay monies so deducted—

i. into a specified account of the trade union; or

ii. in specified proportions into specified accounts of a trade union and a federation of trade unions.

72. Where the grievants were unionised as employees of the respondent, the legal capacity of the respondent to engage with the claimant now challenged, the duty was on the claimant to show that upon their exercise of the rights to recruit members under section 48(1), they went ahead and obtained the Minister Order(s) directing the respondent to deduct and pay union dues from its members in their employment. Where employees opted to pay directly and some through the office, such being intermittent, the right to organise and union secured, the operative law requires more. The trade union must ensure that upon the recruitment of sufficient number of members from a particular employer, an order is issued for the deduction and remittance of trade union dues to ensure the smooth flow of payments and industrial relations.

73. Taking into account matters now submitted and which were subject to Nairobi **Cause No.24 of 2011**, the court shall address the second issue save to add, without the recognition of the claimant by the respondent, and there being no requirement by the respondent to deduct and remit union dues the intervention vide letters dated 20th and 27th November, 2014 seeking to engage the respondent with regard to notice issued and dated 15th November, 2014 is lost. Despite the subject notices being challenged that they were not received by the respondent, without recognition of the claimant by the respondent, to engage in a matter where work relations were not within an agreement with the

claimant was not necessary.

74. The suit thus filed by the claimant for and on behalf of its members against the respondent as the employer, without proof of unionisation, membership or continued membership, this creates a legal hurdle. As these are matters which ought to have been addressed instantly but there is now progress to this stage, the court shall address the substantive issues between the parties.

75. What is the import of **Nairobi Cause No.24 of 2011 - KUDHEIHA versus Comboni Polytechnic** herein?

76. The court directed the respondent to implement the CBA. The court made such directions upon a finding that the respondent was bound by the CBA.

77. The respondent has contested these findings and orders on the grounds that they wanted to file appeal but did not do so as the subject file got lost or cannot be traced at the registry. That as it may, there are valid orders of the court and there is no appeal challenging the same. However, the decree therefrom, cannot be enforced or executed through a different Cause or as herein.

79. Where the respondent has failed to abide the orders under Nairobi Cause No.24 of 2011, it is under such Cause where the claimant must address and ensure the full implementation of the CBA. Filing a new suit and seeking to execute orders from therein and separate the issues to only cover the Clause with regard to termination of employment will not achieve the desired result(s). where Clause 16 of the impugned CBA sets out the notice period for the various category of employees, the implementation of such provisions must be under the subject suit for the respondent to comply.

79. Fundamentally, a CBA is only enforceable under the provisions of section 59(5) of the Labour Relations Act, 2007 as follows;

5. A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

80. Upon negotiations, agreement and consensus, the CBA must be registered with the court to take effect and to have the legal force for enforcement and implementation. Where the process of implementation is sanctioned by the court following a dispute, the motions of registration of the CBA with the court are mandatory as held in **Said Ndege versus Steel Makers Ltd [2014] eKLR** as follows;

..... Section 59(5) of the Labour Relations Act is explicit that a collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court, but effective from the date agreed by the parties. Section 60 of the Act places a primary obligation upon the employer to submit the collective agreement within fourteen days of conclusion to the Industrial Court for registration. *If the employer fails to submit the collective agreement for registration, the trade union is given the leeway to submit it to the Court for registration.*

81. It follows therefore, without the registration of the subject CBA with the Court, its term and import cannot be applied, cited or sought to be enforced as herein. Whatever the outcome of **Cause No.24 of 2011** is, such should follow the process of the law under section 59 of the Labour Relations Act, 2007.

82. Where the subject CBA under Nairobi Cause No.24 of 2011 was registered with the Court, the claimant did not address the same herein. The filed CBA at page 15. of the memorandum of Claim filed on 8th December, 2014 is not signed for the respondent, the Catholic Diocese of Nakuru as under schedule 'area B' at page 41 or by the K.C.S. as represented by Fr. Vincent Wambugu as Secretary General. Such material lapse(s) and in view of section 59 of the Labour Relations Act, cited above renders the applicable of the CBA impossible.

83. Putting the above into account, it is common cause that some grievants were in the year 2007 issued with one year term contracts. Such related to;

- a. James aluvusia
- b. Haron Njuguna Mwangi;
- c. Moses Thuku Nyambura;
- d. Martin Kingori Wangondu;
- e. John Kyalo Kimanzi;
- f. Joseph Lokidor;
- g. Hellene Wannjiru Waititu;
- h. Samuel Michira Mburu;
- i. Susan Wangechi Mukinyo;
- j. Emmanuel Otieno Odeny;

- k. John Kikaba Muniu;
- l. Margaret Kabura Nyaga;
- m. Jackson Milaho Aluvisia;
- n. Richard Wchuli Makokha; and
- o. Titus Amutsama.

84. Upon the lapse of such contracts, there is no evidence of renewal but employment did not terminate. The employee continued in the service of the respondent until the letters and notices dated 5th November, 2014.

85. As correctly pointed out by the Court in Nakuru Cause No.160 of 2013 - Kenya **Union Of Domestic, Hotels, Educational Institutions, Hospitals And Allied Workers versus Comboni Polytechnic [2014] eKLR**, and the employment contracts were issued by the respondent under the name *Comboni Polytechnic, Catholic Diocese of Nakuru*. Where the grievants remained under the direction and management of the respondent and payment statements issued under the name of the respondent, and without any challenge to the existence of an employment relationship, the grievants were covered under the Employment Act, 2007.

86. The grievants above noted to have term contracts upon lapse they remained in employment. The grievants without contracts or whose contracts had no term limit, were all subject to the provisions of section 35 of the Employment Act, 2007 with regard to termination of employment.

87. By notice dated 15th November, 2014 the respondent notified all its employees that all contract would lapse and all had to reapply and sign new contracts. Such notice assessed by the court on its import and implications, taking the term contracts had lapsed and all employees as at such date fell under the protection of the Employment Act, 2007 the notice was valid and lawful.

88. The respondent also complied with the requirements of section 35(3) of the Act and which requires that;

- 3. If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

89. Both parties confirmed, the human resource manager Mr Kimani held meetings with the employees to explain the notice dated 14th November, 2014. Those who agreed to reapply and sign new contracts were retained and those who opted not to reapply or sign new contracts of employment were offered payment of terminal dues including gratuity but declined. Mr Matamu testified that following a meeting held with the human resource manager, they were not satisfied with the terminal dues offered and opted not to sign the new contracts as the respondent had refused and failed to address the issue of wage arrears from the 2006 CBA. The dues offered failed to take into account the arrears resulting from the years 2006 to 2009. The grievants therefore could not apply for the positions held or agree to sign new contract.

90. The offer to end the contract and reapply for positions held as a management prerogative is legitimate. Without written contracts subsisting for the employees, the respondent as the employer was under a duty pursuant to section 10 (1) and (3) of the Employment Act, 2007 to ensure the issuance of written contracts to its employees.

91. The notice issued did not relate to a redundancy. A notice ending contract and inviting application for the same positions does not fall under the meaning of section 40. of the Employment Act, 2007.

92. The court finds no rights violation to justify the claim for reinstatement, compensation or the payment of any damages.

93. On the remedies sought, written notice having issued and the same being found lawful such is not due in payment. On the finding that this was not a case of redundancy, the claim for a severance pay is lost.

94. On the claim for leave pay, the claimant had defined the respondent as an educational institution registered as such. It is common cause that such institutions enjoy term holidays for staff and students with the employees taking the same on full pay. The term holidays are well structured in academic calendars with an allowance of a break in up to three (3) sessions unlike any other sector of work in the country. to claim for annual leave pay outside of such calendar and having taken the leave days due would be to seek unjust enrichment.

The leave allowance claimed arising from the year 2006 to date is premised on the CBA covering the period from the year 2006. Included in this regard are claims for house allowance and underpayments from the subject CBA covering the year 2006 to 2009. As correctly submitted by the respondents, the suit herein having commenced at Nairobi under Cause No.2259 of 2014 filed on 8th December, 2014 the claims premised on arrears due and owing from the years 2006 to 2009 addressed under section 90 of the Employment Act, 2007 are time barred. Under such legal provisions, the court is denied the power and discretion to extend time as held in **Maria Machocho versus Total (K) Cause No. 2 of 2012** and in the case of *in Josephat Ndirangu versus Henkel Chemicals (EA) Limited, [2013] eKLR*, where the court held that;

- ... the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of **Sections 27 and 28** of the Limitation of Actions Act.

95. Even where the grievants seek to claim leave allowance, house allowances and underpayments, as set out above, upon taking academic term holidays, the grievants were on full pay to facilitate their travel and taking of leave. By the evidence of Mr Matamu he confirmed the claimants were housed by the respondent and vacated such premises in February, 2015 way after employment had terminated and the respondent has submitted payment statement for employees not housed having been paid a house allowance. All the claimed underpayments being subject to CBA covering period of 2006 to 2006 are overtaken in time.

96. Before conclusion, the claims filed for Dimo Alfred Opiyo is indeed *res judicata* on the face of **Kenya Union Of Domestic, Hotels, Educational Institutions, Hospitals And Allied Workers versus Comboni Polytechnic [2014] eKLR** cited above. His summary dismissal was addressed by the court way before the notice dated 15th November, 2014 and where the claimant found it necessary to seek for wage arrears under CBA covering the years 2006 to 2009, such matters ought to have been addressed under such Cause and to include him herein on such claims is a bad practice.

97. Similarly the claim with regard to Mary Nanguru who is confirmed to have died before the year 2014 and there are no letters giving the claimant the requisite capacity to sue on her behalf is in bad practice.

98. The submission by the respondent that Alexander Temesi Nabwaya was not issued with notice dated 15th November, 2014 as he was an intern and not an employee is not challenged. This evidence is therefore correct.

99. The claimant ought to have conceded to the claims made therefrom and in the amendments to the claims removed these grievants. This was not the case.

100. The offer by the respondent to pay the grievants their terminal dues and a generous gratuity has since been declined. Where such dues were available as at 31st December, 2014 and remain unpaid as at this date, in view of time and application of section 90 of the Employment Act, 2007 they are lost in time unless the respondent is magnanimous.

101. As some grievants are still in the employment of the respondent, to sanction in costs would put them into hardship. However the claimant ought to meet reasonable costs for the respondent in view of findings above. Such costs should not arise from the grievants whose case has been urged by the claimant.

Accordingly the claimant's case is found without merit and is hereby dismissed. Costs to the respondent and assessed at Ksh.50,000.00.

Delivered at Nakuru this 7th day of February, 2019.

M. MBARU

JUDGE

In the presence of: