



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 3 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

JAMES FINLAYS (K) LIMITED.....RESPONDENT

JUDGEMENT

This matter is brought to court vide an Amended Memorandum of Claim dated 16th February, 2018. The issue in dispute is cited as;

Unlawful, illegal and unfair dismissal of 7 employees

The respondent in an Amended Memorandum of Defence amended on 25th May, 2018 denies the claim and prays that this be dismissed with costs.

The claimant's case is that she has a valid recognition agreement and Collective Bargaining Agreement with the respondent.

The claimant's further case is that on diverse dates between 10th February, 1998 and 15th August, 2011 the respondent employed the seven grievants and assigned them different tasks within its employ and in different estates. This is as follows;

4A. *The 7 employees are;*

a) *Jackson Mitai*

b) *Victor K. Langat*

c) *Elvis Chepkwony*

d) *Moses Moiben Simotwo*

e) *Felix Bii*

f) *Ismael Rono*

g) *Monica Juma*

The claimant's further case is that the grievants were not issued with copies of contracts of employment and at the time of dismissal worked at Simotwet estate. Their duties entailed mechanical tea harvesting.

The claimant's other case is that the grievants reported to work as usual and awaited their supervisor to inform them of the changes in regard to daily task and rate of payment. The supervisor arrived at 7.30 hours and sought to know why they had not started working. They explained that they had heard from their colleagues in other working estates that the daily task had gone up while the daily rate had gone

down. The supervisor admitted this but informed them that formal communication on the issue would be made before 15th June, 2014.

On 15th June, 2014, a Sunday no information had been furnished and on 16th June they reported to work but before they could start, they raised the issue with the general manager who was thereabout and he informed them that such decisions were made at the highest level management and he could not comment on the same.

The claimant's other case is outlined by other features as follows;

- Despite the responds and commentary by the group manager, the workers went on with their duties until the close of the day.
- On 17th June, 2014, the workers reported on duty and proceeded to work. After weighing their first pluck, they requested to be addressed on the issue of daily task and rate. When this was not forthcoming they stopped work to await clarification on the issues as raised.
- On this, the respondent called the police who dispersed the workers and also arrested the above six employees: all the grievants with exception of Monica Juma.
- On 18th June, 2014, officials of the claimant visited the grievants in custody and bailed them out. They were informed that the grievants had been arrested for creating disturbance.
- Upon release, the security officers of the respondent picked them up at around 1130 hours and escorted them to Simtoret estate offices where they were issued with show cause letters dated 17th June, 2014. These required them to show cause as to why disciplinary actions should not be taken against them for participating in work disrupting activities. Answers were to be submitted by 1400 hours on the same day. They were also invited to disciplinary hearing on 19th June, 2014 at 800 hours.
- This disciplinary hearing involved 32 employees but at the close of the day 26 employees were issued with warning letters and six were summarily dismissed.

The claimant's case of Monica Juma Aye who was deployed at Kaproret estate is as follows;

- On 30th May, 2014 she reported to work as usual and was informed that her duties had been changed and was instructed to report to the team leaders Sarah who issued her with sheers, plucking devices and instructed to start work. The employees informed Sarah that she did not know how to operate the device. The employees also wanted to know the rate payable for the new development but Sarah would not answer her and ordered that she continues with work and walked away.
- The employees continued hand plucking tea for four days between 30th May, 2014 to 4th June 2014. At the end of the month she found that she had paid Kshs.5.00 for each kilogramme plucked instead of the usual Kshs.11.64 stipulated by the Collective Bargaining Agreement.
- On 5th June, 2014, as she continued her work, Sarah ordered her to stop working until the Assistant Manager arrived. As she waited, other employees were alerted on weighing their tea pluck but hers was refused.
- She waited endlessly to the close of business, her tea pluck unattended. The other employees left her behind.
- On 6th June, 2014 everybody reported to work but proceeded to the manager's office to seek explanation as to why her tea was not weighed. The manager ordered her to go back to her house and await communication.
- On 6th June, 2014 at around 1330 hours, the shop steward at the estate informed the employee of the manager's directions that their tea be taken care of but nobody was at the weigh station to attend to them. She called the leaf clerk to come and weigh their tea but was informed that he was already through with the days work. She was left with no option but to go back to her house.
- On 7th June, 2014 the employees reported to work and proceeded to hand pluck tea. She poured her previous days pluck on to a bag in order to start a fresh but at around 730 hours, she was ordered out of the area.
- At weighing time, the other employees attempted to sort her tea but the team leader rebuffed them and ordered that it be put back into her plucking basket. She further informed them that she had ceased to be an employee of Kaproret estate and that he was not aware that she had been plucking tea.
- On 9th June, 2014, she was escorted to work by the respondent's security and on arrival marked present and directed to pour all green leaf she had plucked the previous day. As she left to undertake her plucking duties the estate assistant enquired from her why she had declined to pluck tea using sheers. She answered that she was ready to work but only required to know the rate of pay.
- The estate manager did not answer on rates but directed the employees to return the sheers to the store under tight security. On the following day, 10th June, 2014, she reported to work and started but was again ordered out of the work station. She did a letter the following day enquiring on rates of pay but this was not answered.
- On 11th June, 2014, she was summoned to the manager's office and issued with a letter directing her to report to work on 12th June, 2014 and carry out work as directed. She did report as directed but was ordered out of the work station and issued with show

cause letters with directions that this be answered by 1500 hours on the same day. The employees replied in one letter explaining the eventualities of 11th instant.

· On 13th June, 2014, she reported to work but Sarah the team leader declined to assign her duties on grounds that she was awaiting instructions from the manager. She proceeded to the manager's office where she was issued with a letter of summary dismissal.

· On 13th June, 2014, this letter was submitted to the claimant's branch officer who did an appeal but the following day, she was issued with a letter ordering her out of the company quarters. This was despite the fact that she had not exhausted the dispute resolutions mechanisms under the Collective Bargaining Agreement. The matter was not resolvable even on conciliation.

It is the claimant's penultimate case that the termination of the grievants employment was due to their questioning of a violation of the CBA that enshrined the terms of service and therefore the dismissal was unlawful, illegal, unfair, malicious and in bad faith. These employees were within their rights to enquire on the daily task and rate of payment as this had been introduced by the respondent without consultation whatsoever. The unilateral imposition of these rates was against the CBA as set out.

The claimant prays for judgement against the respondent for the following;

a) A declaration that the dismissals of the 7 Grievants herein is unfair, unlawful, untenable, unconscionable and illegal.

b) An order compelling the Respondent to reinstate the 7 Grievants herein without loss of benefits.

c) An order compelling the Respondent to pay the 7 Grievants herein their salaries and/or wages, leave allowance and any other entitlement since the date of dismissal to the date of reinstatement or if prayer (a) fails;

The respondent's case is a denial of the claim. She avers as follows;

i) The employees in flagrant disregard of the CBA and applicable provisions of the law refused to perform their allocated tasks as instructed and unlawfully absented themselves from work. As such, the employees behavior constituted gross misconduct and their summary dismissal warranted and justified.

ii) The Memorandum of Claim is a misrepresentation of the facts and the contents thereof are misleading and calculated to deceive this Honourable Court.

iii) The employees dismissals were carried out in accordance with the applicable provisions of the law and the Collective Bargaining Agreement (hereinafter "CBA")

iv) This cause is brought in bad faith and the Claimant's claims in these proceedings are false and fraudulent.

v) The Claimant is not entitled to the order sought herein.

The respondent's case further comes out as follows;

i) On 14th and 15th June, 2014, the Respondent was made aware of some anonymous leaflets that were circulated on its company farms advising employees not to go to work on 16th June. In the leaflets, the employees were warned that if they disobeyed the instructions not to go to work, their heads would be chopped off. In view of this, the Respondent had to deploy more security personnel in its various work stations to provide security to the employees and also to guard its company property. See Appendix 6 for a copy of the said leaflets

ii) Sometime before 16th June 2014, the employees at Simotwet Estate were informed that there would be a change of their duties and were allotted tasks by the Respondent's Management. This was in line with their employment contracts which provided for the alteration of their duties from time to time at the discretion of the Respondent's management.

iii) On 6th June 2014, the Management of Simotwet Tea Estate allocated MTH tasks to 60 operators.

iv) At about 11:00am on the same day, the employees left their work stations without completing their tasks and without permission from the Respondent's management or their supervisor.

v) On 17th June 2014, the employees reported to work but left their work stations early without completing their assigned tasks and without permission from the Respondent's management. Some of the employees went to different work stations within the Estate and disrupted the other employees who were performing their duties. The Respondents security personnel together with Kenya Police arrested 6 employees namely Jackson Mutai, Victor K. Langat, Elvis Chepkwony, Felix Bii, Ismael Rono and Mose Moiben Simotwo within Chemasingi Estate. See Appendix 7 for a copy of the Assistant Estate Manager's report.

vi) The Respondent thereafter prepared individual Notice to show cause letters for each of the 6 employees to show cause why they should not be dismissed from employment for gross misconduct. The employees failed to submit any response. See Appendix 7 for a copy of show cause letter.

vii) On 19th June 2014, a disciplinary meeting was held. Each of the affected employees attended the meeting with their witnesses/shop stewards and each was given a hearing. See Appendix 7 for a copy of the invitation letter to the disciplinary meeting.

viii) After listening to the reasons given by each of the affected employees and considering their responses, a decision was made by the Respondent to dismiss the employees from employment as per the provisions of clause 25 of the current Collective Bargaining Agreement (CBA) and as per their terms and conditions for service. Apart from leaving work without permission and not completing/performing allotted tasks to the satisfaction of management, there was sufficient evidence that the above employees participated in disrupting other employees while performing their duties at their work stations within the Respondent's other tea estates. See Appendix 8 for a copy of the dismissal letters.

ix) On 20th June 2014, the Claimant Union and the Respondent to discuss the dismissal of the 6 employees. No agreement was reached between the parties during this meeting. See Appendix 9 for a copy of the said letter

x) On 26th June 2014, a meeting was held between the Claimant Union and the Respondent to discuss the dismissal of the 6 employees. No agreement was reached between the parties during this meeting. See Appendix 10 for a copy of the Attendance List and the Disagreement Form

xi) Following this, the Respondent Company instructed the affected employees to vacate the company houses as per Clause 17 of the current CBA.

The respondent further denies the serialization of events at Kaproret estate and instead offers the following as the true version;

11. Paragraph 7 to 7.14 of the Memorandum of Claim are denied. The sequence of events at Kaproret Estate are as follows;

i) On 29th and 30th May 2014, the management of Kaproret Tea Estate made a decision to allocate SP work to forty one employees including Monica Juma. This was in line with their employment contracts which provided for the alteration of their duties from time to time at the discretion of the Respondent's management. See Appendix 11 for copies of letters dated 29th May 2014 from the Assistant Estate Manager to the Kaproret Estate Supervisor notifying her of the job allocations.

ii) The employees whose work and task had been changed reported to their work stations and performed their allotted tasks as per the Respondent's management instructions except 12 employees including the above named Monica Auma Ayuge.

iii) On 5th June 2014, the 12 employees reported to work but refused to perform their allotted tasks. Further, the employees disobeyed the work instructions of the supervisor on duty on this day.

iv) Following this incident, the Estate Management took steps to explain the terms and conditions of service to these employees and the consequences of any indiscipline on their part. Subsequent to this, 1 employee reported back to work and performed his allotted tasks as per the Respondent's management instructions.

v) On 6th June 2014, at around 7.30 am, the remaining 11 employees including Monica Auma went to the Respondent's Estate Manager's Office claiming to have been refused to work by their supervisor. After listening to their grievances, the Estate Manager instructed the supervisor on phone to allow the 11 employees to work despite having failed to obey the Respondent's instructions and absconding duty on 5th June 2014.

vi) On 7th June 2014, the Respondent's Estate Manager requested one of the Estate Shop stewards, Mr. Ongweno, in writing to advise the 11 employees to report on duty and perform their allotted work without fail as agreed on 6th June 2014. Again on this day, the employees disobeyed the Respondent's management instructions and left their work stations. See Appendix 12 for a copy of the said letter.

vii) On 9th June 2014, the management again instructed the employees to resume work but they refused. Efforts by one of the Estate Shop stewards, Mr. Ogweno, to convince the employees to resume work failed. On the same day, the Estate Manager received a letter from the Claimant Union Branch Office dated 7th June 2014 through which the Branch Secretary alleged that the 11 employees had not been assigned duties from 5th June 2014 to 7th June 2014. See Appendix 13 for a copy of the letter dated 7th June 2014

viii) On 10th June 2014, the 11 employees reported to work but refused to pluck tea as per their work arrangement and instruction of their Supervisor. Instead, these employees left their work place and decided to seek audience with the Estate Manager. After listening to them, in the presence of Mr. Ogweno, the Manager advised the employees to return to their work stations and perform their allotted tasks as per their Supervisor's instructions. The employees did not give convincing reasons for not obeying the Respondent's management instructions. See Appendix 14 for a copy of the minutes of the meeting held between the shop stewards and the Respondent's management.

ix) On 11th June 2014, a meeting was held between the Estate Management and the Shop stewards. After lengthy discussions, the Estate Manager agreed to allow the affected employees to report to work on 12th June 2014. The Estate Manager wrote to the Branch Secretary through letter dated 11th June 2014 to confirm this agreement. See Appendix 15 for a copy of the Respondent's letters dated 11th June 2014 and addressed to employees and the Branch Secretary of

Kericho/Bomet County.

x) On 12th June, 2014, the 11 employees again refused to perform the allotted work as the Respondent's management instructions. As a consequence of their behavior, these employees were issued with letters instructing them to show cause why they should not be dismissed from employment for gross misconduct. See Appendix 16 for copies of the show cause letters.

xi) On 13th June 2014, a disciplinary meeting was held and each employee including Monica Auma was given an opportunity to be heard in the presence of their Witnesses/Shop stewards. After considering their responses, the 11 employees were dismissed from employment as per the provisions of clause 25 of the current Collective Bargaining Agreement (CBA) and as per their terms and conditions of service. See Appendix 17 for copies of the dismissal letters.

xii) On 13th June 2014, the Claimant Union through a letter appealed against the dismissal of the 11 employees. Following this appeal, the Respondent's Management agreed to meet the Claimant Union to discuss the matter. See Appendix 18 for a copy of the said letter

xiii) On 23rd June 2014, a meeting was held between the Claimant Union and the Respondent to discuss the dismissal of the 11 employees. No agreement was reached between the parties during this meeting. See Appendix 18 for a copy of the Attendance List and the Disagreement Form

xiv) Following this, the Respondent Company instructed the affected employees to vacate the company houses as per Clause 17 of the current CBA.

This matter came to court variously until the 29th May, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the 7 grievants was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the 7 grievants was wrongful, unfair and unlawful. The claimant in her written submissions dated 4th June, 2018 reiterates her case as pleaded and expressed and further seeks to rely on section 10 (5) of the Employment Act, 2007 which provides as follows;

“Where any matter stipulated in subsection (1) [the employment contract]

*changes, the employer shall, **in consultation with the employee**, revise the contract to reflect the change and notify the employee of the change in writing.”*

This is further amplified in the authority of **Elizabeth Kwamboka Khaemba versus Bog Cardinal Otunga High School Mosoch & 2 Others [2014] eKLR** as relied on by the claimant where Wasilwa, J. observed as follows;

*“The key position is that the employer cannot alter employee's employment contract without **consulting** the employee. The working of the section is couched in mandatory terms, an indication that **the employer cannot unilaterally revise the contract unless there is consultation**. In the current case there was no consultation and the decision to change the duties and position of the claimant was made in shrouded, in malice as an extension of the “**disciplinary**” process instigated against the claimant.*

The end result of changing the Claimant's contract without consultation with her is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination;” (bold/emphasis the claimant's.)

In the case of Monica Juma, a grievant, the claimant submits that she was on raising her grievance on terms of service issued with a show cause letter with mere hours to respond: 1000 hours to 1500 hours. This was inadequate and unreasonable.

On this, the claimant submits that the grievant was not afforded sufficient time to prepare for her defence. Indeed, the disciplinary proceedings managed by the respondent were a sham and did not meet the statutory requirements on process. In this she sought to rely on the authority of **Rebecca Ann Maina and 2 Others versus Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the court rendered itself as follows;

*“In order for an employee to respond to allegations made against them, the charges must be clear and the **employee must be afforded sufficient time to prepare their defence**. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence.”*

A similar pattern also applies to the dismissal cases of the other 6 grievants.

The claimant submits as follows on the case of Monica Juma;

48. *The Claimant further submits that she was never accorded a disciplinary hearing by the Respondent and that none was alluded to in the show cause letter dated 12th June, 2014 which was in direct violation of the mandatory provisions of section 41(3) of the Employment Act which provides that:*

Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

It is her case that this was not the case and therefore the futility of the purported disciplinary proceedings in the instant case.

The claimant further seeks to buttress her case by relying on the authority of **Kepha Thuo Magua versus Board of Governors Satima Secondary School [2013] eKLR** where the court observed thus;

“The evidence on record shows that the claimant raised genuine grievances about the unilateral and adverse changes in his terms of service. The court holds that such genuine complaints were valid and could not constitute a valid reason for termination as provided in section 46 (h) of the Act. The section entitled the Claimant to initiate the complaints about his terms that were changed to his disadvantage and without any agreement between the parties. The court holds that the Government circular entitling the Respondent to determine the salaries of its staff did not thereby entitle the respondent to contravene section 10(5) of the Act which provides that changes in terms and conditions of service be effected in a consultative process between the parties to a contract of employment. The court finds that section 41 of the Act entitled the Claimant to a hearing in presence of a person of his choice including a union representative and the denial of that opportunity by the Respondent rendered the procedure defective.”

The claimant in the penultimate seeks the courts reliance on section 45 (5) of the Employment Act, 2007 in establishing a case of unlawful termination of employment. This provides as follows;

45 (5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-*

(a) *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

(d) *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

(e) *the existence of any previous warning letters issued to the employee.*

On this test, a case of unlawful termination of employment naturally ensues.

The respondent in her written submissions dated 12th June, 2018 submits that this court is precluded from making a determination on this cause by the doctrine of the estoppel. On this, she relies on the authority of **Manfred Walter Schmitt & Another vs A.G & Other [2014] eKLR**

*“I proceeded to discharge the warrants issued. The result of those proceedings and decision is that issue whether there was a violation of the petitioner’s right to privacy was conclusively determined in that case and cannot be re-opened or re-litigated in these proceedings as it is barred by the doctrine of issue estoppel. In **Trade Bank Ltd v LZ Engineering Construction Ltd [2001] EA 266, 272**, the Court of Appeal, adopting the definition of issue estoppel in **Halsbury’s Laws of England (4th Ed.) at p. 861**, state that, ‘An estoppel which has come to be known as an issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are stopped, is one of fact or one of law, or one of mixed fact and law.’ The decision on review is therefore conclusive on the validity of the warrants issued by the subordinate court. it is now beyond contest, at least in the circumstances of this case (see also **Daniel Toroitich arap Moi v Mwangi Stephen Muriithi and Another CA Civil Appeal No. 240 of 2011 [2014]eKLR**).”*

It is the respondent’s submission that this court having made determinations on previous matters relating to the subject matter is now precluded from making a contrary judicial determination on this one. She cites various other matters decided by this court as follows;

- Alice Kemunto Manyura v James Finlays (K) Limited [2016] eKLR
- James Makhkha Omukul v James Finlays (K) Ltd [2017] eKLR

The respondent further submits a case of substantive fairness in respect to termination of the grievants and also submits compliance with section 44 (4) (a) (c) and (e) of the Employment Act, 2007 which are also in tandem with clause 25 of the Collective Bargaining Agreement. This is as follows;

44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- (b) ...*
- (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- (d) ..*
- (e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

I do not agree with the respondent's submission on estoppels. This is an abuse of terminology to unfairly gain mileage on this matter. It is trite law and experience that no two matters are all alike in fact and substance. This court has on numerous occasions been called upon to hear and determine matters between the parties herein. More often than not, the prosecution of the matters is intense and animated. This is sad and unfortunate. Courts do not adopt a personal route in a determination of disputes set before them. It is not expected that we get involved and indulged in the emotions of litigation whatsoever. The expectation is that courts would at all times make determinations based on the merits of each case.

The cases cited by the respondent in submission may bear similarities with this cause but this would not debar this court from hearing and determining the matter on its merits. Moreover, such defence should have come out as early in these proceedings as a preliminary objection. This would have opened the matter to an early scrutiny for substance and possible discontinuation on a point of preliminary objection. This was not the case. The submission as expressed is suspicious. It is devoid of merit and should be thrown out of the window in readiness for other potent issues in dispute.

Overall, this matter tilts in favour of the claimant. She has demonstrated a case of termination of employment for the wrong reasons. This termination was a clear violation of sections 41 (1) and (2), 43, 44 and 45 of the Employment Act, 2007. It was devoid of substantive and procedural requirements in a case of lawful termination of employment.

The grievants were dismissed for urgitating and making a claimer for information on their terms of service: daily task and rate of pay in a situation that these had been changed by the respondent without the involvement of the workers or their union. What was wrong with this? This is a clear case of wrongful, unfair and unlawful termination of employment and I hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment she becomes entitled to the relief sought.

This matter offers a side issue for determination. This is because the pleadings by the claimant do not disclose monthly emoluments which this court would apply in a computation of relief sought. Our previous practice has been to leave the matter open: not involved in a computation of the relief sought on the basis of the absence of pleaded monthly salary of the claimant or like in the present case, the grievants. This must now change. It has so far aggravated injustice to litigants who succeed in their cases but suffer the default of not having provided their monthly or other periodic emoluments in their pleadings.

In this departure I wish to invoke the provisions of section 10 of the Employment Act, 2007 which burdens the employer to provide the particulars of the contract of service. Section 10 (2) (h) and (i) further support a case of particulars of remuneration as follows;

- h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*
- i) the intervals at which the remuneration is paid; and*
- j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*
- k) any other prescribed matter.*

In this constitutional dispensation, it would be all unfair to penalize a litigant on the basis of data that may not be in its possession. Article 22 (3) (b) of the Constitution of Kenya, 2010 provides for absence of formality in proceedings touching on the enforcement of the bill of rights as follows;

22 (3) The chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that –

a) ...

b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

The constitution comes in to alleviate the suffering and consequential injustices of past legal process where courts were sticklers of formality and procedure. This is now a thing of the past and has been overtaken by the societal quest for justice as expressed in our transformative constitution and dispensation. This shift is therefore inevitable and welcome in employment and labour relations.

I am therefore inclined to allow the claim and award relief as follows;

i. A declaration be and is hereby issued that the termination of the employment of the grievants by the respondents was unfair, unlawful, untenable, unconscionable and illegal.

ii. One (1) months salary in lieu of notice...

iii. 12 months compensation for unlawful termination of employment...

iv. The Commissioner of labour be and is hereby ordered to, with the involvement of the parties, compute relief in (i) and (ii) above and file report to this court within 120 days.

v. Mention on 31st October, 2018 for a report on computation.

vi. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 29th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ashubwe instructed by Eshiwani Ashubwe & Company Advocates for the claimant.
2. Mrs. Wetende instructed by Kaplan & Stratton Advocates for the respondent.