



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.323 OF 2011

MARY NJAMBI MARIRA

VERONICA THONI KIHANGU

DAVID MBUGUA CACHUMI

SERAH NYAMBURA MBUGUA

JERUSHA WANJIRU MUNGAI

JOSEPH RUCHATHI KIMANICLAIMANTS

VERSUS

KIAMBU UNITY FINANCE CO-OPERATIVE UNION LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful termination of employment of the Claimants and the non-payment of terminal benefits.

Claim

2. The Claimant were all employed on diverse dates by the respondent, a limited liability company and were placed at various positions at its co-operative at unity Finance Co-operative Union Limited at Kiambu. The matters between the Claimants and the Respondent commenced at the High Court when the Claimants in 2005 and 2006 moved the Court as the Respondent sought to recover loan arrears the Claimants were owing at the time of their termination. The Claimant asked the Court to secure their properties bought on loan facilities secured through employment with the respondent. Parties recorded consents so as to have the labour issues separated and be addressed by this court. The claims herein are not *res judicata* and the Respondent has not counter-claimed for anything due from the claimants. The Claimants served for diverse number of years;

1st Claimant 19 years;

2nd Claimant 19 years;

3rd Claimant 11 years;

4th Claimant 12 years;

5th Claimant 18 years; and

6th Claimant 12 years.

3. The claim is that the Claimants were declared redundant and were not issued with any notice, it led to their termination which was unfair and without payment of terminal benefits.

The 1st Claimant is seeking the payment of;

Salary arrears Kshs.5, 966.00

Payment in lieu of leave of 48 days Kshs.57, 270.00

Leave allowance at 40% x 35,840.00 Kshs.14, 336.00

Terminal benefit at 35,840 x 19 years Kshs.680, 960.00

Pay in lieu of notice at 3 months Kshs.107, 520.00

Responsibility allowance at 2,500 x 9 months Kshs.22, 500.00

Entertainment allowance at 3,000 x 9 months Kshs.27, 000.00

Reduced house allowance at 15% x 35,840 x 9 months Kshs.48, 384.00

Total Kshs.963, 936.00

Lees paid Kshs.85, 000.00

Dues Kshs. 878,936.00

2nd claimant:

Salary arrears Kshs.5, 966.00

Payment in lieu of leave of 48 days Kshs.57, 270.00

Leave allowance at 40% x 35,840.00 Kshs.14, 336.00

Terminal benefit at 35,840 x 19 years Kshs.896, 960.00^[1]

Pay in lieu of notice at 3 months Kshs.107, 520.00

Responsibility allowance at 2,500 x 9 months Kshs.22, 500.00

Entertainment allowance at 3,000 x 9 months Kshs.27, 000.00

Reduced house allowance at 15% x 35,840 x 9 months Kshs.48, 384.00

Total Kshs.1, 178,976.00

Less paid Kshs.107,000.00

Due Kshs. 1,061,976.00.

4. On 7th July 2015, the Claimant made amendment to the 2nd claimant's claims. Service pay was amended to reflect 25 years and not 19 years as set out above.

3rd claimant

Terminal benefits at 28,000 x 11 years Kshs.308, 000.00

Responsibility allowance 2,500 x 9 months Kshs.22, 500.00

Entertainment allowance 3,000 x 9 months Kshs.27, 000.00

Reduced house allowance 15% x 28,000 x 9 months Kshs.37, 800.00

Total Kshs.395, 800.00

4th claimant

Terminal benefits 25,000 x 12 years Kshs.300, 000.00

Responsibility allowance 2,500 x 9 months Kshs.22, 500.00

Entertainment allowance 3,000 x 9 months Kshs.27, 000.00

Reduced house allowance 15% x 25,000 x 9 months kshs.33, 750.00

Total Kshs.383, 253.00

5th claimant

Terminal benefit 22,794 x 18 years Kshs.410, 292.00

Notice pay 3 months x 22,794 Kshs.68, 382.00

Reduced house allowance 15% x 22,794 x 9 months Kshs.30, 771.90

Total Kshs.509, 44.90

6th claimant

Terminal benefits 28,115 x 12 years Kshs.337, 380.00

Notice pay 3 months x 2,000 x 9 months Kshs.84, 345.00[2]

Responsibility allowance 2,500 x 9 months Kshs.22, 500.00

Reduced house allowance 15% x 28,115 x 9 months Kshs.37, 995.00

Total Kshs.509, 445.90.

5. The 1st Claimant testified on behalf of all the claimants, but each was called to confirm their specific claims. The 1st Claimant therefore gave evidence that her last position with the Respondent was the Branch Manager, Kiambu Branch. She had served for 19 years until 5th May 2006 when she was terminated without notice or hearing. She was not called to answer to any charges and when she asked the Banking Manager for reasons for the termination, he said that the Respondent management had made a

decision to terminate her services. In defence the Respondent has submitted a memo dated 3rd March 2006 but this memo was never given to the Claimant. The memo is not signed and does not set out the reasons for termination.

6. The Claimant also testified that before her termination she had approved a loan of Kshs.500,000.00 for a customer who wanted to buy a motor vehicle and the log book was kept as security. The loan was approved before the security was given. That she had no authority to give a loan without the approval of the Banking Manager, John Gathogo. Such a process required that there be an agreement between the client and the respondent, register with the bank Manager and Kenya Revenue Authority (KRA). The log book would then be retained by the Banking Manager. The Claimant followed all the procedures and the client got a loan for 3 years which was being repaid without default.

7. Upon termination, the Claimant was paid for 3 months as notice pay at kshs.85,000.00. There was a Provident Fund and all due savings were paid at kshs.674,747.00. The Claimant is seeking 5% of her fund contribution and issuing the 5% contribution by the respondent. Her evidence was that she was not paid for unfair termination. Severance pay was not paid. Benefits dues;

25% house allowance was reduced and a balance of 15% is owing;

Responsibility allowance was wrongly reduced;

48 days leave not paid;

1 year due payable at 40% not paid;

Certificate of service; and

Compensation for 12 months.

8. The Claimant also testified that she first filed her claim before the High Court to secure her property as she had a loan with the Respondent and had expected that the loan would be offset through her terminal dues. She has since paid the loan in full. She has since greatly suffered due to her termination and been unable to take her children to school hence affecting them. She was seeking compensation.

Defence

9. The Respondent admit that they had employed the Claimant save that the claim on redundancy is not explicit as the claims are a mix of issues on owing dues and unlawful termination. The Respondent challenge the claim for unfair termination as they had a right to terminate in accordance with terms and conditions of service and therefore the 1st to the 4th Claimants were terminated with the compliance of set terms while the 5th and 6th Claimants were summarily dismissed for gross misconduct as per their terms and conditions of service. The Respondent has fully paid terminal benefits that were due and nothing is owing.

10. The defence is also that the suit was filed in wrong in law as it amounts to abuse of Court process as the Claimants filed **HCCC No's 2353 of 2007; 2354 of 2007; and 428 of 2009** which are still pending. The Claimant cannot invoke the jurisdiction of the High Court and this Court simultaneously and the suit should be struck out. Jurisdiction is challenged.

11. The defence is also that the Claimants were not diligent in their duties. The 1st Claimant was terminated from employment due to gross violation of banks policy; gross negligence and lack of integrity;

2nd Claimant was terminated due to gross negligence and losses caused to the respondent;

3rd Claimant was terminated due to negligence in discharging his duties of ensuring that the Respondent did not lose its money through fraud;

4th Claimant was terminated due to negligence in performing her duties as a result of which the Wangigi Branch of the Respondent where she was the auditor lost funds through fraud;

The 5th Claimant was summarily dismissed due to involvement in fraudulent bank transactions which facilitated theft of Kshs.165, 000.00; and

The 6th Claimant was summarily dismissed due to involvement in a fraudulent banking transaction which facilitated the theft of kshs.165, 000.00.

12. The termination of claimants' employment was due to breach of terms and conditions of employment, they were given notice or payment in lieu of such notice or summary dismissal. They were paid their terminal dues;

1st Claimant was paid Kshs.47, 378.55 in full settlement;

2nd Claimant was paid Kshs.58, 643.90 in full settlement;

3rd Claimant was paid Kshs.97, 462.00;

4th Claimant was paid kshs.69, 658.00 in terminal dues and kshs.285, 888.35 for provident fund; and

6th Claimant was paid 421,515.95 in full settlement.

13. The Claimants were not entitled to any allowances as claimed and nothing is due or owing from the respondent. The suit should be dismissed with costs.

14. In evidence, the Respondent witness was **Lydia Kamau** the Human Resource Manager. She joined the Respondent in 2011 and was appointed on 5th May 2015 as human resource manager and thus rely on the filed records as she did not work with the claimants.

15. Ms Kamau testified that the Respondent had a manual for all employees setting the Terms and Conditions of service for management staff. The manual made provisions for summary dismissal at clause 26. Clause 27 was on redundancy. All the Claimants were procedurally terminated and their terminal dues settled in full.

16. The 1st Claimant was terminated for giving loans without following set procedures which resulted in negligence. This was a case for summary dismissal but the Respondent reduced it to normal termination and paid for notice. The Claimant was paid dues;

5 days salary;

Leave pay

3 months' notice pay; and

Her contribution to the provident fund.

17. The Respondent withheld its contributions to the provident fund until the Claimant is 50 years old and in accordance with Retirement Benefits Authority Act and the rules. The Claimant has since filing suit attained the requisite age and has been paid.

The 2nd, 3rd and 4th Claimants were terminated due to negligence and her terminal dues were settled in full;

The 5th and 6th Claimants were summarily dismissed due to fraud. Kshs.165, 000.00 was lost at Kikuyu branch of the Respondent due to the misconduct of the claimants.

The claim for severance pay is regulated at clause 27 of the policy manual in cases of redundancy. Such is paid at 30 days for each year worked but this was not a case of redundancy.

House allowance is covered at clause 12 of the policy manual at 40% basic pay and was taken into account in the payment of terminal benefits.

18. In cross-examination the witness testified that clause 12 of the policy manual address house allowance which was to be paid at 40% of basic salary. This was not factored in the terminal dues. There is no record of the 25% being paid but there is nothing due at 15%. Upon termination, the Claimants are not entitled to 15% as all dues have since been paid. In the termination letter, the reasons for termination are not stated and there was no show cause issued to the claimants. The Claimants had a 1st warning before termination.

19. Ms Kamau also testified that memo dated 8th December 2005 relate to the 3rd Claimant but it was not copied to him as the communication was between the human resource manager and the General Manager. The Claimant was alleged to have diverted his loan contrary to the purpose for which he had applied for it in the loan agreement. The loan was unsecured and despite being requested by the Branch Manager to give collateral, he did not do so. That that was a serious breach of loan terms and an indication of dishonesty. After an audit the Respondent discovered that the Claimant had 2 loans that were diverted, one went to pay Nairobi Bottlers and when the Claimant was asked to explain, he was found to be dishonest.

20. That the 4th Claimant while at Wangige branch of the Respondent engaged in fraud but the termination letter does not set out the reasons for termination. No show cause letter/notice was issued.

21. The 5th Claimant committed fraud of Kshs.165, 000.00 while at Kikuyu branch of the Respondent and the 6th Claimant was also dismissed on similar grounds. Both letters of termination relate to the same amount, same branch and on similar dates – same transaction. There were however no criminal charges made against the claimants. The Respondent management committee was supposed to seat and approve any dismissal but there is no record filed by the Respondent in this case.

22. The 3rd Claimant was paid all dues. Responsibility allowances was put into account in the final dues. He was on Job Group 11 with kshs.2, 000.00 allowance and on KSHS.16, 000.00 entertainment allowance.

23. The 1st Claimant was paid all her dues set out in the terminal dues.

24. The 5th Claimant was summarily dismissed had was not entitled to notice pay or any benefits. Her case related to fraud. Similar reasons were applied on the 6th Claimant but there is no evidence of any collation in the alleged fraud.

Submissions

25. The Claimant submit that the termination of the Claimants was unfair as no show cause notices were issued and are therefore entitled to the remedies set out in the memorandum of claim. The Respondent should also pay costs.

26. The claims for the 2nd Claimant were amended, but the submissions restate the same without

taking the amendment into account.

27. The Claimants have relied on the following cases – **Lawrence Oduori versus KBC, Cause No.1592 of 2010; Grace Muriithi versus Kenya Literature Bureau [2012] eKLR; Bernard Obora & others versus Coca Cola Juices Kenya limited, cause No.758 of 2014.**

28. The Respondent also submit that upon the employment of the claimants, they were also subject to the Terms and Conditions of Service for Management Staff covering 3 years from 1st July 2003 to 30th June 2006. The Claimants were terminated on diverse dates; 1st to 4th Claimants on 5th may 2006; and 5th and 6th Claimants were terminated on 27th January 2006 through summary dismissal arising from fraudulent activities.

29. The Respondent submit that the suit is not properly filed as similar suits were filed before the High Court and this Court lack jurisdiction. That even where such jurisdiction exist, the claim does not meet the requirements of section 90 of the Employment Act.

30. The Claimants were not declared redundant and such claims should not arise.

31. That Under section 17 of Cap 226 (now repealed) the same allowed summary dismissal where an employee was reasonably suspected to have committed acts that are detrimental to the employer's property.

32. The Respondent also submit that none of the Claimants testified in support of their claims and the documents produced by the Respondent are evidence enough that the terminations or dismissal were lawful and in accordance with the policy manual and the applicable law. Section 108 of the Evidence Act place the burden of proof on the party relying on such evidence to produce it. The Claimants have failed in this regard.

33. That the Claimants were all paid their terminal dues and nothing is owing. The Respondent has relied on the following cases – **Alex Bundi versus Kakuzi Limited, HCCC No.195 of 2003; Rift Valley Textiles Ltd versus Edward Onyango Ogada, Civil Appeal No.27 of 1992 (Nakuru).**

Determination

I have considered the pleadings, the evidence in its entirety and all the issues raised in submission and the cited cases. The issues that arise for determination;

Whether the suit is res judicata and if not whether it offends section 90 of the Employment Act;

What is the applicable law; and

Whether the Claimants are entitled to the reliefs claimed.

34. The Claimants admit that there were **HCCC No's 2353 of 2007; 2354 of 2007; and 428 of 2009** filed before the **High Court** but have since been resolved in a consent order. Such order was not produced. However the Respondent has also noted that there was **Cause No.402 (N) of 2009, Mary Njuambi Marira & 5 Others versus Kiambu unity Finance Co-operative Union Limited**. The parties are similar and a replica herein. The issue in dispute of *unlawful termination of employment of the Claimants by the Respondent and refusal to pay them their terminal benefits*. The remedies are also replicated as herein. The cause herein was filed on 10th March 2011 while cause No.402 (N) of 2009 dated 29th July 2009 but there is no Court stamp to indicate if such a document was formally filed with the court... This record was submitted by the respondent. I take it they were served by the Claimants so as to have knowledge of it. However, on 14th September 2009 the Registrar of the Court wrote to the Respondent advocates and noted that;

... Cause No.402(N) of 2009 relate to other parties and that the Claimants had attempted to file suit but was rejected by the Court as it had not complied with the applicable law and the cause of action arose before the new law came into effect. The claim had been inadvertently stamped and given a cause number which was consequently cancelled but some copies were not presented for such cancellation and were served upon the respondent.

35. The Registrar of the Court is the custodian of all records. As absurd as the letter to the Respondent is, which letter is not copied to the Claimants who initiated the suit, if indeed the Claimants filed the claim, such claim was found to have been inadvertently filed and cancelled, and then I find no reason why the Respondent got served with the same. Where the Registrar of the Court recalled the pleadings for his cancellation, such was for the Claimant to submit to facilitate the cancellation. Service upon the Respondent can only result in the objections herein raised. Where out there exists clear records of Cause No.402(N) of 2009, the same has a valid Court stamp and not cancelled or summited for the Registrar to act, then indeed such suit exists filed by the Claimants against the respondent. To file another suit such as herein without moving to address the previous suit filed and served upon the respondent, fail to withdraw it formally, such is double application forbidden in law as that is multiplicity of suit. Where the Claimants are aggrieved by the actions of the Registrar under Cause No.402 (N) of 2009, the remedy was not to file a new Cause, rather it was to address the same to its legal conclusion.

36. On 7th April 2011 the Claimants replied to the defence and addressed the issues with regard to matters filed before the High Court. Nothing is said about **Cause No.402 (N) of 2009**.

37. Noting the above, parties have since proceeded without addressing this crucial aspect of jurisdiction. Upon the Respondent noting the facts above, such should have been the first issue to address. This Court being a Court of justice and directed to apply equity, the issues set out shall be addressed noting the letter of the Registrar directing parties that there no long exists **cause 402(N) of 2009** between the parties, such suit was cancelled and the numbers allocated re-allocated to other patties, the Respondent had not entered appearance or filed any defence in that cause. The claim herein will be addressed in their merits.

38. I have also looked at pleadings with regard to **HCCC No's 2353 of 2007; 2354 of 2007; and 428 of 2009**. Such related to loan repayment and security deposited as land titles. Such do not relate to the claims herein even where the parties may be similar as each Claimant had filed their own suit.

39. The application of section 90 of the Employment Act will be addressed together with the question as to the applicable law in this case that shall resolve the question of jurisdiction, application of section 90 of the Employment Act and the law the Court shall apply in assessing the claims set out.

40. The 1st to the 4th Claimants were terminated vide notices dated 5th May 2006. This is not contested. Equally the 5th and 6th Claimants were summarily dismissed vide notices dated 27th January 2006. The cause of action therefore arose from the termination of employment. The applicable law as at 27th January 2006 and 5th May 2006 was the Employment Act, Cap 226 (repealed). Under the Act, filing of claims on termination of employment were regulated in statute under the law of contract and the Limitation of Actions Act. Such claims should have been filed in Court within 6 years from the date the cause of action arose. The memorandum of claim herein was filed on 10th March 2011. Such time had not lapsed as each Claimant was within the 6 years' time period allowed in law to file suit.

41. With the application of Cap 226 (repealed) the contest of section 90 of the Employment Act, 2007 and its import here is not applicable. Equally, where a party with an employment and labour dispute filed the same before this court, without any evidence of any similar claim/suit having been filed before any other court, this Court has jurisdiction.

42. The issue in dispute set out in this case is that of the unlawful termination of employment and the non-payment of terminal benefits. In the pleadings the claimant's state at paragraph 6 of the memorandum of claim that they were declared redundant and part of the prayers before Court is that of

severance pay in accordance with the Respondent policy manual. However in evidence there was no evidence that this is a case of redundancy. Redundancy under Cap. 226 (repealed) was defined under section 2 to mean;

... Redundancy is the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous...

43. In this regard, noting the issues in dispute, the letters of termination noting that the 1st to 4th Claimants were terminated from their employment for negligence in duty performance while the 5th and 6th Claimants were summarily dismissed and their being no evidence with regard to any redundancy declared by the respondent, such I find is not the case here. See **Johnson Karani versus EA Portland Cement Co. Ltd, HCCC No. 1808 of 1990 (Nairobi)**. I therefore find this is not a case of redundancy as by law defined to warrant any claim for severance pay.

44. Further with regard to the applicable law, the claims set out by the Claimant relate to;

Terminal benefits;

Responsibility allowances;

Entertainment allowance;

Reduced house allowance;

Certificate of service;

Compensation at 12 months; and

Costs of the suit.

45. On the finding that the suit was filed within the requisite time of 6 years since the cessation of employment, such relate to the application of the Employment Act, Cap 226 (repealed). Even though the suit was filed on 10th March 2011 when the operation of the Employment Act, 2007 was in force, the cause of action arose before such Act came into force and where such law is to be applied, the claim would automatically be out of time as it requires all claim based on the Employment Act, 2007 to be filed with the Court within 3 years. With the benefit of the applicable law therefore, Employment Act, Cap 226 (repealed) was based on a completely different conceptual framework unlike the Employment Act, 2007. The claim(s) that can be made from one statute are not a replica of the other as the two pieces of legislation have a different context of and in application. One relate to the legal jurisprudence applicable under Common Law while the other is based on the fair labour relations, a concept introduced under the Employment Act, 2007 and now entrenched under the Bill of Rights and article 41 of the constitution. Thus, the content and context of application and the remedies antecedent under each legislation cannot be juxtaposed as each legislation has a different form of thinking. See **Elizabeth Washeke & Others versus Airtel Networks (K) Ltd, Cause No.1972 of 2013** and the Court finding as to what *fairness* and *unfairness* concepts entail and to just cite part of the decision where the Court held;

... fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair.

46. Therefore under the Employment Act, Cap 226 (repealed) any claim(s) relating to termination of employment, the only damages available in law is the amount one would have been paid if the employment had been terminated in accordance with the employment contract or in accordance with the policy manual applied by the employer. The notice stipulated by the parties, where not given or paid in lieu would address the *unlawful termination* of employment. However, such is to be distinguished with

damages due for *wrongful termination of employment*. Where wrongful termination of employment is pleaded, the prayer to address such wrong under the common law jurisprudence is damages. This is unlike the applicable legal requirements set out under the Employment Act, 2007 where in the case of the issue in dispute being unfair or unlawful termination, the Court must address the procedural and substantive reasons for the same and award compensation even if the employer has paid for notice due or intends to pay in lieu of the required notice. The compensation due under the Employment Act, 2007 is regulated under section 49 of the Act while the findings with regard to whether termination is *unfair* is regulated under section 45 of the Act. As such, a termination that took place before the coming into force of the Employment Act, 2007 cannot apply the concept of *unfair termination* and proceed to seek *compensation* as a result, as such remedy is only applicable under the 'new' Act and not the repealed legislation, Employment Act, Cap 226. See **Court of Appeal for East Africa, Dalmas Ogoye versus KNTC Ltd, and Civil Appeal No.125 of 1996 [1995-1998] 2 EA.**

47. In this case therefore, the legal framework applicable is the Employment Act, Cap 226 (repealed) and the issue in dispute set out and the remedy of compensation is not applicable. Such claim and remedy are under the Employment Act, 2007. Such cannot apply here and even where such a finding were to find fault, the same [claim and remedy] would still be time barred under section 90 of the Employment Act, 2007 as the cause of action arose since 2006 and the suit was filed in 2011, a period of over 5 years.

48. In the same vain, I have scanned the entire record especially the Claimants case, I find no pleadings with regard to wrongful termination or a remedy seeking damages in that regard, such must be pleaded where the Court even in the best effort to award as deemed fit is to award any damages. The pleading of such a claim and the remedy due is within the context of the common law thinking with regard to the need to call specific evidence to prove such a claim for the Court to be able to assess and award as appropriate. Such evidence, is not offered in the pleadings, in evidence and the written submissions also left such issued exposed. Therefore, even where it was apparent that the 5th and 6th Claimants were *wrongly* dismissed from their employment as the elements necessary to prove fraud were addressed by the Respondent as the employer, the remedy to address such wrong in damages is not addressed by the claimants. Such is to be specifically pleaded under the applicable law and proved in evidence for the Court to award. Such wrongful acts by the Respondent cannot be addressed under the Employment Act, 2007 where the remedy for compensation apply. In the case of **Alex Bundi versus Kakuzi Limited, HCCC No. 195 of 2003**, the Court held;

... The general terms and conditions applicable to the appointment [of the plaintiff] were incorporated in the employment letter. ... The damages for wrongful dismissal are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either proper notice or salary in lieu thereof. ... Where a statute stipulates certain conditions to be followed before an employee's employment can be terminated ... to terminate the employment without following the laid down procedure would render the termination illegal,

49. I therefore find that the only claims the Court can assess in this case are only those of;

Terminal benefits;

Responsibility allowances;

Entertainment allowance;

Reduced house allowance;

Certificate of service; and

Costs due.

50. Such claims are set out separate and distinct from any claims that the Claimant may have with

regard to provident fund invested with the Respondent under the provisions of the Retirement Benefits Act (RBA). Such are regulated under a different legislative framework and context of the managing trustee(s) within the rules of the RBA apply. Such cannot be addressed herein.

51. The 1st Claimant case is that her terminal dues were not paid and claim;

Salary arrears at kshs.5, 966.00;

Leave pay of 48 days at kshs.57, 520.00;

Leave allowances at 40% of basic pay at kshs.14, 336.00

Notice pay of 3 months at kshs.107, 520.00

Responsibility allowance 9 months;

Entertainment allowance 9 months; and

Reduced house allowances.

52. In the letter of termination dated 5th may 2006, the Claimant upon termination was paid for;

5 days salary worked in May 2006;

36 days leave; and

3 months' notice pay.

53. The applicable terms and conditions of employment relate to the contract of employment issued to the Claimant. Since employment the Claimant rose through the ranks and her terms and conditions were regulated under the respondent's *Terms and Conditions pf Service for management Staff*. The application of such terms related to a time of 3 years from 1st July 2003 thus lapsing 30th June 2006. However the Respondent has not submitted the subsequent terms. With such lapse and the claimants' reliance of the applicable terms, such the Court shall apply herein.

54. The 1st Claimant was in the *Middle Management* level of the Respondent categories of employment. The claim for salary arrears at Kshs. 5,966.00 noting the termination letter noting 5 days of salary arrears have since been paid, such claim I find to have no basis. The claim is for 5 days salary.

55. Leave is claimed at 48 days but the Respondent paid for 36 days. Leave where earned is due and where taken, the record is kept by the employer. The 36 days said to have been due should have been supported with a schedule of what was taken and hence a balance. I find there are 12 days not paid for. I award Kshs. 14,380.

56. On the leave allowance due, clause 7 of the policy manual allow an allowance of 30% of basic pay. The claim is for 40%. I find no support with regard to why the Claimant has applied 40% and not the 30% that was allowed on accumulated leave. With the award of 12 days for leave due and unpaid, 30% leave allowance is due based on the policy manual that required such allowance be paid where there were more than 7 days of leave. The Claimant is awarded kshs.10, 644.00.

57. The claim for responsibility and entertainment allowances is claimed by the 1st to the 4th claimants. Such claims are set at 9 months. Clause 13, 16 and 17 of the policy manual address the issues of acting allowances, the entertainment and responsibility allowances. Such are due where the Respondent General Manager had in writing appointed the employee to act in a higher position than his/her current position. As such the Claimants should have then produced the written appointment noting

their current position and the position they were appointed to act for the Court to relate and award. I find no evidence in this regard and this shall not be awarded.

58. House allowance was to be paid at 40% basic salary. Such is regulated at clause 12 of the policy manual. However at clause 12(b), such house allowance was not a factor for consideration in the computation of terminal benefits. As set out above, the wrongful terminations herein having not been addressed under the appropriate legislation, the wrongful application of clause 12(b) that exclude the computation of house allowance due upon termination, has to also go with such omissions. The application of the policy manual on the claimants' employment is thus regulated. In any event, the claimants' witness failed to set out how these dues are owing noting the 9 months in reference. Therefore, even where such an allowance was due, its rationale is not established for the Court to award.

2nd claimant

Using the analysis above, the 2nd Claimant was paid for 5 days salary; leave for 48 days; and 3 months' pay in lieu of notice. The Claimant is seeking salary arrears for 5 days; leave for 48 days; leave allowance at 40%; notice pay for 3 months. Salary arrears, leave at 48 days and notice pay are thus paid. Leave allowance is the only item I find contested in terms of the applicable rate which should have been at 30% and the Claimant is awarded Kshs.10, 644.00.

3rd claimant

The Claimant claims on responsibility allowances; entertainment allowances; house allowances are declined. Such do not arise as noted above.

4th claimant

The claims for responsibility allowances; entertainment allowance; and reduced house allowance are declined. Such to not arise for the 4th Claimant and noting above analysis.

5th and 6th claimants

Both Claimants were summarily dismissed. The 5th Claimant was not paid any dues while the 6th Claimant was paid for 56 leave days not taken. The 5th Claimant is seeking payment of notice and reduced house allowance. The 6th Claimant is seeking notice pay; responsibility and reduced house allowances. The provisions under the Employment Act, Cap 226 (repealed) with regard to summary dismissal were most brutal. This is compounded by the Respondent in the policy manual where summary dismissal was without notice and no benefits accrued save for what the Claimant had worked for earned at the time less any due benefits. Such was the law then and hence the changed framework under the Employment Act, 2007. As such no notice pay is due to the Claimants herein as well as the housing or responsibility allowances, such allowances having been analysed above as not being due.

59. In conclusion therefore, the claims must fail to a large extent due to how the issues were framed, pleaded and addressed in evidence. Parties must address the context within which each claim is addressed particularly the applicable law. This Court is first and foremost bound by the constitution, the constitutive Act and any other written law in addressing all claim before it and the same considered within the realms of equity and justice. Where a legislative framework requires a party to address matters filed before this Court in a particular manner, non-compliance cannot be visited on the other part or the Court in ensuring the ends of justice are achieved.

In the foregoing, judgement is entered for the Claimants as following;

- a. **1st claimant, Mary Nyambura Marira is awarded 12 days leave pay at kshs.14, 380.00 and**

- leave allowance at kshs.10, 644.00. Such will be paid with interest at Court rates.
- b. The 2nd claimant, Veronica Thoni Kihagu is awarded leave allowance at kshs.10, 644.00 and such shall be paid with interest at Court rates.
 - c. Where Certificates of Service are not issued, the Respondent is hereby directed to issue such unconditionally within the next 14 days;
 - d. Other claims fail in their entirety;
 - e. Each party shall bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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